USAID
FROM THE AMERICAN PEOPLE

ABA Rule of Law Initiative

BALKANS REGIONAL RULE OF LAW NETWORK
ALB / BIH / MKD / RKS / SRB

THE RESEARCH ON THE EFFECTIVENESS OF THE LEGAL PROTECTION SYSTEM OF THE ACCUSED IN ALBANIA, BOSNIA AND HERZEGOVINA, KOSOVO, MACEDONIA AND SERBIA

CHRIS
Mreža Odbora za ljudska prava u Srbiji CHRIS
The Network of the Committees for Human Rights in Serbia CHRIS

Policy Center

HELSINKI COMMITTEE FOR HUMAN RIGHTS IN REPUBLIKA SRPSKA

2016.

Publisher:
Helsinki Committee for Human Rights in
Republika Srpska
Phone: +387 55 419 274Fax: +387 55 210 851
Email: helcomm@teol.net
Web: www.helcommrs.org

For the publisher:
Branko Todorović, Executive Director

Editors:
Vedrana Subotić
Tamara Zrnović

Authors:
Miroslav Spasojević
Vanesa Belkić
Vedrana Subotić

Research Associates:
Anisa Metalla
Dragan Popović
Dženeta Omerdić
Gordan Kalajdžiev
Jasmina Alihodžić

Sarah A. Freuden

Proofreading:
Sarah A. Freuden

Design:
Digital Prints
www. digitalprints-bn.com

Free/non-commercial circulation:

The statements and analyses expressed herein are solely those of authors and do not represent the position or policy of the Helsinki Committee for Human Rights in Republika Srpska. This report is made possible by the generous support of the US Agency for International Development (USAID) through the program "Balkans regional rule of law network" that has been implemented by the American Bar Association Rule of Law Initiative (ABA ROLI).

TABLE OF CONTENTS

1. EXECUTIVE SUMMARY

In order to meet European Union standards, the judicial systems of Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia have gone through a long process of reform. Although a number of significant reforms have been conducted in the field of criminal legislation in all countries, reports of relevant institutions/organizations indicate that the criminal law systems still are not fully functional and do not fully ensure adequate protection to all persons that need legal protection and assistance throughout the entire criminal proceeding. There are also certain challenges in the functioning of ex officio systems that significantly impair their efficiency and affect the provision of effective defense to defendants in criminal proceedings.

The Research on the effectiveness of the legal protection system of the accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia was conducted by the Helsinki Committee for Human Rights in Republika Srpska and partner organizations in the region in the period of September 2015 - January 2016. This research was realized within the project: *Enhancing the protection of the rights of the accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia* which aim is to contribute to reinforcing the system of legal protection of the accused in five countries in the region. Implementation of the project is financially supported by the American Agency for International Development (USAID) through the project: *Balkans regional rule of law network* (BRRLN).

The aim of this research is to identify the most important obstacles and challenges to the establishment of a transparent and efficient system of ex officio defense in accordance with national and international standards in all countries, and define recommendations for improving the existing system of ex officio defense in the region in order to improve the quality of representation of accused persons. The basic premise is that the reforms implemented in the field of criminal law in all five countries in the region have not achieved the expected results. Moreover, of particular relevance to this study, there are certain problems in the functioning of the ex officio defense system that significantly impair its efficiency, which affects the provision of effective defense to defendants in criminal proceedings. The Helsinki Committee for Human Rights in Republika Srpska was responsible for the process of coordination of the research on the effectiveness of the legal protection of the accused in five countries in the region with the support of project partners. Also, members of the expert Work Group Ex Officio were actively involved in the entire process of conducting research in order to facilitate the collection of the necessary data.

Bearing in mind that the various national and international organizations and institutions have conducted different activities in five countries of the region with the aim of improving the ex officio defense system, the results of this research have summarized all the existing data in this area. In order to avoid duplication and assure efficiency of the process of collection of existing data, the applied methods during the realization of research were adapted to the activities implemented in each country separately when it comes to representing the accused person by ex officio. Recommendations under this research were agreed among participants of six consultation meetings that were organized in Albania, Bosnia and Herzegovina, Macedonia and Serbia. These consultation meetings were attended by different participants including representatives of bar associations, lawyers, prosecutors, judges, representatives of academia and civil society organizations.

2. INTRODUCTION

Through participation in the European integration process Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia took over the obligation to adopt domestic legal systems compatible with European Union (EU) legal practice. In order to meet EU standards, the judicial systems of all five countries are going through a long process of reform. Although a number of significant reforms have been conducted in the field of criminal legislation in all countries, reports of relevant institutions/organizations indicate that the criminal law systems still are not fully functional and do not fully ensure adequate protection to all persons that need legal protection and assistance throughout the entire criminal proceeding.

The relationship between the lawyers and their clients in all countries is regulated by *inter alia* the Codes of Ethics of the Chambers of attorneys and by the Law on the Legal Profession. According these documents and international standards in this field lawyers are obligated to provide effective legal assistance for clients who are not in position to pay for services. When it comes to fulfilling of these obligations in practice, lawyers in all countries have been faced with diverse problems. Results of Comparative analyses of criminal defense in five countries of the region emphasized that there is no transparent mechanism in place when lawyers are appointed and paid ex officio. Further, their fees are usually not paid on time or not paid at all. Lawyers in all five countries believe that the appointment, payment and competence development of ex officio lawyers needs to be enhanced as it is burdened by lack of transparency, corruption and inequality. This both harms the profession of lawyers and, far more importantly, it harms the rights of accused to be legally properly represented and protected as well. Although the relevant data indicate that there are a large number of CSOs in all five countries that provide legal assistance, it is obvious that they provide more civil than criminal legal assistance. On the other hand, a large majority of lawyers in all countries do not recognize opportunities for cooperation with CSOs.

Research on the effectiveness of the legal protection system of the accused in the five countries in the region was conducted within the project: *Enhancing the protection of the rights of the accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia*. This project has been implemented by the Helsinki Committee for Human Rights in Republika Srpska in cooperation with partner organizations in the region[1] with the aim to contribute to reinforcing the system of legal protection of the accused in the five countries in the region. The starting point for the realization of this research is the document *Comparative analysis on the criminal defense advocacy in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia,* which was created in February 2014 under the program "Balkans regional rule of law network (BRRLN)."[2] Pursuance of analysis was used to determine how establishing a regional network of defense lawyers can contribute to the establishment of strong, independent and effective advocacy in criminal defense.

---

1 Center for Legal Aid and Regional Development (CLARD), Tirana Legal Aid Society (TLAS), Helsinki Committee for Human Rights of the Republic of Macedonia, The Network of the Committees for Human Rights in Serbia (CHRIS), Policy Center Belgrade, Bar Association/ Attorney office "Tojić," Bijeljina

2 The network was formed with the aim to improve the rule of law in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia by introducing mechanisms for cooperation and exchange of best practices between the bar associations in the region and civil society organizations dealing with the judiciary.

The results of the performed comparative analysis on the criminal defense advocacy in five countries and the work of the members of the expert work groups,[3] which discussed problems in the functioning of the criminal defense, showed that all five countries in the region are facing serious challenges in ensuring the quality of access to justice for all citizens. In accordance with the recommendations of the above mentioned analysis, it is necessary to identify the most important issues affecting the establishment and operation of a transparent system of ex officio defense - particularly in the areas of assigning counsel ex officio, determination and payment of fees to lawyers involved, ensuring that lawyers have the skills and competence necessary to provide effective defenses by officio to accused persons and possibilities for setting up alternative models in ex officio defense.

3. THE PURPOSE AND OBJECTIVES OF RESEARCH

In accordance with the provisions of the criminal law in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia, free legal assistance is provided to all persons accused of certain crimes who are not able to pay for a lawyer. However, experience so far has shown that, in practice, all five countries are facing problems of enforcing the laws and ensuring adequate access to justice for all citizens. The most important problems in providing adequate defense ex officio for accused persons is mostly referred to: the lack of transparency in the appointment of lawyers by ex officio, and inadequate measures to guarantee that those appointed provide competent defense for the accused.

The subject of the research is to evaluate the existing legislation and practice in the provision of defense by ex officio in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia, with reference to existing international standards and practices in this area. Therefore, the focus of the research will be the manner of appointment, payment and competency of lawyers, who serve as ex officio defense counsel. The aim of the research is to identify the most important obstacles and challenges to the establishment of a transparent and efficient system of ex officio defense in accordance with national and international standards in all countries, and define recommendations for improving the existing system of ex officio defense in the region in order to improve the quality of representation of accused persons.

The basic premise is that the reforms implemented in the field of criminal law in all five countries in the region have not achieved the expected results. Moreover, of particular relevance to this study, there are certain problems in the functioning of the ex officio defense system that significantly impair its efficiency, which affects the provision of effective defense to defendants in criminal proceedings.

[3] Starting from the results of the analysis formed a total of five expert working group, which consisted of ten members (two members from each of the five member states BRRLN Network) - Legal Aid and Ex Officio Defense; Media and Public Awareness; Continuing Legal Education and Training; Bar Chamber Capacity; Criminal Law. Members of the Working Groups were further discussed previously identified problems and challenges within the criminal defense faced by countries in the region and possibilities for overcoming them and improving the current situation in this area.

4. METHODOLOGY

Research on the effectiveness of the legal protection of the accused has been conducted simultaneously in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia, in order to identify the main obstacles to the implementation of an efficient and transparent system to provide ex officio defense for accused persons. The Helsinki Committee for Human Rights in Republika Srpska was responsible for the process of coordination of the research, with the support of project partners and analysts engaged for the purposes of the successful implementation of these activities. The research methodology was developed in close cooperation between the Helsinki Committee for Human Rights in Republika Srpska, coordinators of partner organizations involved in the project, and analysts engaged for the purpose of carrying out the survey. Members of the expert Work Group Ex Officio were actively involved in the entire process of conducting research in order to facilitate the collection of the necessary data. This research is conducted parallel in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia in the period of September 2015 - January 2016.

