

## **Our vision:**

A world where every person's right to a fair trial is respected.

**Communiqué**  
A Fair Deal:  
Negotiating Justice

Communiqué issued  
after Roundtable  
Meeting: "A Fair Deal:  
Negotiating Justice."  
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**Fair**

**Trials**

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## Introduction

1. On 10 November 2015, Fair Trials International (**'Fair Trials'**) brought together leading experts (a list of participants is provided in the Annex) in criminal procedure from the United States to discuss plea bargaining in the US. The meeting was held as a first step in a new area of work for Fair Trials focused on improving the fairness of the growing global reliance on plea deals. Due to the prevalent use of plea deals in the US criminal justice system, the meeting was designed to draw extensively on the wealth of expertise which has developed in the US as a result.
2. Fair Trials convened the meeting in order to: (i) examine the main challenges relating to the use of plea deals in the US, including ways in which the right to a fair trial is compromised as a result; (ii) identify examples of good practice in relation to the introduction of safeguards to limit the negative impact of plea deals; and (iii) explore how US expertise relating to the use of plea deals could inform the development of similar practices in other jurisdictions so as to minimise the risk of unjust outcomes and identify willing participants.
3. The expert group met from 11 am until 4 pm at the offices of the Open Society Foundations in Washington, D.C. Prior to the meeting, Fair Trials provided participants with a concept note for the meeting. Freshfields Bruckhaus Deringer (**'Freshfields'**), Fair Trials' pro bono research partner in the project, sent a representative to the meeting to present their ongoing research into the growth in reliance on plea deals in jurisdictions around the world. Following this presentation, discussions primarily focused on law and practice in relation to plea deals in the United States only. The remainder of this communique outlines the discussion.

## Mapping the global use of plea deals: Freshfields Research (Holly Williams)

4. This project involves an initial scoping study to map the global use of plea bargaining practices followed by an in-depth analysis that will be conducted on six national jurisdictions. For the purpose of this study, the working definition of plea bargaining is ***"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"***. Fair Trials and Freshfields chose this relatively broad definition to ensure that they would capture as many different types of activity that may be considered plea bargaining as possible.
5. The research follows a three-stage process which will eventually reach approximately 75 countries. In the first phase, Freshfields sends a survey to each country which contains a number of questions relating to plea bargaining, including whether the practice of plea bargaining exists in the jurisdiction and if so: (i) what laws/policies govern it; (ii) how it works in practice, and (iii) how commonly it is used. Following the scoping research, Freshfields hopes to create a world map which illustrates for each country the data gathered, in particular statistics in relation to the frequency of the use of plea bargaining. In-depth research will then follow in six key jurisdictions.
6. It has been challenging to collect meaningful statistics on the use of plea bargaining because: (i) in some countries, particularly where the process of plea bargaining is relatively informal

or new, statistics haven't been produced; and (ii) where statistics have been produced, the basis for the statistics is not the same making it difficult to draw meaningful comparisons. For example, in the US, figures are based on how many cases are disposed of with a "guilty plea" rather than specifically by the use of plea bargaining. In France, statistics relate to the number of cases which have been dealt with using a particular procedure, but this number may not capture all the cases in which any form of informal plea bargaining is used.

7. From initial responses, some interesting findings have included the reasons for the introduction of plea bargaining, which generally has been implemented in order to: (i) increase efficiency of courts and prosecutors, (ii) reduce costs, (iii) increase the responsiveness of penalties to defendants' acceptance of responsibility, and (iv) combat organised crime by incentivising cooperating witnesses.
8. Completed surveys have also shed light on the ways in which plea bargaining has come into practice in various jurisdictions. In some, such as the UK and Germany, plea bargaining developed organically in practice and only later became regulated by statute. In others such as Italy, which was the first inquisitorial system to introduce adversarial principles into its criminal justice system, plea bargaining was introduced as part of a larger reform of the criminal procedural code. In general, adversarial systems have tended to adopt plea bargaining more easily. Investigative or inquisitorial systems more often experience tension between plea bargaining and the truth-seeking function of that criminal justice system.
9. Three country case studies from the initial phase of the survey were presented.
  - a. **Germany:** In the late 1970s, Germany was described as "*the land of no plea bargaining.*" However, the situation has changed quite significantly since then. Plea bargaining forms a part of the criminal trial. The defendant can make an offer to confess at trial in exchange for a guarantee from the judge in relation to maximum sentences or the dismissal of certain charges. The emphasis in the German system is on the confession rather than a guilty plea; by making it easier to prove the indicted facts through a confession, the agreement can shorten the trial, but not replace it altogether; the court must still examine the credibility of the confession. All three parties (judge, prosecutor and defendant) are involved in the process, with a particularly active role for the judge.
  - b. **People's Republic of China (China):** In China, plea bargaining takes the form of a summary or expedited procedure in which some of the defendants' rights are forfeited. It is used in cases in which the facts are clear, the evidence undisputed, the defendant pleads guilty and all parties agree to the use of such procedure. A lesser punishment may be imposed but this is not guaranteed. Despite the summary nature of the proceedings the judge will still review the prosecution's file, call parties to court, allow them to argue certain points and provide the defendant with the chance to make a statement. However other requirements regarding witness examination and evidence presentation are waived.
  - c. **England & Wales:** The procedure in England and Wales permits bargaining on sentence, charge and fact. Following a guilty plea, a judge fully considers the plea bargain and assesses whether or not it is fair and in the interests of justice. The court

then holds a sentencing hearing during which a judge will consider any sentencing submissions the parties have. Where there is a dispute as to material facts between the parties, the court may call a Newton hearing and invite the parties to make representations or present further evidence. This is essentially a mini-trial run by the judge (without a jury), where evidence will be called by the parties in the usual way and the criminal burden and standard of proof will apply. At the end of the hearing, the judge makes a finding of fact and determines the sentence accordingly.