The usage of appropriate methods allowed collection of the necessary data on the research and on that basis production of the final report. The process of the research is based on three main segments: **1) the process of appointing attorneys for ex officio procedures; 2) payment for appointed attorneys; and 3) competence to provide defense for ex officio.** During the realization of this research questioning methods were applied in order to collect the necessary data on the basis of statements of the examinees. The quantitative - qualitative content analysis of documents was also used in order to collect necessary data from the secondary sources. Given that there are different legal and cultural environments in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia, a comparative analysis was applied to compare the achieved results related to a defined research topic. Findings of conducted research are based on a review of relevant documents, realized interviews with target groups, responses of the target groups to a questionnaire developed by the research team, as well as the results of focus groups discussions organized by the research team.

a) Review of relevant documents related to a defined research topic (documents of national and international organizations and institutions, international standards, conventions, media reports). **Analysis of secondary sources** allowed the collection of data necessary to define the key findings and recommendations. An overview of collected documents also provided the comparison of the international standards and obligations in connection with the appointment of ex officio defense with the current situation in practice in all five regional states. The analysis of secondary sources includes information related to Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia. In addition, the analyses of secondary resources in Serbia included the minutes of consultation meetings with stakeholders (i.e. lawyers, representatives of bar associations, judges, prosecutors, police officers, representatives of civil society organizations active in the field of Justice) that were organized by the OSCE Mission to Serbia and the Bar Association of Serbia.[4]

[4] The consultation meetings were held in Kragujevac (November 3, 2015), Nis (November 5, 2015) and Belgrade (November 12, 2015).

b) A written survey of target groups (lawyers who can represent the accused persons ex officio, representatives of bar associations, representatives of civil society organizations active in the field of Justice, representatives of the academic community, experts for professional development). **Interviewing the target groups** was carried out in order to have a better view and understanding of the most important obstacles for establishing an efficient and transparent system of ex officio defense. The process of the interviewing was conducted in Macedonia and Albania in order to verify in practice the data previously collected in the field of criminal defense. In total 55 respondents in Macedonia answered the previously prepared questionnaire. 23 of those respondents were lawyers, 9 were judges and 8 were prosecutors at the respective courts. Besides that, 15 respondents were members of the Helsinki Committee for Human Rights of the Republic of Macedonia and the Coalition of Civil Association "All for Fair Trails," who observe the judicial proceeding before the competent courts. In addition, 32 respondents were female while 23 of them were male. Respondents in Albania completed 46 questionnaires. Among the respondents, 30 were lawyers in Tirana and other local cities in Albania, while 10 were prosecutors, judges, and academics. Representatives of the organizations that provide legal aid answered 6 questionnaires.

c) The focus groups conducted in Bosnia and Herzegovina were attended by lawyers who serve a sex officio representatives of accused persons, representatives of bar associations, representatives of civil society organizations that are active in the field of Justice/provide legal aid, and representatives of the academic community. These focus groups were attended by 32 participants (male 50%, female 50%) from Bijeljina, Tuzla and Sarajevo, and lasted between 90 and 105 minutes (average 98 minutes). All of them were recorded and transcribed for later analysis. After transcription, the research coordinator listened to the recordings and read all the transcribed materials. The entire discussion was directed and guided by a moderator, who kept the group focused and ensured that each participant had the opportunity to express his/her opinion. The moderator asked questions using the guidelines specifically developed for the session. The participants were mainly asked to express their opinions and statements, to describe their experiences and to testify about the experiences of others in connection with the topic. When analyzing the data collected during the focus group discussions, special attention was paid to the statements that participants used in order to validate their expressed views, and the sources of information the participants used to justify their views and experiences on the topic of discussion. Realized focus groups with representatives of the target groups enabled the collection of data necessary to identify key gaps and barriers to the establishment of an efficient system of ex officio defense.

The methodology applied during the realization of this research respected the particularity of the legal context and culture of each country separately. Bearing in mind that the various national and international organizations/institutions have conducted different activities in the five countries of the region with the aim of improving the ex officio defense system, the results of this research have summarized all the existing data in this area. In order to avoid duplication and assure efficiency of the process of collection of existing data, the applied methods during the realization of research were adapted to the activities implemented in each country separately when it comes to representing the accused person by ex officio. Recommendations under this research were agreed among participants of six consultation meetings that were organized in Albania (Tirana, Durres), Bosnia and Herzegovina (Bijeljina), Macedonia (Skopje), Serbia (Belgrade, Nis). These consultation meetings were attended by 131 participants (66 female, 65 male) – lawyers, prosecutors,

judges, representatives of bar associations, representatives of academia and civil society organizations.

5. INTERNATIONAL STANDARDS FOR PROTECTION OF HUMAN RIGHTS OF ACCUSED

5.1. International instruments that provide the legal representation to accused

As it is stated in numerous national and international documents, access to justice is one of the fundamental to the protection of human rights. In order to ensure that obligations imposed by law are properly met, these documents all recognize that a person has a right to legal representation when his/her fundamental rights to liberty and life are put at risk. *The Universal Declaration on Human Rights*, for example, provides for the presumption of innocence, the right to be tried without unnecessary delay, equality before the law, and the right to a fair and public hearing by an independent tribunal established by law. *The International Covenant on Civil and Political Rights* likewise provides that everyone has a right to "defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it" and to "have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing."[5]

According to *International Bar Association* standards, the independence of the legal profession is an essential guarantee for the promotion and protection of human rights, and is necessary for effective and adequate access to legal assistance. The right to counsel when charged with a criminal offence is integral part of the right to fair trial, a fundamental right that is recognized by numerous international human rights instruments. According the *UN Basic Principles on Role of Lawyers* all persons must have "equal access to lawyers" and such access must be provided to everyone "without distinction of any kind, such as discrimination based on race, color, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status."[6] The basic principles listed in this document have determined that the government is responsible for ensuring that all people that are in custody are provided with adequate opportunities, time and facilities to be visited and to communicate and consult with a lawyer without delay or censorship, and in full confidentiality. Further, the government has the responsibility to ensure sufficient funding and resources in order to provide legal assistance to the poor and disadvantaged persons, in cooperation with professional associations of lawyers.

The international standards envisage that "governments, professional associations of lawyers/educational institutions shall ensure that lawyers have appropriate education and

5 The International Covenant on Civil and Political Rights (Article 14), http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

6 Adopted at the 8th UN Congress on the prevention of Crime and Treatment of Offenders that take place in Havana in 1990

training designed to promote knowledge and understanding of the role and the skills required in practicing as a lawyer, and be made aware of ideals and ethical duties of lawyer and of human rights and fundamental freedoms recognized by national and international law."[7] Accordingly, the existing programs of education should strengthen their legal skills, increase awareness of ethical and human rights issues, and train lawyers to respect, protect, and promote the rights and interests of their clients. In practice, the quality of the legal services that have been delivered to accused persons could be influenced by various factors such as: what resources the accused person has; what mechanisms are in place to provide the legal assistance via an appointment system; the competences of appointed lawyers; the quality of its education and training; the sufficient number of competent appointed lawyers; the caseload by appointed lawyers.

Despite the recognition of importance of defense lawyers in international human rights instruments as well as in the national constitutional laws, the lawyers who work on behalf of poor or indigent persons are constantly faced with economic pressure, because they are often paid less than their colleagues in the other parts of judiciary sectors. Accordingly, they often take on larger case loads, in order to make ends meet, which makes it difficult to focus on providing effective representation for individual clients. Also, defense lawyers often lack access to needed resources and/or sufficient time to investigate and prepare the case, and the prosecution does not always provide the evidence that a defense lawyer intends to use in trial in order to prepare a defense. This lack of resources can result in reduced effectiveness and quality of representation of accused persons. The legal framework cannot protect the rights of the people if they are unaware or do not understand those rights, which can be especially harmful during the criminal investigation and proceedings. Governments and professional associations should educate and inform the public about their rights and duties under the law and the role of lawyers in protecting the fundamental freedoms, with special attention to be given to the poor and other disadvantaged persons.[8]

The availability of legal defense service to people who are suspected or charged with a crime offence as well as the guarantees of independence of lawyers in fulfilling of their professional duties without of any restrictions, pressures or interference should be considered when assessing the quality and extent of legal assistance that is guaranteed to criminal defendants under international standards and instruments.

5.2. International practice in providing the legal representation to accused (The U.S. Federal System, Armenia, and Ukraine)

This section examines the practices of the U.S. federal system, Armenia and Ukraine with respect to the provision of free legal counsel for indigent criminal defendants. U.S. federal courts have a long history of providing counsel at no charge to criminal defendants who cannot afford representation, and have a well-developed system that contemplates the use of public defenders, community legal aid organizations and private attorneys. Armenia and Ukraine historically did not have systems in place for the appointment of independent and effective defense counsel. In recent years, though, both countries have enacted sweeping

7 UN Basic Principles on Role of Lawyers, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990)

8 UN Basic Principles on Role of Lawyers, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990)

judicial reforms that include the creation of systems for appointment of defense counsel to suspects and accused who cannot afford to pay. Their approaches differ greatly, however. Armenia has opened a public defender office, which hires full-time public defenders that provide representation to indigent defendants in the overwhelming majority of cases, while Ukraine has implemented a free legal aid system, which uses qualified private attorneys to provide legal aid to indigent defendants.

5.2.1. U.S. Federal System

The U.S. Constitution guarantees the right to counsel in serious criminal proceedings, and the states and the federal government have implemented systems for ensuring that indigent defendants have access to counsel. In the federal court system, the Criminal Justice Act of 1964 (CJA) provides federal funds for attorneys, experts, and services necessary for the adequate representation of indigent individual defendants. Under the CJA, each federal district is responsible for adopting its own plan for providing representation to qualifying defendants.[9]The district's plan must comply with the minimum requirements set by the CJA and must be approved by the "judicial council," a panel of trial and appellate judges in the circuit in which the district lies. The Judicial Conference of the United States issues policies and guidelines for administration of the CJA and approves funding requests and spending plans. The Administrative Office of the U.S. Courts, under the direction and supervision of the Judicial Conference oversees the expenditure of the funds and administers the federal defender and panel attorney program nationally. Administrative costs are very low – most of the money appropriated goes to running federal defender programs and paying appointed counsel.

Types of Representation **–**Under the CJA, eligible defendants may be represented by a federal public defender organization,[10]a community legal organization, a bar association-appointed attorney, or a private attorney appointed under the Act (CJA attorney). The CJA requires appointment of private attorneys in a "substantial proportion" of cases, which has been interpreted as at least 25% of cases. Nationwide, however, federal defenders receive approximately 60%of appointments and the remaining 40%are assigned to CJA attorneys.

Eligibility for Representation **–**In order to qualify for representation, a defendant must be indigent, as determined by the presiding judge. An indigent defendant must be provided representation if he or she is:

a) Charged with a serious crime – i.e., a felony or a Class A misdemeanor–or otherwise entitled to appointment of counsel under the Sixth Amendment to the U.S. Constitution or Federal law;

b) A juvenile alleged to have committed act of juvenile delinquency;

c) Charged with a violation of probation or supervised release, or facing a change in the status of supervised release (e.g., revocation or imposition of a new condition);

9 Each U.S. state has at least one federal district, and there are ninety-four federal districts in total.

10 Federal defender organizations are not mandatory, but they exist in ninety-one of ninety-four districts.

d) Under arrest, in circumstances where representation is required by law for an arrestee;
e) Subject to a mental condition hearing;
f) In custody as a material witness; or
g) Facing transfer to the United States from a foreign country, in connection with proceedings designed to verify the offender's consent for transfer.

Representation also may be provided in the interests of justice for an indigent defendant charged with a Class B or C misdemeanor or an infraction for which a sentence to confinement is authorized, or for a petitioner in a habeas corpus proceeding. An indigent defendant may waive the right to appointed counsel if the waiver is "knowing and voluntary." If not, counsel will be appointed regardless of the defendant's wishes.

Scope of Representation **–** A defendant for whom counsel is appointed is entitled to representation at every stage of the proceedings, including "ancillary matters," from his or her initial appearance through disposition of the case on appeal. Appointed counsel must appear in person at all proceedings and must obtain leave of the court to have substitute counsel appear, which will be granted only in exceptional circumstances.

Qualifications of Appointed Counsel **–** Aside from counsel in capital cases, U.S. Federal law contains others hold qualifications for attorneys wishing to serve as appointed counsel. Individual district plans require different qualifications and levels of experience. Many but not all mandate that CJA attorneys be admitted to the bar of the particular district, in addition to being a member in good standing of a state bar. Other common requirements include: criminal trial experience; knowledge of the Federal Rules of Criminal Procedure, Federal Rules of Evidence, and Federal Sentencing Guidelines; and recommendations from judges, prosecutors and other defense attorneys. Finally, some districts have implemented mentorship and/or CLE programs require some or all CJA attorneys to participate in those programs. In the District of Connecticut,[11] for example, less experienced attorneys are often admitted to the "CJA panel," – i.e., the list of eligible attorneys – on a probationary basis, during which they may take cases but must receive mentoring from a more experienced attorney and attend training programs provided by the Federal Defender. All full-fledged panel members and attorneys in the Federal Defender's office are expected to serve as mentors to probationary panel members. Every attorney on the panel must complete relevant CLE courses, provided by the Federal Defender or otherwise.