10. Common themes were highlighted from the data so far collected, along the following lines of enquiry:
  - a. *Whether the accused has to accept guilt:* In England, France, Hong Kong, Nigeria, China and Russia, defendants must accept guilt, whereas in Spain, Italy and the USA, no explicit admission of guilt is required. In Germany, there is no concept of a guilty plea, only a confession that is considered as corroborating evidence, sometimes treated as an implied guilty plea.
  - b. *The role of the judge (active or passive) in negotiations:* In Germany, the judge has a key role in negotiations, acting as an intermediary between the parties in facilitating agreement. They can also initiate the plea bargaining process. The main actors in German plea bargaining negotiations are usually the judge and defendant, with a reduced role for the prosecutor. In England, maximum penalties are set by law but the judge has discretion as to what sentence to give depending on the circumstances. In Italy, parties agree on the sentence; the judge can only approve or reject this agreement but not amend it.
  - c. *Whether penalties are prescribed by law:* In France, the proposed penalty cannot exceed one year and can be no more than  $\frac{1}{2}$  of the sentence the defendant would otherwise have received. In Italy, plea bargaining is subject to a maximum discount in sentence of  $\frac{1}{3}$ . In England, although it is generally accepted that a defendant who enters a timely guilty plea will receive around a  $\frac{1}{3}$  discount, this discount is subject to the judge's discretion. In China, use of the summary procedure does not guarantee any reduction in sentence.
  - d. *Safeguards:* In France, Italy and Russia, the use of plea bargaining is limited to certain crimes, while in France, it is also limited to certain types of defendants (ie, not juveniles). In Germany and France, if an agreement falls through, the defendant's confession or admission of guilt cannot be used in subsequent proceedings. In France and Russia, the accused must consult a lawyer at certain stages in the process. In Italy and China, the final decision can be challenged.
11. Early research has also confirmed that the practice of plea bargaining is growing around the world; it was introduced in law in Nigeria in 2004, Mexico in 2008, and is under consideration in Japan.

## Problems With Plea Deals: the US Experience

### *Distorted Incentives*

12. Participants began the discussion of problems in the US plea bargaining system by identifying the way in which the system distorts the relationships between prosecutors, defenders, defendants, and police. Public defenders offered low caps on reimbursement for a high volume of cases are financially incentivised to advise clients to plead guilty with a minimum of investigation. This in turn allows prosecutors and police to act with minimal oversight, as defense lawyers and judges do not subject their work to the scrutiny it should receive pursuant to a full criminal trial. This lack of oversight leads to slippage in the performance of police and prosecutors, primarily where rate of conviction (achieved through plea deals) is the measure of success.

### *Bargaining rights in misdemeanour and felony practice*

13. This pattern - a high volume of prosecutions, dealt with summarily through plea bargaining by overworked and underpaid public defenders primarily in order for defendants to be released from pre-trial detention – is prevalent in misdemeanour and municipal practice. On the other hand, in felony prosecutions and in federal courts, different issues of due process arise, particularly in relation to waiver of rights. These waivers differ by jurisdiction: for example, in Virginia it is compulsory for defendants to waive the right to appeal upon entering a plea bargain; this is not required in neighbouring Washington D.C.
14. There is also substantial variation in the scope of evidence the prosecution is required to disclose prior to plea bargaining. Some participants suggested that for these felony cases, a neutral third party (a judge) could be involved with the negotiations to ensure that due process is observed. Currently, the judge is least involved at precisely the situation in which the defendant's rights are most engaged. There were some examples of US federal judges (in New Mexico, for example) ordering this kind of dispute resolution with the aid of another federal judge and involved participants had found it helpful, but it was not common practice anywhere in the US.
15. Such a reform would not, in any case, help in the majority of criminal cases resolved by plea bargain that are misdemeanours, however. Misdemeanour defendants are largely poor, and their primary concern is getting out of pre-trial detention and returning to their lives. Any safeguard that would draw out the process (and thus their detention), such as the involvement of a third party mediator, would not serve defendants' agendas. However participants cautioned against exempting the problems in plea bargaining for minor offences from scrutiny. Convictions, even for misdemeanours, have a lasting impact on defendants' rights: to get jobs, to access public housing and other benefits and services, to obtain or sustain legal immigration status, and in enhancements at sentencing for later offences, etc. For this reason and because of the dangers of criminalising large portions of a population, the use of plea bargaining as a method of dealing with prosecutions for minor offences should be evaluated critically and in conversation with movements to reduce the overuse of pre-trial detention and over-criminalisation more generally. Many of these cases, participants suggested, could be dealt with by fines, like traffic offences.

16. Furthermore, the endemic use of plea bargains in misdemeanour cases to avoid pre-trial detention suggests that reform is needed urgently to the money bail system, which discriminates against poor defendants and incentivises the acceptance of plea bargains to the point of coercion.