Appointment Process and Duration **-** As with eligibility, Federal law does not regulate the process by which attorneys are appointed and different districts have adopted different approaches in this regard. In the District of Connecticut, for example, all attorneys wishing to serve as appointed counsel must submit an application to a "standing committee" composed of: the Federal Defender (or his designee); five qualified private attorneys appointed by the Chief Judge of the District (who serve two-year, renewable terms); the Clerk of Court, who serves as a non-voting member; and a CJA panel representative. The standing committee reviews applications and passes them on to the Chief Judge of the District with a recommendation, in writing, for approval, denial or admission on a probationary basis.

11

The District of Connecticut is used as an example throughout this research because the researcher, Sarah Freuden, worked in that District and therefore is particularly familiar with its CJA plan.

Approved attorneys are admitted to the CJA panel for three years, which can be renewed upon invitation or successful re-application. Serving on the panel is a privilege, not a right, and the board of judges may remove a member in the interests of indigent defendants without providing a formal complaint procedure or appeals process for the attorney. In practice, the Federal Defender conducts periodic reviews, consulting with judges, prosecutors, and other panel attorneys (particularly those who have served as mentors), to determine whether attorneys should be removed from the panel. Appointment of CJA attorneys as counsel for indigent defendants is made on a randomized, rotational basis. In certain circumstances, however, a particular attorney – even one who is not on the CJA panel – may be appointed to ensure that the accused receives effective representation. For example, an attorney that possesses special expertise on the issues involved the case may be appointed in order to best serve the accused. CJA attorneys may refuse appointments, but three successive refusals may constitute grounds for removal.

Fees and Payment of Appointed Counsel – The Judicial Conference sets guidelines for payment, which must comply with the maximums set forth in CJA. At present, CJA attorneys are paid an hourly rate of $129in non-capital cases, which includes attorney compensation and office overhead. The CJA limits total compensation for categories of representation (at present, $10,000 for felonies, $2,900 for misdemeanors, and $7,200 for appeals). Maximums may be exceeded if the presiding judge certifies that a higher amount is necessary to provide fair compensation and the Chief Judge of the relevant Circuit Court of Appeals approves. Courts are encouraged to require case budgeting for any case where representation is likely to exceed 300 hours of attorney time or $30,000.In order to obtain payment for their services, CJA attorneys must submit a standardized payment-request voucher within forty-five days of the disposition of the case. The Clerk's office reviews the form for completeness, compliance with the guidelines, and mathematical accuracy. The presiding judge then reviews the request for reasonableness. The Chief Judge of the Circuit or his designee conducts the review for reasonableness if the requested compensation exceeds the statutory maximum. Absent extraordinary circumstances, judges are expected to act upon a request for compensation within thirty days.

5.2.2. Armenia

In 2006, ABA ROLI helped support the establishment of the Public Defender's Office (PDO) in Armenia, making it the first former Soviet country to implement a public-defender system. Prior to the establishment of the PDO, criminal defense lawyers for indigent defendants in Armenia were appointed by investigators or prosecutors with whom they had close relationships, which seriously compromised defense counsel's independence and the potential for effective, quality representation. Now, the PDO provides legal aid for indigent defendants in all criminal cases and some civil cases as well.

Eligibility for Representation –Under Armenian law, indigent defendants are entitled to free representation in all criminal cases. Criminal defendants apply directly to the PDO for free legal services. At present, the PDO accepts all applications, often without investigating the client's ability to pay due to the Office's budgetary constraints. From January to October 2015, the PDO represented individuals in 3,780 criminal cases.

Structure of the PDO **–**The PDO is a part of the Chamber of Advocates (Armenia's bar association) and is formally led by the Head of the Chamber of Advocates (Head CA), who is responsible for the overall direction of the Office, including its policies and budget, as well as employment of attorneys and formal decision making. Being a part of the Chamber of Advocates ensures that the PDO is free from interference or direct control by the judiciary, executive or legislative branches.However, the Government of Armenia must approvethe PDO's annual budget, which has been approximately $600,000 for the last several years, despite an increasing caseload.The Head CA is responsible for nominating the Head of the Public Defender's Office (Head PD), which the Chamber's Board must approve.The Head PD, who does not have an active caseload, is responsible for managing day-to-day operations of the PDO and assigning cases. A deputy and two assistants, who do have active caseloads, assist the Head PD.

At present, the PDO employs just over fifty full-time public defenders. Approximately half of those attorneys are located in Yerevan; the others are spread across ten regional satellite offices. Public defenders handle an average of ninety-five cases per year, not including appeals, representation of victims, or civil cases. They generally are responsible for all aspects of their cases, because the PDO has a minimal management structure and very limited administrative and clerical support staff. In addition to full-time public defenders, the PDO hires part-time attorneys, as needed, to accommodate variable caseloads. The Law on Advocacy also permits the PDO to contract with private counsel, but the Office rarely does so due to budgetary limitations.

Hiring and Retention Processes–Armenia uses a competitive process to select public defenders. Attorneys must first pass a written exam, and then engage in an oral interview. Public defenders selected through this process are hired for a one-year contract.

Since2013, the PDO has conducted an annual review for each public defender, to determine whether to extend his or her contract. The review examines, *inter alia*: acquittals and favorable judgments, results at sentencing, the number of appeals or claims filed, adherence to office policy on maintenance of case files, completion of required trainings, and any disciplinary proceedings. Each public defender receives a numerical score by an evaluation committee made up of staff from the Chamber, the PDO, and two independent advocates. Typically, 20% of the public defender contracts are not renewed. Those public defenders whose contracts are not renewed may reapply, and will then compete with new applicants for open positions. The Chamber began developing a more comprehensive evaluation procedure in July of 2015, which will include a more substantive review of a public defender's work. In the new system, if problems are identified, the public defender will be counseled and given an opportunity to improve before any action is taken against him or her. If there is no improvement, then the attorney will receive a negative evaluation, which may result in sanctions and the non-renewal of his or her contract.

Training and Mentorship of Public Defenders **–**There is no orientation training for new public defenders, but newer attorneys are often paired with more senior lawyers in co-defendant cases. Moreover, a pilot mentorship program was introduced in 2014 and is currently being expanded. At present, two former public defenders and one current public defender have served as mentors to less experienced public defenders. These attorneys advise mentees for a three-month period, primarily over the telephone and via email, on case strategy and issues in criminal law. The PDO is also in the process of finalizing a pilot web-based case management system, which will with the organization and management of caseloads. All members of the Chamber of Advocates – including public defenders – are

required to complete twenty-four hours of continuing legal education each year. The Chamber organizes trainings relevant to criminal defense attorneys, including weekend trainings supported by ABA ROLI, and charges a fee as part of its members' dues. In 2009,the Chamber, with the support of ABA ROLI published a practical guidebook for the practice of criminal law that contains case law, case procedures and model motions.

Fees and Payment of Public Defenders - Public defender pay is tied to public prosecutor pay. It is currently $770 gross and $600 net per month, which is considered an attractive salary in Armenia. All public defenders receive the same pay regardless of experience, difficulty of caseload, location, or hours worked. The few private attorneys retained by the PDO are paid an hourly rate based on the salary of a public defender.

5.2.3. Ukraine

Until recently, all Ukrainian citizens were required to pay for legal representation. Over the past five years, however, sweeping reforms have been enacted that, once fully implemented, will guarantee the right to free legal aid to indigent individuals in criminal, civil and administrative cases. In 2011, Ukraine's parliament adopted The Law of Ukraine "On Free Legal Aid."In conjunction with the Law on Free Legal Aid, the Coordination Center for Legal Aid Provision (CCLAP) was established within the Ministry of Justice to implement the new guarantees. In 2012, anew Criminal Procedure Code (CPC) was adopted, which regulates the work of lawyers providing free legal services to criminal defendants. Finally, in 2014 the Parliament adopted the Law of Ukraine "On Public Prosecutor's Office" which modifies the Law on Free Legal Aid and, in particular, expands the rights of detainees, suspects, accused, and convicted.

Legal aid services in Ukraine are divided into two categories: "primary legal aid," which covers services related to access to law – e.g., provision of legal information and support in drafting legal documents; and "secondary legal aid," which covers services related to access to justice. The Law on Free Legal Aid guarantees both, and twenty-seven regional Free Secondary Legal Aid Centers (FSLAC) have been created to assist the CCLAP in fulfilling its mandate to provide secondary legal aid. The FSLACs serve as territorial units of the CCLAP and oversee the appointment of lawyers to provide secondary legal aid in criminal cases. More specifically, the FSLACs are responsible for: engaging lawyers on a permanent, regular and/or temporary basis, and replacing lawyers, as necessary; making decisions on free legal aid in individual cases and assigning counsel; verifying financial documentation and providing compensation to lawyers providing free legal aid; monitoring the quality of free legal aid; and cooperating and coordinating with, *inter alia*, law enforcement bodies, courts, and executive and self-government bodies.

Eligibility for Representation and Scope of Representation -Ukrainian law now guarantees free legal aid to a suspect or accused from detention until the end of criminal proceedings. Those who have been convicted and sentenced to imprisonment are also entitled to obtain free legal counsel from one of the legal aid centers. Individuals who have been detained are ordinarily guaranteed the right to access a lawyer within one hour of their detention. At present, there are two mechanisms in place for notifying a FSLAC that an indigent individual is in detention. A representative from the relevant law-enforcement body is obligated to inform a FSLAC immediately about the detention, including personal

information about the detainee and the location, time, and reason for the detention. The detained person or his/her close relatives may also inform the FSLAC, which the FSLAC verifies by contacting the relevant law enforcement agency.[12] Either way, upon verifying a detention the FSLAC assigns an eligible attorney, who is obliged to meet with the detainee confidentially within the first hour of detention. In exceptional circumstances, the lawyer is given up to six hours to meet with the detainee. If the lawyer does not arrive within the prescribed period, the responsible law enforcement officer must contact the FSLAC, which then assigns another lawyer. A detained person has the right to refuse free legal aid, but must do so in the presence of the assigned lawyer during the confidential meeting.

Requirements for Appointment and Appointment Process–Lawyers providing free legal aid must be included in the Registries of Free Secondary Legal Aid Lawyers (FSLA). All FLSA lawyers must successfully complete a competitive assessment, which includes: 1) a review of the lawyer's qualifications, 2) an anonymous written test, and 3) an interview. Once added to the Registries, attorneys are engaged to provide free legal aid on a voluntary basis. Each lawyer signs a contract with a FSLAC, which governs her workload and provides guarantees respecting the lawyer's activity. As of September 2014, 3,889 of approximately 30,000 lawyers in Ukraine were included in the Registries. Of those, 2,180 had been engaged by an FSLAC to provide legal services in criminal cases.