#### ***Relationship between plea bargaining and mass incarceration***

17. Participants differed on whether they believed that plea bargains were overwhelmingly used as a result of over-criminalisation and mass incarceration, or whether the availability of plea bargains was itself a driver of these phenomena, allowing police and prosecutors to process volumes of arrests and prosecutions they otherwise could not. This perspective cuts against the assumption of many jurisdictions adopting or considering plea bargaining as an efficiency measure. In the words of one participant,

“Would we have draconian laws if we didn’t have plea bargaining? Would we have passed minimum mandatory sentences if we had to actually apply them? Mandatory minimum sentences bind the judge (but not the prosecutor) and are applied in only about 20% of cases where defendants are eligible for them. So it could be that plea bargaining actually causes mass incarceration, and not the other way around. The more we rely on plea bargaining, the more we end up spending on criminal justice.”

#### ***Plea bargaining and fair trials safeguards***

18. Insufficient attention has been paid to how the US criminal justice system structurally depends on a certain percentage of cases going to trial. As the trial rate dwindles, participants urged stakeholders to consider the fact that the Grand Jury system does not function adequately to filter out unworthy cases. Historically, the feeling has been that though the charging mechanism is imperfect, weaknesses in the prosecution would come out at trial. Now that there are so few trials, prosecutions are escaping rigorous enquiry at every stage.
19. The use of plea bargains to elicit cooperating witnesses was also criticized. In practice, participants explained, the most culpable defendant has the most valuable information for prosecutors and thus often ends up with the best plea offer. This distorts prosecutors’ priorities and public trust in the system which seems to reward the guiltiest conspirators.
20. If the vast majority of cases are to be resolved via plea bargaining with no meaningful judicial oversight, participants opined that procedural protections and disclosure of evidence must feature earlier in the process. In particular, full disclosure, including of exculpatory (Brady) evidence, should be required prior to any waiver of rights. This would preclude the use of so-called “explosive” plea offers (these typically expire on the same day as the offer or shortly thereafter, with the offer diminishing in benefits for the defendant thereafter). Some participants felt that early pleas should be prohibited until fuller investigation had taken place.
21. In addition to disclosure, meaningful access to a lawyer must be prioritised early in proceedings where plea bargaining is on the table. This would mean increased availability of lawyers at police stations and at interrogations (meaning less need for discovery on those

issues later) and would allow lawyers to make requests for discovery earlier in the process as well. In the US, there is the right to access counsel on paper but in reality this rarely occurs at the earliest stages post-arrest. Besides the right of access to counsel, the ability of lawyers to adequately protect their clients' rights is limited by enormous caseloads and limited funding for public defenders. This leads, as earlier discussed, to incentives for lawyers to counsel clients to accept plea bargains, and this pattern is not itself monitored.

### ***The "trial penalty"***

22. Participants also raised the impact of the overwhelming use of plea bargaining and the associated "trial penalty" on the justice system's role in protecting public safety and ensuring that guilty people are punished. Presumably, if a prosecutor offers someone an option to accept a lower sentence (i.e. 7 years) if they don't exercise their right to trial, that prosecutor believes that 7 years is an acceptable sentence that will protect the public and punish the accused. However if the defendant exercises his right to trial, he may receive a sentence more than double that (say 20 years). The discrepancy in sentences after pleas and trials raises key questions: What is the purpose of those extra years in prison? What public policies are they intended to serve? These questions touch on core principles of justice: that punishment should be proportionate to the crime and no greater than necessary.
23. One way to reduce the trial penalty and the unjustness of the imbalance between sentences offered pursuant to plea bargains and those imposed after trial, would be to limit the sentence discounts available for plea bargaining. Participants suggested that the discount shouldn't be so large that it insults justice or makes the offer itself coercive. This depends on determinate sentencing. If the highest penalty is set at the outset, discounts can be more rational. Other participants disagreed that large discounts were necessarily unjust, depending on the purpose of plea bargaining. As long as the sentence possible at trial is itself just, these participants held, large downward departures as a benefit of a bargain should be permissible.
24. One way participants proposed to think about the purpose of plea bargaining was to distinguish "odds bargaining" from "cost bargaining." The purpose of cost bargaining is to reduce the costs associated with trial. The purpose of odds bargaining is to secure a conviction where the prosecution might not otherwise secure one. Many participants felt that cost bargaining is an acceptable practice, but odds bargaining is not. However, other participants cautioned against reducing plea bargaining to cost bargaining. The savings to the government of not having to bring a case to trial would be so great that to tie the process to the cost savings in individual cases would result in even larger trial penalties than we see now. Still other participants urged scepticism toward claims of efficiency as reasons for using plea bargains, since such alleged savings are rarely calculated or tested.



## Examples of Good Practice and Potential Reforms

### *Transparency and Data Collection*

25. Participants reported that it is difficult to gauge the impact of the Holder Memo<sup>1</sup>, because regular data about plea bargains is not collected. Plea bargains still operate with no transparency or accountability. It was suggested that it might be useful for example to have statistics on what was originally charged, whether the defendant pleads, what the final charges were and whether the defendant was eligible for an enhancement. Participants with experience in research on the effects of such prosecutorial guidance cautioned as to the difficulty of carrying it out. It requires permission from several agencies and access to pre-sentencing reports and other confidential information and direct access to the prosecutors and decision makers in individual cases.
26. Furthermore, the success or otherwise of the Holder memo and other prosecutorial guidance is political; it depends on who is in power and can be replaced by the next administration. Many participants were sceptical that it would have much of an impact without more fundamental sentencing reform.
27. As suggested by the Supreme Court in *Lafler v Cooper*,<sup>2</sup> many participants proposed regular recording of plea offers as a way of increasing transparency and allowing judges to engage more effectively with the fairness of the bargain. However, prosecutors have resisted this, saying that it would force them to expose informants in open court.
28. Some recommended more fulsome allocutions, perhaps guided by a model allocution, as another method of increasing judicial engagement. This might force judges and parties to slow down and review the terms of the agreement, for example by asking the defendant about the quality and length of his consultations with counsel. Others at the table described allocutions as a “charade” which do not permit judges to pierce the veil of the plea bargain. Having the history of the various offers and responses as part of negotiations would better allow the judge to explore the conditions in which the agreement was reached.

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<sup>1</sup> The ‘Holder Memo’ refers to a 24 September 2010 Memorandum from then-Attorney General Eric Holder to all Department of Justice attorneys clarifying the proper exercise of prosecutorial discretion in relation to charging and sentencing. The memo clarified that charging decisions should be made with the overall goals of the criminal justice system in mind and based on an individualised assessment of the defendant. Furthermore, specifically in relation to plea bargains, the memo states that “charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned to arrive at a plea bargain that does not reflect the seriousness of the defendant’s conduct.” Furthermore it requires plea agreements to be reviewed by a supervisory attorney and made subject to written guidance regarding the standard elements required in plea agreements, including the waivers of a defendant’s rights. Later memoranda from Holder further limited the permissibility of prosecutors adding certain sentencing enhancements (known as section 851 enhancements, these are in relation to prior drug offences) to defendants refusing plea offers.

<sup>2</sup> 132 S. Ct. 1376 (2012)

### ***Regulating prosecutorial behaviour***

29. The US system is characterised by prosecutors with nearly unlimited power to make offers. Participants spoke about the need to regulate prosecutorial behaviour and increase oversight over their role in plea bargaining by enforceable rule or statute, rather than continuing to rely on prosecutorial discretion. For example, both defense lawyers and judges (in some jurisdictions) are required to provide special disclosure to non-citizen defendants regarding the impact of plea offers on their immigration status. But prosecutors do not have similar obligations to disclose such information.
30. Besides the troubling lack of oversight and transparency of prosecutors' activity, participants were concerned that prosecutors levied an enormous amount of power in charging and sentencing, but bore none of the consequences of the mass incarceration that results in part from heavy handed prosecutorial behaviour. There were some examples of innovative local programs designed to reward prosecutors and other justice system actors<sup>3</sup> for considering alternatives to incarceration. One mentioned was Adult Redeploy Illinois, which provides financial grants to programs that allow diversion of non-violent offenders from state prisons by providing community-based services.<sup>4</sup>

### ***Judicial involvement in plea negotiations***

31. Participants again suggested an increased role for judges to mediate plea negotiations, but others questioned the appropriateness of mediation (and indeed plea bargaining itself) with the presumption of innocence, insisting that only a rights-based approach is compatible with criminal proceedings. Some were concerned that any type of compulsory pre-trial mediation might result in the stigmatisation of defendants who proceeded to trial as unreasonable for rejecting an offer a judge had already deemed was fair. As stated by one expert, "the idea of mediation is reflective of the unequal playing field that exists and the desire to introduce 'real' negotiation."
32. However, defendants' and their lawyers' ability to engage in any type of mediation is limited by their unequal access to information *vis a vis* the prosecution. Without adequate pre-plea disclosure, defendants are unable to make informed decisions about plea offers on the basis of a police file alone, before witnesses have been heard. Rules requiring discovery prior to plea bargaining (and open file discovery more generally) has been adopted in Texas<sup>5</sup> and could be duplicated elsewhere.

### ***Systemic reform: sentencing, pre-trial detention and over criminalisation***

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<sup>3</sup> The Law Enforcement Assisted Diversion (LEAD) program in Seattle, as one example provided at the meeting, engages police officers to divert drug users to treatment even prior to booking. See <http://leadkingcounty.org>.

<sup>4</sup> See <http://www.icja.state.il.us/redeploy/>. The program is projected to save \$19 million in incarceration costs and reduced juvenile incarceration rates by over 50% with no increase in crime rates.

<sup>5</sup> Michael Morton Act, Tex. Code Crim. Proc. art. 39.14(j).

33. Sentencing reform is clearly a central aspect of reforming the plea bargaining system in the US. Many participants agreed that the available discounts to sentences pursuant to a plea bargain should be narrowed so that the most culpable defendants are steered toward pleas and those for whom the evidence is weaker can more easily go to trial.
34. Participants identified bail/pre-trial detention reform as another key to increased due process protection in plea bargaining. Most people accept plea offers to get out of jail, the fact of detention creating a disadvantage in bargaining power too detrimental to overcome. This is unlikely to change until pre-trial release is available to the poor people most often arrested.
35. Participants emphasised that the criminal justice system in any country needs to be “right sized” for its capacity. For example, if new criminal offences or modes of arrest or prosecution are being adopted, court resources, probation, pre-trial services, etc. all need investment and growth in order to appropriately deal with the numbers and complexity of cases. Higher numbers of prosecutions cannot be filtered through plea bargaining as a way to avoid proportionate investment in the entire criminal justice system. In the US, there are a huge number of small offences and an aggressive approach in many quarters to arrest and prosecute in relation to these violations, without consideration for the ability of the justice system to process them effectively and lawfully. Experts urged that decisions about how police are deploying their resources should be more transparent and democratically controlled.
36. Besides policing, concerns were raised about charging practices (overcharging) in the US feeding into the overuse of plea bargaining. An example of good practice mentioned by a participant is the practice in some jurisdictions of requiring a prosecutor to review a police complaint before it is filed. Some participants urged higher standards for filing initial charges, placing the exercise of discretion earlier in the process to compensate for the lack of trial. However others suggested that this would simply push plea bargaining up to pre-indictment, or reduce efficiency gains.