CCLAP offers free trainings, primarily related to the CPC, which FSLA lawyers may participate in on a voluntary basis. CCLAP has also developed guidelines for FSLA lawyers, in an effort to share best practices and support on-going training.[13]Finally, CCLAP is making use of social media; it moderates several Facebook groups intended to serve as discussion forums and provide consultation support to FSLA lawyers. The FSLACs are tasked with monitoring the quality of representation provided by FLSA lawyers. To that end, quality-monitoring units have been established in all FSLACs, which are run by experienced legal aid lawyers.[14]These units are in the process of implementing a variety of measures to ensure quality – including, *inter alia*, interviewing and observing FSLA lawyers, analyzing workloads, collecting statistical and observational data on performance, and promoting quality standards.

Fees and Payment of FSLA Lawyers –CCLAP develops draft procedures and regulations for compensation of FSLA lawyers, in consultation with the Ministries of Finance, Social Policy, and Economic Development and Trade. The Ministry of Justice then submits those procedures and regulations to the Cabinet of Ministers for approval. FSLA lawyers are compensated according to the type of representation provided. For representation during detention, compensation is determined on a case-by-case basis, taking into account the complexity of the case and the activities undertaken, among other things. For representation

12 The two methods are not mutually exclusive; law enforcement is always required to notify the FSLAC, but the detained person or his representative may do so as well. The latter procedure was adopted to guard against the risk of violation of detainee rights.

13 As of 2014, however, no comprehensive trainings had been provided to CCLAP or the FSLACs to support institutional capacity building within the legal aid system. That is problematic, given that these nascent institutions are charged with implementing the free legal aid system in Ukraine.

14 To prevent conflicts of interest, those lawyers are no longer permitted to engage in legal aid activities, but they may continue their private practice.

during criminal proceedings, lawyers receive a base payment of 2.5 times the minimal wage multiplied by twenty hours (the estimated time spent by a lawyer on each separate stage of a criminal proceeding). That number is then multiplied by three indexes, which take into account the stage of the criminal proceedings, the complexity of the case, and whether the case poses any special difficulties – e.g., an appeal. Lawyers are also remunerated for costs incurred during representation, including transportation, fuel, and hotel costs. Payment is calculated and remitted on a monthly basis for each completed stage of the criminal case. CCLAP has established a transparent policy for the weekly publication on FSLAC websites of information on lawyer compensation.

6. KEY FINDINGS OF CONDUCTED RESEARCH

6.1. The analysis of effectiveness of the legal protection system of the accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia

Albania, BIH, Kosovo, Macedonia and Serbia are located on the territory of the Western Balkans, which is political term created by the EU in order to indicate a new approach towards these countries in the context of the accession process. All five countries have chosen EU membership as their main political goal and have undertaken some reforms needed to fulfill accession criteria and to harmonize national legislation with the standards of the EU. At present, countries in the region are at different stages in the EU accession process - Albania, Macedonia and Serbia have been recognized as the candidate countries, while Bosnia and Herzegovina and Kosovo have potential candidate status.

The countries in the region have undergone major reforms, which significantly transformed their economies in the past 20 years. They have experienced transformation toward market-based systems, privatization of inefficient state owned enterprises, rapid adoption of modern banking systems and the external orientation of their economies. The challenges in their economic systems have usually been reflected through high unemployment rates and dysfunctional economy. Unemployment rate across region is high and young people are particularly affected. Despite the numerous structural reforms that have been initiated and implemented in the past two decades, the achieved results are not satisfactory mainly due to reform fatigue, resistance from various social actors and different interests of political elites. Accordingly, the region is faced with an uncompleted process of transition, redundant state involvement in the functioning of the market and legal uncertainty. Also, the complex political and economic situation in the region at the end of twentieth century yielded difficult diplomatic relations and by extension also affected cooperation and communication among countries in the region.

An independent and efficient judiciary is a crucial component of every democratic state. Because of this, judicial reforms have become a significant part of the EU accession process. The judiciary was mostly influenced by Romano-Germanic traditions as well as with legacy of forty-years of communist/socialist rule. Accordingly, improvement of the rule of law became one of the main preconditions for EU accession for all countries in the region. Besides independence, efficiency and accountability, an essential feature of the judicial reforms is effectiveness, which means that the policies undertaken should comply with the normative values of the rule of law in order to improve the quality of the judiciary.

In light of EU accession, the countries in the region (except Albania) have reformed their criminal procedure codes. The inquisitorial systems in these countries were considered to be ineffective at protecting defendants' rights. As a result, they have introduced adversarial or quasi-adversarial systems modeled on the common law instead of the inquisitorial system. These changes have significantly altered the role of the court and judges in the entire process. The court no longer plays a major role in conducting the criminal procedure, which is now the responsibility of the prosecutor. The role of the judge is to ensure the procedural fairness of the proceedings, not to lead them. By contrast, compared to the previous period, the new systems provide defendants and their lawyers with a more active role in the criminal proceedings.

Other instruments based on common law (such as plea bargaining and deferral of prosecution) have also been introduced in order to increase the efficiency of new systems. Currently, the countries in the region are at different levels of the process of adoption and implementation of procedural reforms. Bosnia and Herzegovina began to implement the criminal procedure reforms in 2003, while Kosovo, Serbia and Macedonia began to implement the new codes in late 2013. Albania has made recent changes to criminal law and criminal justice procedures, but has not reformed its criminal procedure.

6.1.1. Albania

a) Overview of the Criminal Law Reforms: The judicial system in Albania is consisted of the Supreme Court, the courts of appeal and the courts of first instance. The Constitution also foresees the organization and functioning of a Constitutional Court. This Court guarantees respect for the Constitution and has the exclusive right of its final interpretation.[15] Albania has made recent changes to its criminal law and criminal justice procedures in order to harmonize its national legislation with its international obligation, particularly in the area of human rights. The process of criminal law reform has been focused on: the accountability, impartiality and professionalism of judges and prosecutors; elimination of delays in criminal proceedings; improving the position of defense lawyers in trials; increasing the quality of service lawyers provide to criminal defendants; and broadening the scope of cases in which criminal defendants must have a defense advocate.

In 2012, the Ministry of Justice approved amendments to the Law on Advocacy in order to improve the courts' performance. The first aim of these changes was to solve problems regarding postponement of hearings due to the frequent absence of lawyers, by establishing a procedural law that introduces changes to the rights and obligations of lawyers. These amendments also provide for the creation of the National School of Advocates (as a body of the National Chamber of Advocates), which will conduct educational trainings in order to prepare advocate-trainees for practice and to help licensed lawyers to maintain and upgrade their professional knowledge and competencies. Finally, the amendments to the Criminal Code provide for stricter punishments for those convicted of murdering members of the police force, murdering their spouses, combating homicide motivated by blood feuds and unlawfully possessing weapons.

Present law: As it is stated in the statute of the National Bar Association, the main objective of this association is to promote the provision of free legal assistance for those who cannot afford a lawyer. The compensation for lawyers is determined by the court or the

15 The Constitution of the Republic of Albania, adopted in November 28, 1998, part eight.

prosecutor's office, when the person represented does not have the financial ability to pay and the legal assistance is provided free of charge. In these circumstances the size of the reward is determined with a joint decision of the Minister of Justice and the governing council of national Bar Association.[16] The governing council of the Bar Association appoints counsel for judicial proceedings when required by the court, and also appoints replacement counsel when a lawyer quits and the client cannot find another one.[17]
The joint order issued by Ministry of Justice and the BAR association lists tariffs for lawyers' rewards in the absence of lawyer-client arrangements. This Order also states that for penal cases "the service for minors in conflict with the law should be half of the tariffs applied for adults," and the service for "people in need" should be 80% lower than the above tariffs."[18] This act has replaced Regulation No. 2 (1996) "On the tariffs of maximal reward for legal assistance given by the lawyers of the Ministry of Justice." The Order also provides for the possibility to determine by agreement of the parties remuneration, the respective table of costs related to the type of service, and the agency the remuneration is required from. According to this *Regulation* "in cases where the lawyer is appointed, the remuneration is determined by the court and cannot be more than 60% of the above tariffs (Article 3).

b) The situation of the legal assistance in Albania in the context of present justice reform process [19]

Before the legislative changes of 2012, the conduct of the disciplinary process in National Bar Association had specific problems with regard to the malfunctioning of the structures in charge of examining the complaints against advocates, and the very complicated way the examination of these complaints had to go through, the meeting of the formal conditions by the complainants, compliance with the deadlines. As a result of these problems, only a limited number of disciplinary measures were taken against advocates for violations of professional standards or rules of ethics. This did not respond to the stage and problems affecting the Advocacy and the quality of its service delivery. The legal amendments which came into force at the end of January 2013 addressed the issue of the complaints, which do not meet the formal conditions for filing the complaint, by providing in the law the establishment of the NCA Complaints Commissioner, who not only receives the complaints, but also explains to the complainants the process of their review, as well as guarantees the proper recording and acceptance of the valid complaints. With the establishment of the Disciplinary Committee in 2013, a total of 167 complaints were registered with the Court of

16 Article 11 of Law 9109, date 17/07/2003, "On the profession of the lawyer in the Republic of Albania,

17 Article 22 of the Law 9109, date 17/07/2003, "On the profession of the lawyer in the Republic of Albania"

18 The joint order issued by Ministry of Justice and the BAR association, No. 1284/3 and 212, dated 16/05/2005, "On the approval of fees of lawyers for the legal assistance"

19 These findings are based in the strategic documents presented so far by the special commission for the justice reform in Albania and the public consultations with CSOs. TLAS is one of the CSOs consulted by the parliamentary group, to produce opinions and suggestions.

Serious Crimes claiming that the court appointed advocates had failed to appear at court hearings. The Disciplinary Committee has suspended the license of one advocate on these grounds, and has given a written warning to three other advocates.

Legal aid budget: Provision of legal aid is ensured by the State Commission for Legal Aid, whose mission is to provide primary or secondary legal aid to persons who have the right to legal aid: **a)** upon a request to be defended by a lawyer in all phases of the criminal process by an accused who lacks the financial means to obtain a lawyer or otherwise does not have a lawyer; **b)** to those who need legal aid in civil or administrative cases (but persons have to prove they do not have sufficient financial means to pay for such legal aid), or in cases that are extremely complex from the procedural or substantive aspect; and **c)** to minors during criminal proceedings.

The State Commission for Legal Aid appoints counsel to individuals who fall within one of the enumerated categories. This Commission is also tasked with implementing the budget for the granting of legal aid. Primary and secondary legal aid is provided by state budget funds, under a separate item in the budget of the State Commission for Legal Aid. The State Commission for Legal Aid has the right to receive other lawful funding apart from the funds foreseen in the state budget. The budget of the State Commission for Legal Aid in 2015 was13,700,000 ALL. Data obtained by the Commission indicates that the funding from the state budget for such legal aid was 4,180,000 ALL. According the CEPEJ report "during 2014, 39 million ALL are paid to the ex officio lawyer, of which 6 million have been dues accumulated from 2013. One of the reasons of failure to pay the ex officio lawyers on time, in addition to the problems of budget insufficiency, has been the failure to submit on time the documentation necessary to make such payment." [20]

On the other side, regarding the budget situation on legal aid, the representative of the Ministry of Finances, in the round table "On financing the judicial system" stated that in respect of the aid does not exist a case where the legal aid is negated by the Ministry of Finances. The process is complicated that there are some stakeholders but there is no case of negating the legal aid for specific cases when they have fulfilled the legal requests foreseen by the legislation in force. Representatives of judiciary maximally assess the establishment by law of the report the judicial budget should have with GDP because this ensures the budgetary independence of the judiciary as well as the non-interference of the Ministry of Finances through guidelines or laws which limit or reduce this budget. If the request is formally correct and accompanied with evidences (proving insufficient means) the Ministry of Finances will not deny payment for legal aid.