#### ***Public trust in the criminal justice system***

37. In terms of making general suggestions to non-US jurisdictions contemplating plea bargaining, it was proposed that the two biggest areas of problems were informational (timely, comprehensive pre-bargain discovery) and ensuring effective defense representation with funding adequate to prevent lawyers recommending pleas against their clients’ best interests. Sentencing discounts should be limited, it was suggested, such that innocent people were not incentivised to plead guilty.
38. Others at the table disputed the idea that the main function of the criminal justice system and plea bargaining within it should be to separate the guilty from the innocent. In the words of one expert, “We can’t sacrifice the presumption of innocence to efficiency.” Rather, the system should strive to ensure that any punishment is just. Others disagreed that the problem of innocence was so central. Most of the people accepting plea bargains are guilty of something, if not exactly of what they were charged. The innocent will be protected, one participant opined, by ensuring the rights of the guilty.

39. Another participant identified public faith in the justice system as a casualty of plea bargaining due to its secrecy. This might be particularly true in countries with justice systems marked by corruption or central government control. Some measure of transparency, the ability to appeal against plea bargains and the ability of judges to probe them could be deployed to help build or maintain public faith in the system.
40. Participants highlighted several key points in criminal proceedings that could be opened up with greater transparency to improve equality of arms and public trust in the system. One was, as earlier discussed, the publication of the plea offer. Others suggested greater openness in grand jury proceedings and an ability of the defence to present evidence there, for a real scrutiny and filtering of cases to take place.

### **Global Advocacy Opportunities**

41. Fair Trials convened this meeting in the US in order to consolidate its understanding of the advantages and disadvantages of plea bargaining in the country where the practice was pioneered and is most often used. Our goal is to use this understanding, together with the research we are conducting in partnership with Freshfields, to assist jurisdictions around the world who are considering adopting plea bargaining (or looking at reforming it where it is already in practice) in developing a system that reflects best practice in human rights protection as experts understand it. Fair Trials asked the experts at the meeting to suggest what forms of advocacy and technical support would likely be most helpful to justice sector actors and civil society in these jurisdictions.
42. It was also suggested that studying the experiences of non-US systems might be helpful to movements for reform within the USA. Sweden was raised as a possible example of good or instructive practice, as nearly all cases go to trial there (though some participants pointed out that Sweden itself was considering adopting plea bargaining).
43. Experts urged attention to local context when preparing for work on plea bargaining; in particular, the reasons for introducing plea bargaining: to reduce case backlogs and the use of pre-trial detention? As part of a larger reform of the criminal procedure code? To help build capacity for prosecutions in under-policed jurisdictions? It would also be important to understand the legal context of plea bargaining; for example, whether it would need to be set out in legislation or could be undertaken on an ad hoc or informal bases by judges and parties.
44. Understanding local culture and history in relation to crime and law was also highlighted. For example, post-authoritarian states transitioning to democracy often experience a spike in crime without corresponding investment in the justice system, which may also be struggling to comply with new constitutions and procedural rights. Plea bargaining sometimes happens informally in this context even if it is not created by law. An example given was South Africa, where plea bargaining was introduced in the mid-1990's to deal with organised crime. Unlike the USA, where plea bargaining is characterised by strong and well-resourced prosecutors, in South Africa a comparatively weaker prosecutor's office was seen by the public as bargaining away too much in serious cases where it was outgunned by well-resourced defence counsel. These differences in context and public perception are crucial to appreciate when doing work internationally, and may not become clear during desk research.

45. Participants also spoke about the US' role in exporting its model of plea bargaining abroad through the State Department, the Office of Overseas Prosecutorial Development and Training (OPDAT), and other agencies. Despite the acknowledged problems with the US style plea bargaining system and other aspects of its criminal justice system, the US continues to support and promote their adoption in other jurisdictions. US funding and support for these reforms can make it difficult for local actors to effectively resist them or to adapt them effectively to local contexts. Participants supported Fair Trials' proposal to bring US expertise and experience to localities under pressure from US government agencies to adopt plea bargaining, to ensure that local actors understand the problems that have arisen inside the US with these models and to assist them in designing plea bargaining systems that better serve their needs and better safeguard the rights of defendants.
46. The motivation behind the US' push for the adoption of plea bargaining abroad has to do with its engagement in a global war on drugs, terrorism, and financial crime that often requires complex cross-border prosecutions. It was pointed out that the European Union shares these priorities and in practice supports and funds the same overseas development programs that the US does, making it a potential target for advocacy as well. Furthermore, the European Court of Human Rights has approved the US style of plea bargaining in the context of extradition cases as well as its assessment of European models, and there may be scope for strategic litigation on that point.
47. Many participants had engaged in the training of lawyers abroad and were keen to be involved in potentially training lawyers to defend their clients' rights in the context of plea bargaining.
48. Experts also urged that whenever possible, the voices and experiences of defendants affected by plea bargaining be included in advocacy and decision making. Where true consultation is not possible, at least the stories of affected individuals should be included in advocacy. Others urged attention to the role of the victim in proceedings, and their position as stakeholders in plea bargaining policy.
49. Participants strongly recommended the importance of establishing baselines through research (for example on what constitutes a normal sentence for particular offences, on the extent of backlogs and the comprehensive costs of processing cases) in jurisdictions that have not yet put plea bargaining in practice, in order to better assess the impact of plea bargaining when it starts being used. This will allow jurisdictions to monitor whether plea bargaining is doing the job it was implemented to do, or whether it is imposing additional costs in terms of longer sentences, larger numbers of prosecutions, etc. The lack of such baseline studies in US jurisdictions makes it difficult to properly evaluate the impact of various models and changes in policy and practice.
50. Finally, participants affirmed the importance of involving civil society in discussions and advocacy around plea bargaining.

### **Key Recommendations and Next Steps**

51. The discussion coalesced around several key areas of concern for due process in the plea bargaining system in the US, which participants felt would be important considerations for

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other jurisdictions grappling with the practice. These, with associated recommendations, included:

- a. *Access to information and evidence:* Early, comprehensive discovery and disclosure, including exculpatory evidence must be provided to defendants before any plea agreement can be made.
- b. *Access to adequate legal assistance:* In order to engage in plea bargaining, defendants must have advice from counsel whose remuneration is sufficient enough that the lawyer is not incentivised to advise the client to plead guilty against his interests. Ideally, access to a lawyer should be facilitated at the earliest moments post-arrest so that counsel is in a better position to advise a client about any early plea offers and can receive and request evidence earlier.
- c. *Recording of plea offers:* Plea offers and, if possible, subsequent negotiations should be recorded and made available to judges. This will allow the judge to probe the conditions of the offer; for example, (whether the defendant was properly advised of the consequences of pleading guilty (including being given information about the likely sentence he would receive after conviction at trial and any collateral consequences on immigration, public benefits, etc.) and whether sufficient evidence was disclosed to the defense prior to the plea deal. This would also facilitate any later appeals against plea agreements and would help to promote greater transparency and accountability for prosecutorial practices.
- d. *Greater involvement of judges in plea bargaining:* In the US, judges should take a more active role in plea bargaining in order to ensure that defendants' rights are respected. Quasi-mediation might be appropriate for some cases.
- e. *Higher standards in charging practices:* Where trials become relatively rare, the need to have a rigorous system for vetting the strength of cases arises earlier in the criminal procedure. In the US context, higher charging standards might take the form of requiring prosecutorial oversight of police complaints and reforms to the grand jury system such that the defence may take a more active role and it may function as a real filter for indictment.
- f. *Limited sentencing discounts in plea bargaining:* To avoid the severity of the US' "trial penalty," and to protect against plea offers that coerce innocent defendants to plead guilty, sentencing discounts should be limited and made transparent.
- g. *Limitations on waivers:* Waiver of the right to trial as part of plea bargaining should not require the waiver of other rights. In particular, the right to appeal or to complain about the effectiveness of counsel should not be routinely waived as part of plea agreements.
- h. *Pre-trial detention/bail reform:* In order to avoid the problem in the US of a large proportion of misdemeanour defendants pleading guilty simply to get out of pre-trial detention, money bail and other forms of pre-trial release must avoid discriminating against poor defendants.

- i. *Decriminalisation and diversion*: Instead of instituting plea bargaining to deal with large numbers of minor criminal cases, jurisdictions should endeavour to address undesirable behaviour through means other than the criminal justice system. Where possible, defendants with mental illness or drug addiction should be diverted to treatment programs prior to entering the criminal system. Other diversion programs should be contemplated and criminal justice actors should be incentivised to reduce crime and incarceration simultaneously.
  - j. *Sentencing reform*: Plea bargaining is inextricably related to sentencing regimes. In the US, its overwhelming use is closely tied to mandatory minimums and the guidelines that leave judges with limited discretion in sentencing. Reform of excessive sentences will have the effect of lessening the pressure on defendants to plead guilty against their interests.
52. Fair Trials plans to publish a report in autumn 2016, drawing on the discussion represented here and presenting the research it is undertaking on global practices in plea bargaining. This publication aims to provide an overview of the due process issues that may arise for jurisdictions adopting or reforming plea bargaining systems, and to provide some general recommendations for policy makers to consider. The experts at the roundtable will be consulted on this paper.
53. As research into practice in global jurisdictions deepens, Fair Trials will also be planning specific activities to support both criminal justice actors and civil society responding to plea bargaining, by providing research, technical support, advocacy, training or network-building. In particular we hope to mobilise the US experts present at this meeting, and others with whom we are in contact, to provide perspective on the pitfalls of the US model and lessons learned to jurisdictions to which the US is supporting legal reforms that facilitate plea bargaining.

**Fair Trials**  
**13 Jan 2016**

**ANNEX**  
**PARTICIPANT BIOGRAPHIES**  
**(Alphabetical Order)**

Albert Alschuler

Albert Alschuler is the Julius Kreeger Professor Emeritus of Law and Criminology at the University of Chicago Law School. Alschuler is widely published and has written articles on plea bargaining, sentencing reform, privacy, search and seizure, civil procedure, jury selection, legal history, legal ethics, confessions, courtroom conduct, American legal theory and other topics in the area of criminal justice.

Daniel Arshack

Daniel Arshack is a managing partner and a criminal defense attorney at the law firm Arshack, Hajek and Lehrman. He represents clients in state, federal and international courts at all levels and has also represented clients at the United Nations. Arshack has recognised expertise in international criminal justice issues and anti-death penalty advocacy and conducts training sessions globally. In addition, he is a founding member of the International Criminal Bar and in 1996 set up a new public defender's office in New York known as The Bronx Defenders, where his team of lawyers and support staff handled around 13000 cases annually.