It is important the observation that the judicial budget not to be touched along a year, in cases that the Council of Ministers, Ministry of Finances limit or reduce it through instructions or laws. Judiciary representatives requested not to violate the budget during the reallocation of funds as far as the judiciary is governed by a board. As the budget is an estimate, the courts should have the opportunity to reallocate and adopt into the board of the budget as the legislative body of the judiciary.

c) Issues related to practical implementation

20

CEPEJ report on the European judicial systems, justice effectiveness and quality, CEPEJ Study no. 20, Series 2014 (2012) pg 69.

In the arrest and detention stage: Despite the fact that the Constitution guarantees such right for the persons who are subject to such limitation, the situation in the field and the legal situation do not meet such obligation. The analysis of the above acts shows that there is no specific legal or by-law regulation that would make effective the defense of people in this stage through the assistance of the lawyer.

In the stage of preliminary investigations: In this stage, the possibility for people in difficult economic situations to benefit from free legal assistance is generally functioning. The law requires the agency responsible for preliminary investigations (prosecution office) at the court of first instance to cover the remuneration of lawyers appointed for compulsory defense cases, and in cases when the defendant appoints a lawyer but has no means to cover the costs of this service. The prosecuting body has the authority to appoint a defense attorney for a defendant who has none.[21] Though the prosecutor is a public official who, during his/her duty, represents public interests, s/he can have no "interest" in the case under investigation, since the results of the investigations are considered an indicator of the results of his/her professional work. The process in Albania therefore contains a tension between the role of the prosecutor and defendant as "opposing parties" in front of an independent and impartial court and the requirements of a "fair legal (judicial process," because by appointing counsel for the defendant at the investigation stage, the prosecutor is essentially choosing his/her opponent. It is understandable that between the prosecutor and the defendant there are conflicts of interest.

In the stage of first instance judgment: At this stage, the authority to appoint a lawyer falls on the judge. Different practices are seen in different courts regarding the appointment of lawyers. There are functioning models, but also models that create practical concerns. The concerns exist mainly in the "big" judicial districts. In some of them the Bar Association does not participate in determining the criteria used by the court in appointing a lawyer. In these courts, the practice has created a group of "ready" lawyers from which the judges select the lawyer based on the communication availability. The lawyer that is available on the phone or already already in the court or nearby, is selected. In some other courts, the Bar Association has deposited lists of lawyers and contact details. In these cases, the judges are the ones making direct contact and selection. Some BAR Associations have determined a group of "ready" lawyers, according to a schedule. In these cases, based on the schedule drafted by Bar Association, the judge appoints the lawyer who will take on the defense.

In the stage after the verdict (appeal, recourse, request, review): This is the stage of judgment where the biggest problems exist in practice. In the initial judgment, including the review of the case by the Appellate Court, there is a more-or-less consolidated practice for providing the legal counsel either appointed in the cases foreseen in Criminal Procedure Code or with the demand of the defendant "with lack of sufficient means." But in the other judgment stages, such as the Recourse in High Court, or the examination of the Request for "sentence review" in High Court, such practice does not exist. The concern increases after the position of the Constitutional Court that the legal counsel in determined circumstances is indispensable even in these judgment stages.

The Constitutional Court of the Republic of Albania guarantees that "the provisions of the Constitution and the European Convention on Human Rights defend the interests of

21 The Code of Criminal Procedure, Article 49.

the defendant in a process, because it's him/her who will be directly affected by the outcome of a process carried out without his/her and the lawyer's presence. Based on the specific case under adjudication, when the case was being examined as the result of the recourse presented by the prosecutor, who has requested the aggravation of the defendant's position and the fact that neither the defendant nor the lawyer were present in the trial, the Criminal College of the High Court should have not carried out the judgment without clarifying why they were not present and without giving the possibility to the defendant party to carry out legal defense. In these circumstances, the High Court and Bar Association should determine the modalities of their collaboration in order to effectively fulfill this constitutional obligation determined by the Constitutional Court.

In the stage of sentence execution: Even in this stage, there is a lack of practice or normative act which would make the implementation of legal assistance effective. Despite the great need for legal assistance in this stage of the process, there is no usable normative ground for this type of assistance. It is clear that the jurisprudence of Strasbourg Court has clearly stated that "the stage of execution of court sentences is part of the judicial process." As a result, the requirements of Article 6 of the Convention are applicable at this stage too. This emphasizes the need to create the framework to protect the rights of the individual in this stage of the process.

Quality of defense: There is no unified opinion on this issue. Opinions vary, mainly according to the size of the judicial district where the activity of prosecution offices or the lawyers defending the defendants is carried out. In the judicial districts where there are a limited number of defense lawyers, the predominant opinion is that there is no difference between the professional level of defense provided by attorneys retained by the defendants or their relatives and the defense provided by attorneys appointed by the prosecuting body. This lack of difference comes from the fact that the same attorneys carry out the defense in both cases. The opinion changes in judicial districts with a higher number of lawyers. In these judicial districts, the predominant opinion is that there is a relatively large professional difference among the lawyers. A group of professional lawyers successful in the market, due to their work load, are not involved in the defense of cases where the lawyer is appointed by the prosecutor's office.

Another group of lawyers, mainly those who do not have a great work load, show a greater willingness to be included voluntarily in the list of attorneys from which the prosecutor chooses defense lawyers. But the predominant opinion in these judicial districts is that the lawyers included in these lists are not the most professional ones. Furthermore, even the professional lawyers included in the list do not show a sufficient care for the quality of defense[22] Another phenomena seen in this stage of the defense, is related to the fact that we are only dealing with the cases when the defense lawyer is appointed by the prosecution office because of the obligation in the cases foreseen by the Code of Criminal Procedure. There are rare cases when a lawyer is appointed "because of the request of the defendant due to the financial impossibility to pay the lawyer himself."The examination of the acts regulating this field and the interviews organized in courts and prosecution offices shows that there is a lack of defining criteriafor the concept of a "lack of sufficient means to pay the lawyer." In these cases the prosecution offices act based only on the statement and request

22

We should take into consideration the opinion that these lawyers see their participation in these cases as participation "to cover" the procedural needs of the prosecuting body that has appointed them, when the prosecutor find it impossible to carry out determined procedural actions without the presence of the defense lawyer.

of the interested persons. An important issue at this stage of the defense is the one connected to the remuneration of lawyers.

The documents examined show that after 2005, despite the approval of the relevant documentation in this regard[23], the *Regulation No 2* (1996) with its respective fees continues to be used. The analysis of these acts shows the existing issues regarding the remuneration method. The lawyers consider the regulation is still applied discrimination in remuneration, due to low fees in comparison with the existing market of lawyer fees or because of the provision of the maximum fee. *The Joint Order*, despite bringing closer the general differences in service fees, increasing the standard legal fee (excluding the free agreement), still accepts the "discrimination" of the lawyers serving "people in need." Without clarifying this arrangement (i.e. without determining who contributes the established difference), this way of expression creates a difference in fees, which directly implies a difference in service quality.

The interviews pointed out the numerous problems even with the application of fees. The heads of prosecution offices in their interviews raised the issue of insufficient funds to deal with the actual needs. As a result the payments are done very late, mainly a payment for the whole year in the beginning of the next financial year. These issues of remuneration for the lawyers who are involved in this category of defenses, creates a difference in service quality, because this type of defense is considered a "field of action" only for lawyers who are unsuccessful in the market. The "quality" of the defense is not only an ethical issue, but at the same time represents an important constitutional issue for the protection of fundamental human rights. This position was clearly taken by the Constitutional Court of the Republic of Albania deliberating that "according to important constitutional and procedural principles and the jurisprudence of the Constitutional Court, the defense lawyer in a court process should act in compliance with the law, standards and professional ethics to defend the rights of his/her client. When the attorney acts in violation of his/her obligations in defense of the client's rights, he/she violates the individual's right to legal counsel."[24]

Defendants – minors under trial: Minors who need legal assistance receive special treatment due to the specifics circumstances of this group. The Republic of Albania has adhered to a number of Conventions and other international acts, which include obligations regarding the protection of the rights of minors. Since the criminal law recognizes the criminal responsibility of minors aged 14-18 years, they can be subject to criminal proceedings. The Criminal Procedure Code guarantees the application of Article 54 of the Constitution, which provides for a special state protection for children. Also, Article 35 of the Criminal Procedure Code specifically guarantee the right to counsel for all minors. The special protection provided by the Albanian legislation is expressed also in the practice of the Constitutional Court. This Court held that "based on the mentioned provisions it is clear that in the judgment of minors the legal defense is obligatory and its absence, based on Article 128 of the *Criminal Procedure Code*, makes the procedural acts absolutely invalid and

23 Joint Order No 1284/3, Date 16.05.2005, of the Ministry of Justice and No 212, Date 16.05.2005 of the BAR Association: "On the fees for the remuneration of lawyers providing legal assistance"

24 The decision No. 222, date November 4, 2002

as a result, the judgment is unconstitutional.[25] The studies carried out, however, especially those conducted by non-profit organizations, have identified a total lack of care to take into consideration the specifics of their defense.

There is no special group of lawyers who specialize in defense of this category of defendants. As a result, there is a lack of professionalism in this specific area of defense. The obligations in Article 37 of the *Convention on the Rights of the Child*, for arrest, detention or imprisonment of a child only as a measure of last resort and for the shortest appropriate period of time," are not upheld, since the judicial practice is full of paradoxes of arrest and imprisonment of children even for non grave criminal offenses. Obviously, the "nonexistence" of specialized prosecutors or judges has its negative impact on these indicators, but there is a negative impact from the lack of legal assistance from specially trained lawyers. Another phenomenon, which is present not only for the defense of this category of people, is the monitoring of the work of lawyers offering legal assistance. The fact that the Bar Association does not supervise the quality of the legal assistance is well known. This monitoring is not carried out even by other governmental or non-governmental mechanisms. Accordingly, quality is mentioned only in the meetings with persons participating in the process, judges, prosecutors, judicial police officers, lawyers, etc. Furthermore, there is no normative framework showing who and how the monitoring is organized.

Individuals damaged by a criminal act: This category of persons, despite being directly linked to criminal offenses, is not taken into consideration regarding the way their rights in a judicial process are respected. There is no legal provision to provide legal assistance for this category of individuals in cases where they cannot afford the costs of legal assistance.

d) Conclusions and recommendations

The obvious complexity of the issue requires whole set of policy measures which should be done in order to improve the ex-officio defense system in Albania. The measures should cover all necessary aspects of the system and fulfill the gaps in the legislation, procedure and practice. The most important for the people who are using the system is that right to the fair trial is respected in accordance to international standards, particularly these set by European Court for Human Rights. That requires full respect the rights of the ex-officio lawyers to be paid and treated in fair way. The existing practice in Albania is burden with non-equal treatment of the lawyers, serious lack of the lawyers' capacity and dedication and variety of practical solutions which are different from court to court. The non-equal practice creates fertile ground for corruption and ruins the whole system. The practical consequence is jeopardizing the right to the fair trial.

Due to the fact that lawyers' chamber should be responsible for selection of the ex-officio lawyers, its role need to be strengthened. Chamber should take important part in the whole process of selection and monitoring of lawyers' work in these cases. The selection criteria need to be very strictly prescribed and respected. The system which provides the fair treatment of the lawyers is not important only for the lawyers themselves but also for the rights of the accused. The accused needs to have possibility to be represented in front of the court by the lawyers who are selected in fair process and not on the basis of corruption.