Michael Cassidy

Michael Cassidy is a Boston College Law Professor, teaching and writing in the areas of Criminal Law, Evidence and Professional Responsibility. Cassidy is regarded as an expert on the subject of prosecutorial ethics and gives training sessions throughout the US to public sector attorneys on their duties under the Rules of Professional Conduct. Before becoming a Professor, Cassidy worked as a government lawyer prosecuting serious felony cases.

Lauren-Brooke Eisen

Lauren-Brooke Eisen is Senior Counsel in the Brennan Center's Justice Program where she is involved in improving the criminal justice process through legal reforms. Eisen supervises NYU students who participate in the Brennan Center Public Policy Advocacy Clinic and is currently an adjunct instructor at the John Jay College of Criminal Justice. Her work has been extensively published and she has particular expertise in state sentencing and correctional reform, legislative drafting, bipartisan commissions, state corrections and courts, and implementing evidence-based criminal justice practices with departments of corrections.

Jamie Fellner

Jamie Fellner is Senior Advisor for the United States Program of Human Rights Watch. Fellner specialises in US criminal justice issues, such as prison conditions, the incarceration of the mentally ill, sentencing, the death penalty and drug law enforcement. She has undertaken various roles at Human Rights Watch and was the first director of Human Rights Watch's US program between 2001



and 2007. In the area of pre-trial criminal practice, she has authored major reports on bail reform and on coercive plea bargaining.

#### Nina Ginsberg

Nina Ginsberg is a founding partner of DiMuro Ginsberg and is a known leader in the area of criminal law. Ginsberg largely deals with complex criminal trials and appellate litigation before federal and state courts with a focus on national security law, white collar investigations and prosecution, financial and securities fraud, computer crime, copyright fraud and professional ethics. For many years, Ginsberg has been an active member of the National Association of Criminal Defense Lawyers and is currently the secretary for the organisation. Ginsberg has been named one of the top 75 lawyers in Washington by Washingtonian Magazine and has been recently recognised as one of the Women Leaders in the Law by the Washington Post and Virginia Lawyers Media.

#### Judge John Gleeson

Judge John Gleeson is a United States federal judge of the United States District Court for the Eastern District of New York. He has been an Adjunct Professor of Law at New York University School of Law since 1995. He has had many articles published and is a co-author of 'Federal Criminal Practice: A second Circuit Handbook'.

#### Nancy Hollander

Nancy Hollander is an internationally recognised criminal defense lawyer from the US firm of Freedman Boyd Hollander Goldberg Urias & Ward P.A., based in Albuquerque, New Mexico and an Associate Tenant at Doughty Street Chambers in London, UK. She has acted as lead counsel for the Special Tribunal for Lebanon and as counsel for the International Criminal Court. Hollander has taught in numerous trial practice programs and at national and international seminars on various subjects; written extensively on various criminal law topics; coordinated and taught training courses for criminal defense lawyers wishing to appear before the International Criminal Court and International Criminal Tribunal for the Former Yugoslavia; and acted as a consultant to the United Nations Development Programme in Vietnam. Hollander has received numerous awards including being listed in the 'Top 250 Women in Litigation in the U.S' for 2012-2014 and in 2001 was named as one of America's top fifty women litigators by the National Law Journal. She is also a member of the European Criminal Bar Association.

#### Mary Miller-Flowers

Mary Miller-Flowers works for the Open Society Foundations Human Rights Initiative as an Associate Director for Justice. She is responsible for an international grant making and advocacy programme aimed at combatting the overuse of pre-trial detention and increasing the ability of criminal defendants to access legal aid. Flowers is also involved in providing support to grant-giving programs dealing with issues such as drug policy, disability rights and freedom of information.

### Kyle O'Dowd

Kyle O'Dowd works for the National Association of Criminal Defense Lawyers (NACDL) as the Associate Executive Director for Policy. O'Dowd participated in many advisory groups including the United States Sentencing Commission's Practitioners Advisory Group. He is also widely published, writing articles and reports on sentencing and other criminal issues for NACDL, the Federal Sentencing Reporter, the Association of Corporate Counsel's ACCA Docket, and Families Against Mandatory Minimums' FAMM-gram.

### Mary Price

Mary Price acts as General Counsel for Families Against Mandatory Minimums (FAMM). Price is in charge of the FAMM Litigation Project and campaigns for reform of federal sentencing and corrections law and policy before Congress, the U.S. sentencing Commission, the Bureau of Prisons and the Department of Justice. Price has particular expertise on federal sentencing law and policy and has made numerous media appearances to speak on this topic. Price graduated cum laude from Georgetown University Law Center, where she was a Public Interest Law Scholar and the Law Center's first recipient of the Bettina Pruckmayr Human Rights Award.

### Cynthia Roseberry

Cynthia Roseberry works as a Project Manager for Clemency Project 2014, a project created to provide pro bono support for Clemency to federal prisoners who would potentially receive a shorter sentence if sentenced today. Roseberry practiced federal and state criminal defense in Georgia for over ten years and founded the Misdemeanor Clinic as well as lecturing in Advanced Criminal Procedure and teaching at the Death Penalty Clinic at DePaul University College of Law in Illinois. She is a founding board member of the Georgia Innocence Project and a past president of the Georgia Association of Criminal Defense Lawyers.

### Martin Schönteich

Martin Schönteich serves as a Senior Legal Officer on National Criminal Justice Reform with Open Society Foundations. Schönteich has worked extensively in South Africa, previously working for the Institute for Security Studies in Pretoria and managing the South African Institute of Race Relations' Parliamentary Affairs Office, where he undertook policy related research on the criminal justice system. Currently, he is also an Advocate of the High Court of South Africa.