25 The decision No. 13, date June 10, 2005

The corrupted system produces the lower level of quality and seriously endangered rights of the persons which are part of court proceedings. It also ruins the whole system of rule of law and human rights protection in the country. The cooperation of the courts is absolutely necessary for the reform of appointment system and the courts should be sanctioned in all cases when the chamber' list of ex-officio lawyers is not respected.

It is the unquestionable right of all people to choose the most qualified lawyer who can represent him/her in front of the court. The fact that someone is not in the position (from various reasons) to pay the lawyer should not mean that the quality of the service will be lower or not equal with the one who can pay the lawyer. Chamber should install the software which could track all the ex-officio lawyers, including number of cases, track records, successfulness and all other relevant data. The software could provide randomness in the appointment of the layers. The accurate data in the software provides the opportunity for all defendants to have full overview of the possible ex-officio lawyers and to choose freely on the basis of clear evidences of results. This also requires necessary changes in Criminal Procedure Code in order to meet standards from the practice of European Court of Human Rights. The lawyers' chamber should adopt rules and procedures which will prescribe whole procedure and all important steps as well as rights and obligation of the lawyers.

For their work, lawyers need to be adequately paid. The right system of lawyers' fees is important for exercising the right on fair trial. Existing practice in Albania is not consistent and there is a lack of motivation among lawyers to accept ex-officio defense cases. Payments could be provided several times during the proceedings. Also, one of the useful improvements should be change of a payment method. The payments should be based on working hours instead on number of hearings. Complicate bureaucracy in the payment system is also one of the issues which are making lawyers' work harder. This could be easily changed with small adjust of the practice. For the rights of defendants it will be very helpful if free legal aid services could be also include in ex-officio defense system.

Training and skill improvements for the ex-officio lawyers are important part of the reform of the whole system. Lawyers with the lack of the capacities could make serious damage for the accused and significantly jeopardize the substance of the rights of the accused. The whole system of capacity building for the ex-officio lawyers should be responsibility of lawyers' chamber. Chamber should organize the trainings and other forms of education but also keep the records on all the lawyers. These records requires accurate data on specific knowledge and skills of the lawyers, experience in special proceedings as well as clear evaluation results for all participants in education process. The disciplinary proceedings against the lawyers have to be notified in their dossiers. Trainings should be more specialized and minimum of the lawyers' capacities should be prescribed by the rule book of the chamber.

In order to achieve all the results from the paper, following practical steps should be done:

- New regulation within the chamber with all rules and procedures for ex-officio lawyers' appointments;
- Update of the ex-officio lawyers' lists in chamber;
- Installing the software which could track all the ex-officio lawyers;
- Sanctions for the courts which are not respecting the chamber list of ex-officio lawyers;
- New tariff for the ex-officio lawyers ;

- Unified tariff for all legal procedures;
- Changing the practice of payment of ex-officio lawyers and payments on the basis of working hours;
- Simplification of the administrative procedures for payments to the ex-officio lawyers;
- Inclusion of free legal aid services in ex-officio defense system;
- Full responsibility of Chamber over the education and tracking the records of ex-officio lawyers;
- Inclusion of the disciplinary proceedings against the lawyers into their dossiers;
- Changing the Criminal Proceeding Code that foresees that the lawyer is selected exclusively from the accused;

6.1.2. Bosnia and Herzegovina

a) Overview of the Criminal Law Reforms: The Dayton Peace Agreement (1995) gives most authority to the two Entities, Republika Srpska (RS) and the Federation of Bosnia and Herzegovina (FBiH), with a weak state structure on the top. The district of Brčko has a high degree of autonomy outside the two Entities, while the FBiH is sub-divided into ten Cantons, each with considerable powers on legal matters. Further, every canton is further split in municipalities. The Republika Srpska is only divided into municipalities. The major issue in BiH is the fragmented national polity along ethnic-geographic lines. Allocation of decision-making positions within the public sector at State, Entity and often also at Canton levels is based on ethnic considerations. At the State level, an ethnic "balance" is achieved by having senior posts filled by staff from the three dominant ethnic groups.

State (BIH) Level: The **Constitutional Court of Bosnia and Herzegovina** is composed of nine judges,[26] and its main duty is to be the interpreter and guardian of the Constitution of Bosnia and Herzegovina. The Parliament of Bosnia and Herzegovina adopted the Law on the Court of BIH (July 3, 2002) which was earlier promulgated by the Office of High Representative in Bosnia and Herzegovina (OHR). The **Court of Bosnia and Herzegovina** was formally established by the Decision of the High Representative (2002), when the first seven judges of the Court were appointed.[27] **The High Judicial and Prosecutorial Council (HJPC)** is a state-level body established by law in 2004 with the aim of ensuring an independent, impartial and professional judiciary in Bosnia and Herzegovina. This judicial institution is not explicitly written into the Constitution, but uses the constitutional provisions to justify its establishment.

The Federation of Bosnia and Herzegovina: The **Constitutional Court of the FBiH** is composed of nine judges, which are finally selected and appointed by the HJPC. This Court decides on the constitutionality of Federal, Cantonal and Municipal regulations and decides questions that arise under legislation regulating immunity. **The Supreme Court** of

26 The four are selected by the House of Representatives of the FBiH, 2 are selected by National Assembly of the Republika Srpska, and the remaining 3 members are selected by the President of the European Court of Human Rights after consultation with the Presidency of Bosnia and Herzegovina. The judges selected by the President of the European Court of Human Rights cannot be citizens of Bosnia and Herzegovina or of any neighboring country.

27 Presently the Court of Bosnia and Herzegovina has 53 judges, and all of them are citizens of Bosnia and Herzegovina. At the beginning the Court had international judges as well.

the FBiH is the highest appellate court in the FBiH and has four divisions: Criminal Division, Civil Division, Administrative Division, and Division for Registering and Monitoring of the Court Practice. All judges of the Court are appointed and disciplined by the HJPC. The **Cantonal Courts** in the FBiH have first instance jurisdiction, appellate jurisdiction, and jurisdiction over other legal matters prescribed by the Law. The jurisdiction of the **Municipal Courts** in the FBiH encompasses first instance jurisdiction in criminal and civil cases, as well as jurisdiction in other matters prescribed by the Law.

Republika Srpska: The **Constitutional Court of the RS** is composed of nine judges, which are selected by the National Assembly. The Constitutional Court decides on the constitutionality of laws and both the constitutionality and legality of regulations and general acts. **The Supreme Court of the RS** is the highest appellate court in the RS and has three divisions: Criminal Division, Civil Division and Administrative Division. All judges of the Court are appointed and disciplined by the HJPC. The **District Courts** have first instance jurisdiction, appellate jurisdiction and jurisdiction over other legal matters prescribed by the Law. The **District Commercial Courts** have special jurisdiction over intellectual property matters, disputes related to maritime law and aeronautical law, bankruptcy and liquidation proceedings, issues related to unfair competition, and disputes arising from trade of goods, services, etc. **The High Commercial Court** has appellate jurisdiction over first instance rulings of District Commercial Courts as well as jurisdiction to resolve conflicts of jurisdiction between District Commercial Courts, to decide on transfer of jurisdiction from one District court to another, and to ensure unified enforcement of laws. The **Basic Courts** are established for municipalities in the RS and encompass first instance jurisdiction in criminal and civil cases, as well as jurisdiction in other matters prescribed by the Law.

The Brcko District: The **Appellate Court of the Brcko District** has eight judges, which are appointed and disciplined by the HJPC. The jurisdiction of the Appellate Court comprises deciding on ordinary legal remedies against rulings of the Basic Court in the BD as well as deciding on extraordinary legal remedies against final court rulings. Jurisdiction of the **Basic Court of the BD** comprises first instance jurisdiction in both criminal and civil matters, as well as jurisdiction over other legal matters as prescribed by the law.

The judiciary reform in Bosnia and Herzegovina (started in 2003) is reflected through the adoption of new criminal and criminal procedure codes[28] and restructuring of the court and prosecutorial system, as well as the establishment of some new judicial institutions. When it comes to criminal law, Bosnia and Herzegovina has introduced a mixed system that contains both inquisitorial and adversarial elements. The plea bargaining and removal of investigative judge/transfer of investigative responsibilities were two major adversarial reforms that was introduced in Bosnia and Herzegovina judiciary in order to speed up the proceedings. In the light of these reforms in criminal law, presentation of evidence was made more party-led and the cross-examination of witnesses was introduced.

b) The situation of the legal assistance in Bosnia and Herzegovina in the context of present justice reform process

28

Although there are four criminal procedure codes in Bosnia and Herzegovina - state, two entities (Federation of Bosnia and Herzegovina, Republika Srpska) and Becko District - the criminal procedure is similar in all of them with some minor differences.

The Constitution of Bosnia and Herzegovina, as well as the laws of the country, two entities, and Brcko District protect the rights of persons who are suspected or charged with a crime offence. The rights contained in the European Convention of Human Rights and other international legal instruments are applied directly to all citizens of Bosnia and Herzegovina and have priority over all other law. In accordance with the administrative organization of the state, there are four Criminal Procedure Codes in effect - Bosnia and Herzegovina Criminal Procedure Code, FBIH Criminal Procedure Code, RS Criminal Procedure Code and District Brcko Criminal Procedure Code. These documents are substantially similar and provide the same protection of the rights of defendants. Under all four Codes: "A person deprived of liberty must be appointed a defense advocate upon his request if he is unable to afford one. The suspect or accused has a right to present his own defense or to be defended by an advocate of his choice. If the suspect or accused does not have counsel, counsel will be appointed for him in cases specified by law."[29]

Access to justice for the poor and marginalized persons in Bosnia and Herzegovina is not guaranteed due to a fragmented and underdeveloped Free Legal Aid system within the country as well as a lack of harmonized legislation at the state level.[30]The free legal aid agencies in the Republika Srpska and FBiH primarily provide legal aid in civil matters. The civil society organizations provide the free legal assistance usually in civil cases, while their role in this field has not recognized or regulated at the country level. The Free Legal Aid Network (FLAN) in Bosnia and Herzegovina was established by the governmental agencies and civil society organizations in order to ensure uniform quality of legal aid services to all citizens in need as well as to improve continuing monitoring of new and modification of existing regulations and monitoring of case law. A total of 26 organizations and governmental institutions have signed the agreement to provide free legal aid services to citizens in Bosnia and Herzegovina. This is seen as the first step towards an organized multi-institutional approach to addressing questions of common interests of all free legal aid providers.[31]

Free legal assistance in Bosnia and Herzegovina is only available in a limited number of jurisdictions. At the different levels of the state, where relevant legislation is in place, governmental free legal aid services are underequipped, understaffed, and lack quality monitoring tools and professional training.[32] Citizens generally are not aware of their rights to free legal aid services, while the risk of discrimination mostly affects marginalized and vulnerable groups, people with disabilities, and victims of domestic and gender-based violence. In addition to the lack of political will and support for the establishment of a harmonized free legal aid system in Bosnia and Herzegovina, insufficient funding also

29 Bosnia and Herzegovina Criminal Procedure Code, Articles 5–7; Federation of BIH Criminal Procedure Code, Articles 5–7; Republika Srpska Criminal Procedure Code, Articles 5–7; District Brcko Criminal Procedure Code, Articles 5–7.