### Stephen J. Schulhofer

Stephen Schulhofer works as a Professor at the New York University School of Law. He is recognised as being one of America's most distinguished scholars of criminal justice, writing over 50 articles and seven books, including the leading casebook in the field. His work on a range of criminal justice and national security topics is highly regarded and widely cited. Schulhofer also serves as the reporter for the American Law Institute's project to revise the sexual offense provisions of the Model Penal Code.

### Nkechi Taifa

Nkechi Taifa has worked at Open Society Foundations since 2002. Her current role as a Senior Policy Analyst for Civil and Criminal Justice Reform involves advising Congress and the Executive branch on criminal justice policies. Taifa's main focuses are on federal sentencing reform, accountability in the enforcement of federal law, re-entry of previously incarcerated persons and prison reform. Taifa also convenes the Justice Roundtable, a Washington based advocacy network advancing federal criminal justice policy reforms. Throughout her career, Taifa has spoken extensively across the US and is a published writer on a variety of issues in the areas of criminal justice and civil and human rights. She has received numerous awards and honours including the prestigious 'President's Award from the Washington Council of Lawyers'.

### Jessie Tannenbaum

Jessie Tannenbaum is a Senior Legal Analyst at the American Bar Association Rule of Law Initiative, where she conducts research and analysis and manages programs related to justice sector reform. Ms. Tannenbaum has been the principal or co-author of a number of ABA ROLI publications, including the *Legal Profession Reform Index for the Kyrgyz Republic, Vol. II* (2014), the *Comparative Analysis of Criminal Defense Advocacy for Albania, Bosnia and Herzegovina, Kosovo, Macedonia, and Serbia* (2014); the *Judicial Reform Index for Armenia, Vol. IV* (2012), the *Detention Procedure Assessment Tool for Armenia* (2010) and *Lebanon* (2012), the *Prosecutorial Reform Index for Guatemala* (2011), and the *Handbook of International Standards on Pretrial Detention Procedure and on Sentencing Procedure* (2010), among others. Prior to joining ABA ROLI in 2008, Ms. Tannenbaum was a fellow at the Executive Secretariat of the Inter-American Commission on Human Rights, where her work focused on cases involving the death penalty, conditions of detention, and the protection of human rights defenders. Tannenbaum holds an LL.M. in international human rights law, summa cum laude, and a J.D., cum laude, from Notre Dame Law School, and a B.A. in French and International Studies, cum laude, from the University of Denver.

### Nicole Taylor

Nicole D. Taylor, Program Director with the International Legal Foundation (ILF), is an experienced criminal defense attorney and manager. She currently manages and guides the implementation of ILF's public defender offices and development of legal aid reform in Afghanistan, Nepal, the West Bank and Tunisia. Ms. Taylor began her practice as a Public Defender at the Defender Association of Philadelphia. There she represented indigent and marginalized people charged with serious felonies and misdemeanors. Ms. Taylor also engaged in private practice as an associate attorney at the law firm of El-Shabazz + Harris, LLC, where she continued to develop her criminal practice and also engaged in civil litigation and family law. Ms. Taylor spent a summer interning with the Judicial Inspectorate of Prisons in Cape Town, South Africa where she researched prison reform post apartheid. She is a graduate of Howard University School of Law and Spelman College.

### Holly Williams

Holly is a newly qualified lawyer in the Dispute Resolution team at Freshfields Bruckhaus Deringer. Her previous experience includes advising a real-estate company on a cross-border litigation concerning control of its leading foreign investment in South East Asia, and advising a South Africa-

based telecoms company in a long-running dispute concerning a multi-billion dollar sale of a majority stake in a Nigerian mobile telecoms operator. During her time as a trainee, Holly was seconded to the National Council for Civil Liberties (**Liberty**) where she worked on a number of claims under the Human Rights Act and helped to formulate Liberty's policy in relation to the Trade Union Bill.

### **Fair Trials Staff**

#### Libby McVeigh

Libby McVeigh serves as the Legal and Policy Director for Fair Trials International, where she manages all of Fair Trials' legal and policy activities, including research, training, litigation, advocacy, network coordination and casework. McVeigh is a qualified solicitor with a wide range of human rights law experience. Before joining Fair Trials, she established and managed the Anti-trafficking programme at the Humanitarian Organisation for Migration Economics, worked as a Legal Officer at The Equal Rights Trust and was a Litigation Solicitor at Refugee and Migrant Justice.

#### Jago Russell

Jago has been the Chief Executive of Fair Trials since September 2008. Before joining Fair Trials, he worked as a policy specialist at the human rights charity (Liberty) and worked as a Legal Specialist in the UK Parliament, assisting the Human Rights, Home Affairs and Constitutional Affairs Select Committees. Russell is a qualified solicitor and has published and lectured widely on a range of criminal justice and human rights issues.

#### Rebecca Shaeffer

Rebecca Shaeffer is a Legal and Policy Officer at Fair Trials International in London, where she has worked on campaigns relating to criminal procedural rights in Europe, pre-trial detention, and transnational police and judicial cooperation. Shaeffer has a J.D. from Georgetown University Law Center and is a member of the Pennsylvania Bar. She has worked on criminal justice and human rights issues around the world in a variety of capacities, including as a criminal defense investigator in the federal system in the USA and as a law clerk at the DC Public Defender Service where she assisted lawyers to deal with the immigration consequences of criminal convictions. Prior to her role at Fair Trials, she was a fellow at Human Rights Watch.