30 The law on legal aid at the state (Bosnia and Herzegovina) level is still pending. Therefore it is possible to find different solutions, applied in practice, at entity/cantonal level.

31 The network set up thanks to support of UNDP's project "Access to Justice – Dealing with the past and building confidence for the future," funded by the UN Bureau for Crisis Prevention and Recovery, UNDP and the Government of Switzerland.

32 The Office for Legal Aid in Brcko District is part of the judiciary and is well-funded, and legal aid lawyers serve as counsel in about half of criminal cases.

hinders the systematic approach to developing legal standards and the capacities of free legal aid providers in accordance with relevant international standards. of the lack of an efficient legal aid system is the one of the main reasons why defendants generally hire private lawyers instead of legal aid lawyers.

Mandatory defense: A person deprived of liberty must be appointed a defense lawyer upon his/her request if he is unable to afford one. At his first interrogation, a person suspected or accused of a crime must: be informed of the offense he is suspected of or charged with and the grounds for suspicion, and that any statement he makes may be used as evidence; be given the opportunity to make a statement regarding the facts and evidence against him and to present facts and evidence in his favor; and may not be required to present a defense or answer questions posed to him. The suspect or accused has a right to present his own defense or to be defended by an advocate of his choice. If the suspect or accused does not have counsel, counsel will be appointed for him in cases specified by law. The defendant must be given sufficient time to prepare a defense.[33]

According to criminal law proceedings, the suspect or accused persons are entitled to defense counsel at all stages of criminal proceedings, including: from the moment of first questioning if the suspect is mute or deaf or is suspected of a criminal offense for which a penalty of long-term imprisonment may be imposed; during proceedings to decide on a proposal to order pretrial detention or throughout all proceedings if the suspect or accused is in custody; and after an indictment has been brought for a criminal offense carrying a sentence of 10 years or more.[34]Defense counsel is mandatory in certain serious cases and the preliminary proceeding judge, hearing judge, trial judge, or presiding judge must appoint counsel in such cases if the accused or his family does not retain one. The suspect or accused will have the right to counsel until the verdict becomes final and, if a sentence of long-term imprisonment is imposed, for appeal proceedings. In addition, relevant legislation prescribes that the court must appoint counsel if the court finds it necessary in the interests of justice, due to the complexity of the case, the mental condition of the suspect or accused, or other circumstances.

According the relevant criminal law, the defense counsel has the right to inspect the file and any evidence in favor of the defendant during the investigation, unless disclosure of the file or evidence would endanger the purpose of the investigation. After the indictment is issued, the suspect/defense counsel has the right to inspect all files and evidence. Further the judge/panel of judges/prosecutor must submit all new evidence, information, or facts that could serve as evidence at the trial to the defense. The current legislation also provides the defense counsel/suspect with the right to make copies of all files or documents after the indictment has been issued [35]

33

Bosnia and Herzegovina Criminal Procedure Code, Federation of BIH Criminal Procedure Code, Republika Srpska Criminal Procedure Code, District Brcko Criminal Procedure Code.

34

Bosnia and Herzegovina Criminal Procedure Code, Articles39, 45; Federation of BIH Criminal Procedure Code, Articles 53, 59; Republika Srpska Criminal Procedure Code, Articles 47, 53; District Brcko Criminal Procedure Code, Articles 39, 45.

35

Bosnia and Herzegovina Criminal Procedure Code, Article 47; Federation of BIH Criminal Procedure Code, Article 61; Republika Srpska Criminal Procedure Code, Article 55; District Brcko Criminal Procedure Code, Article 47.

Defense at public expense in case when there is not mandatory defense: In cases of mandatory defense, defense counsel will be appointed if the suspect or accused does not retain a lawyer. When conditions are not met for the mandatory defense, and proceeding are conducted for an offense for which a prison sentence of three years may be pronounced or more or when the interest of justice so require, regardless of the prescribed punishment, a defense attorney shall be assigned to the accused at his request if, due to an adverse financial situation, he is not able to pay the expenses of the defense. Defense counsel must also be appointed if the court finds it necessary due to the complexity of the case, the mental condition of the suspect or accused, or other circumstances. When appointing the defense lawyer, the suspect/accused person will first be asked to choose counsel from the presented list of available lawyers. If the suspect/accused does not select his/her counsel, the court will appoint a lawyer according to the order of the list. If the requested lawyer is unable to accept ex officio defense, the court will call the next lawyer from the list in order to provide all lawyers with equal possibility to be appointed ex officio.

The courts usually issue decisions on the payment of the cost of ex officio lawyers at the end of the trial. If the accused person cannot prove that s/he is in a disadvantaged economic position, the court can request him or her to pay for the defense. The procedure on proving the economic wealth of the accused differs from court to court.[36]However, in most cases, the court does not check whether the accused has additional property or resources aside from what s/he has stated in the beginning of the case. Further, in many cases, the accused has not registered the property in his/her name, which makes it very hard prove that the property belongs to him/her. This lack of transparency may significantly increase the costs for ex officio defense by enabling ex officio counsel to be provided in cases where the accused could have afforded to pay.

***Eligibility criteria for appointing defense lawyer*:** The existing FBiH Ethics Code as well as Republika Srpska Ethics Code requires lawyers to provide free legal assistance for suspected/accused persons who are not in a position to pay for services or to represent socially vulnerable persons if requested to do so by the competent body of the Chamber of Advocates.[37] In practice this requirement is fulfilled mainly through the cooperation with the **Bar Association** in providing a list of available lawyers willing to be appointed by the courts to represent indigent defendants. The suspect/accused persons generally use this possibility, in particular before the War Crimes Chamber of the Court of Bosnia and Herzegovina.

c) Issues related to practical implementation[38]

---

36 Before the Court of BH, accused have to fill out forms accompanied by supporting documentation (house and income lists, loan contracts, unemployment confirmation, non-possession of real estate). Before the Sarajevo Cantonal Court the accused fills out a form on his/her economic situation, while additional documents are not requested until the end of the trail. Before the District court of Banja Luka, teh defense is obliged to submit documentation during the trial that proves the disadvantaged economic situation of the accused. In cases where the accused possesses assets, costs for the defense are refunded through encorced collection, if needed. If he/she does not have assessts, defense costs are paid by the respective court.

37 Federation of Bosnia and Herzegovina Ethics Code rule XI; Republika Srpska Ethics Code rule II

38 When discussing the experiences in practice these are based on both attorney reporting and other forms of data.

Appointment of the ex officio lawyers: Although large amounts of money have been allocated for funding the ex officio defense in Bosnia and Herzegovina [39] in recent years, the data available from practice indicates that only a few "favored lawyers," for whom it is often claimed that they obtain the cases on the basis of personal contacts, have the greatest benefit from providing ex officio defense. The existing Bosnia and Herzegovina legislation does not guarantee a fair distribution of ex officio defense and it often happens in practice that only a few "selected lawyers" appear as defense attorneys assigned ex officio. At the same time, there are prominent lawyers with many years of professional experience in the field of criminal law who have never had a single case where they were engaged as ex officio defense attorneys. Also, in some instances, lawyers have been invited by an official body to work as ex officio counsels, but they usually have been informed that they must come to court immediately. This in most cases is not manageable due to geographical distance, the fact they are currently outside the state, have scheduled trials.

Legal provisions in Bosnia and Herzegovina stipulate that at the first court appearance suspects must be presented with a list of ex officio attorneys if they are unable to defend themselves or to hire a lawyer, and they must be enabled to independently choose a defense attorney to represent them. Although judicial employees are prohibited from suggesting or influencing the suspects in any way in the choice of the ex officio defense attorney, in practice some of the suspects/accused individuals have not had the opportunity to independently choose their defense attorney, but were either assigned a defense attorney without their knowledge or the court did not accept their choice of ex officio attorney. Also, it has happened in practice that certain officials "suggest" or "promote" certain lawyers to suspects and the suspected individuals often appear before the court with the already pre-selected name of the defense attorney even before s/he was offered the list. In these cases, it is obvious that the choice of a lawyer has been suggested to the suspect, but these claims are very difficult to prove. Court transcripts from interrogations, which often do not contain enough information on the choice of a lawyer, mainly state that the suspect was presented with the list of ex officio defense attorneys and then the information about the chosen defense attorney is given. As a suspect does not confirm the accuracy of these statements by his/her signature it cannot be accurately argued that his/her right to independently choose ex officio attorney has been respected.

These experiences indicate the examples of different kinds of irregularities in the allocation of the ex officio attorneys by various official bodies. The fact that some excellent lawyers have very few or no ex officio defense cases indicates that suspects are not exercising their independent will and that a mix of different influences - the impact of the police, the influence of the prosecutor, the direct decision of the court, the impact of the judicial police – affect the appointment of counsel. All these statements indicate that there are instances of corruption in the process of ex officio appointment of defense counsel, which cause damage to all those who perform their job professionally, conscientiously and correctly.[40] However, the court cannot influence the situation when a suspect appears at a

---

39

According to the data collected by CIN in the period 2005 - 2010 at least 32 million BAM was spent for ex officio defense from the budget of 41 courts in Bosnia and Herzegovina. Available at: https://www.cin.ba/ekstra-profiti-za-odabrane-po-sluzbenoj-duznosti/

40

hearing having pre-selected the defense attorney whom he wants to hire. The court must respect the provisions of the Criminal Procedure Code, where the suspect is given freedom to choose a defense attorney, although in some cases there are indications that this right is abused. Also, in practice there have been cases in which the suspect hires a lawyer, and then, after two or three actions taken by the lawyer, declares that he doesn't have money to pay, so the court assigns a lawyer ex officio.[41]

The Criminal Procedure Code of Bosnia and Herzegovina previously allowed the Court Chamber to choose a defense attorney ex officio in the name of the suspect when the suspect refused to do so. After a 2009amendment to the law, in cases when the suspect refuses to choose a defense attorney, the attorney will be assigned in the order as given in the list of lawyers. Although this amendment to the law should have provided equal opportunity to all lawyers, in practice cases are still being assigned to only a few "chosen lawyers." Another problem relates to the number of lawyers appointed. According to the existing legal provisions, a suspect retaining an attorney can have more than one hired lawyer and can also share counsel with other defendants, while there is a limit when it comes to the ex officio defense - one suspect, one defense attorney. So, it happens in practice that there are cases in which there are up to ten accused, where the defense attorney is paid for each of them, which unnecessarily creates enormous costs.

For their part, the ex officio lawyers that have the highest number of cases per year mainly report that they get the cases on the basis of many years of experience and reputation, and because they have many friends and acquaintances who give recommendations to the people who need their help. Regardless, it is widely reported that although a large number of lawyers appear on the lists, in general only a small group of lawyers are known for their representation of criminal defendants and are the most frequently selected by indigent defendants. Moreover, the advocates who are frequently selected to represent indigent defendants take so many cases that they earn an income substantially above the average for the lawyer in Bosnia and Herzegovina.

Payment to the ex officio lawyers: A lawyer is entitled to receive payment for his/her work according to the tariff established by the Bar Association, in agreement with the Ministry of Justice. The amount of reward for the work of lawyers is based on the type of procedure, the action taken, the value of litigation or the prescribed penalty, as well as the other parameters established by the tariff.[42] Decisions on procedural expenses made by the court and other authorities determine the amount of compensation for legal assistance performed by lawyer, according the tariff in force at the time of providing legal aid. After the completion of the judicial proceeding, the lawyer compiles a list of expenses for his/her

---

The Cantonal Court in Tuzla may serve as an example on how to prevent the possible abuse of the right to choose one's ex officio attorney since every hearing at which ex officio defense attorney is assigned, is audio recorded. The purpose is to determine whether the right of the suspect to choose his/her defense attorney has been respected by the judges.

41 In 2009, the Sarajevo Cantonal court issued a verdict against M.P. on 20 years of imprisonment finding her guilty for fraud, tax evasion, falsification of documents, false statements given while obtaining a bank loan, what brought her illegal benefit in the amount of app. 5 BAM. At the beginning o the trail, M.P paid herself for the defense lawyer. Shortly after the beginning of the trail, M.P. issued a request that the court appoint her defense lawyer M.K. as an ex officio lawyer as she was not able to pay the costs for the defense as the court has blocked her accounts. As the trail was already ongoing and the accused had to have a defense lawyer in this criminal case, the court has appointed her defense lawyer M.K. as her ex officio defense lawyer. For her defense, the court has paid 47.560 BAM from its budget. Available at: http://www.mrezapravde.ba/mpbh/latinica/vijest.php?id=111

42 Repbilika Srpska Law on Advocacy, Chapter III, Article 25, Federation of BiH Law on Advocacy, Chapter IV, Article 31.

work, which is approved by the relevant court. But in practice, lawyers are waiting to receive payments up to several years, due to insufficient budget funds.

Following the practice of some countries in the region, the Law on Advocacy of Republika Srpska foresees that the amount of the payment for defense lawyers will be determined by the RS Government and in accordance with the proposal of the Minister of Justice. Further, it is foreseen that the Government will approve an amendment to the Law on the amount of fees and payments of ex officio counsel by respecting the deadline of 60 days after the Law has entered into force. The amendment has not been made public, yet.[43] As one of the reasons for adopting those decisions, it has been stated that the costs for ex officio defense are paid from the entity budget what makes it necessary that the RS Government has a certain influence as it has in all other cases where the funds are paid from the budget.

Ex officio lawyers' fees are paid in accordance with the Decision of the Court of Bosnia and Herzegovina as well as the tariffs determined by the relevant Bar Associations.[44]Therefore, ex officio defense lawyers charge their clients in accordance with the existing tariffs for defense attorneys (100%), which represent significant expenses from budgets on all levels in Bosnia and Herzegovina. In this way, Bosnia and Herzegovina is an exception compared to other countries of the region, where the fee for defense lawyers is typically about 50% of the tariffs established by the Bar Association. Most of the lawyers contacted agree that the existing tariffs for ex officio defense are high and put a burden on the budgets. They agree that payments should be adjusted to the economic situation in the country. Further, ex officio defense seems to be attractive to some lawyers as it offers them the possibility for enormous income that is mostly beyond the average income in the country. In spite of different initiatives for decreasing the existing tariffs, including by lawyers, significant steps in this regard have not yet been made. Financing of the ex officio defense system is often emphasized as one of the leading problems that lawyers deal with in practice, because of irregular payment due primarily to a lack of funds in the budget devoted to this purpose. However, lawyers are obliged to pay taxes to the state regardless the delay of payments for ex officio defense.

The delays of payments of ex officio defense from courts to engaged lawyers might influence the quality of defense and thus impact the rights of the suspect or accused to fair trial. Experiences from practice show that ex officio defense lawyers that represent accused before cantonal and district courts waited for the refund of their costs for several years and used their own funds to pay for the defense. Tariffs for lawyers in the Court of Bosnia and Herzegovina are significantly lower in comparison with other courts, although this institution deals with the most serious crimes. However, lawyers appearing before the Court of Bosnia and Herzegovina are at least compensated regularly, which is one of the main

43

Law on the Advocacy of Republika Srpska, Articles 26 and 116, Official Gazette 80/15, September 2015.The draft version of the new Law on Advocay of Federation of BiH predicts that lawyers are obliged to provide free legalm assistance to indigent persons in proportion to their capacities. Also, the Bar Association of FBiH will cooperate with the competente authorities in order to provide effective legal assistance to indigent persons.

44

Fees for lawyers are calculated differently, depending on different costs of points that are the basis for calcualting the fee for the lawyer. Thus, for one appearance in court for a war crime case, the fee is 900 BAM before the Cantonal court. Appearanace in court of lawyers before the Court of BH costs 780 BAM, while if the trials lasts longer than one day, the lawyers gets paid 50% of this amount.

reasons why some lawyers have accepted cases before this court more often than other courts. Information gathered by lawyers suggests that this tariff is acceptable mostly for colleagues who live in and around Sarajevo, the seat of the Court of Bosnia and Herzegovina. Trials last for a very short time, so the fact that the tariff is significantly lower in comparison with other courts affects the abilities of lawyers who come from other places of BH to participate in the trials.

Competencies of the ex officio lawyers: In accordance with existing laws, lawyers are obliged to constantly participate in professional trainings and to obtain new knowledge and skills that are needed for professional, independent, efficient and ethical conduction of their advocacy work and in line with the programs for professional trainings of the Bar Association. The Bar Associations in the Republika Srpska and the Federation of BiH are primary responsible for the professional training and development. Regarding this issue, the FBiH Bar Association organizes training sessions for lawyers, but primarily encourages lawyers to attend seminars organized by relevant institutions on changes in the law, including the seminar on criminal law organized by the Court of Bosnia and Herzegovina. The RS Bar Association includes discussion of legal issues at its annual conference.

The list of lawyers that are authorized to represent suspects/accused persons before the Court of Bosnia and Herzegovina is established and updated by the Criminal Defense Support Section (OKO)[45]on a monthly basis.[46]In order to ensure the highest standards of representation, the Court of Bosnia and Herzegovina requires lawyers to demonstrate their knowledge of relevant law before they are placed on the list or they are allowed to appear before this Court. The applicants for the list must be current and valid members of the Bar Associations in the RS or the FBiH and must possess at least seven years of relevant working experience as a lawyer, judge or prosecutor in order to be appointed as the only lawyer or primary lawyer on a case. Lawyers must also possess knowledge and expertise in the relevant areas of law in accordance with the criteria published by OKO. The War Crimes Chamber of the Court of Bosnia and Herzegovina requires all advocates defending persons charged with war crimes who have never defended a war crimes case to complete a special one-day training course.[47] These knowledge criteria can be satisfied by experience or by participation in an alternative training that is provided by OKO and has been required for the War Crimes Chamber lawyers only. This system as provided by OKO work well since 10 years and could be seen as a possible model for entity level courts. Until now, approximately 250 advocates have been certified by OKO to defend war crimes cases before the Court of Bosnia and Herzegovina. In addition, a number of NGOs have cooperated with the Bar Associations in the RS and the FBiH as well as the governmental bodies at the

45

In accordance with the Law on the Court of BH, and in order to respect the principle of equality of parties in trial, the Department for criminal defense (OKO) of the BH Ministry of Justice is accepted as a body responsible for offering support to the defense and to the ex officio defense lawyers in criminal cases before the Court of BH. The Rules of Proceudres on the amandmens to the Rules of Procedures on teh Court of BH, Official Gazette Bosnia and Herzegovina No 60/11, Article 41.

46

In the process of evalauting the conditions for including lawyers on the list, applicant, inter alia, has to submit a short CV in teh legnth of app. 50 words (e.g. Curriculum Vitae, reference lists of clients, etc.) on the professional lawyers experience, that will be presneted as an integrated part of the list of certified lawyers for representation before the Court of BH.

47

The Additional Rules of Procedure for Defense Lawyers, adopted by the Plenum of Judges of the Court of BiH on 30th June 2005. Available at: http://www.okobih.ba/?opcija=sadrzaj&id=3&jezik=e

state/entity/cantonal levels in order to provide educational trainings for lawyers and other legal professionals. In the cases where lawyers do not fulfill the standard criteria for appearing before the Court of Bosnia and Herzegovina, the Law of the Court of Bosnia and Herzegovina has a provision for lawyers to be *specially admitted.* Judges will be able to specially admit lawyers from Bosnia and Herzegovina who are not on the list of authorized advocates where it is in the interests of justice to do so, and Judges can also specially admit foreign lawyers, where their expertise and fair trial rights demand it.[48]Any application for Special Admission must be made to the Court. Quality defense of suspects/accused persons can be provided only by lawyers who have relevant professional knowledge and experience. In order to increase both the competence of the lawyers and the quality of the defense they provide, it is necessary to organize trainings for lawyers at the lower courts (district and cantonal) and to create mandatory continuing legal education.

Finally, lawyers involved in defending suspects or accused persons pointed out that prosecutors do not always give them access to the case file or to evidence prior to the issuance of an indictment.[49]The defense counsel, suspect or accused has the right to make copies of all files or documents after the indictment has been issued, but this right is not always honored in practice. For instance, lawyers that are involved in defending war crimes cases before the Court of Bosnia and Herzegovina asserted that the report on the evidence is given to them on a CD-ROM at the time of the hearing, but lawyers are not allowed to bring their laptops to court. In addition, the use of evidence declared to be secret pursuant to the Law on the Protection of Secret Data.[50] Based on this, only the prosecution and court is permitted to see this evidence that could be a serious problem for suspect/accused because it is impossible for the lawyer to present the defense without seeing the evidences against defendant. Like the other factors, this likely affects the quality of defense. Therefore, judges and prosecutors must uphold their obligations to submit all new evidence, information, or facts that could serve as evidence at the trial to the defense.

d) Conclusions and recommendations

The most obvious issue in the matter of protection of the rights of accused is appointment of ex-officio lawyers. The existing practice allows significant level of corruption and seriously jeopardizes the rights of accused. The issue requires public debate and full awareness of all stakeholders. In order to prevent the corruption and non-equal treatment of lawyers, one of the possible solutions is strict prevention of the corruptive practice and higher involvement of the court. This includes rigorous fight against corruption, the high frequent contacts between court and Lawyers' chamber as well as administrative and criminal procedures against the court officials and lawyers which are part of the forbidden

48 The Additional Rules of Procedure for Defense Lawyers, Article 3.4 (4).

49 Bosnia and Herzegovina Criminal Procedure Code, Article 47; FBiH Criminal Procedure Code, Article 61; RS Criminal Procedure Code, Article 55; Brcko District Criminal Procedure Code, Article 47.

50 Official Gazette of BH, 54/05, http://www.sudbih.gov.ba/files/docs/zakoni/en/zakon_o_zastiti_tajnih_podataka_54_05_-_eng.pdf

practice. The solution is quick and simple and do not require changes of existing legislation neither the additional costs for the budget. On the other side, the solution also requires high level of integrity and awareness about the importance of rule of law among all relevant decision makers in court and chambers. This is hard to expect in the countries which have not developed democracy and legal tradition. Unfortunately, all Balkan states are in this group, including Bosnia and Herzegovina.

The other possible solution requires some legislative changes and new mechanisms for improving practice of ex officio lawyers' appointment. The most important part of this solution is strengthening the role of lawyers' chambers. On the first place, they need to update the list of ex-officio lawyers on more frequent base (several times per year). Chambers should be integral part of the process and their role is very important in securing the just system of appointment. The system which provides the fair treatment of the lawyers is not important only for the lawyers themselves but also for the rights of the accused. The accused needs to have possibility to be represented in front of the court by the lawyers who are selected in fair process and not on the basis of corruption. The corrupted system produces the lower level of quality and seriously endangered rights of the persons which are part of court proceedings. It also ruins the whole system of rule of law and human rights protection in the country.

The other important thing is creation of the special list of lawyers in criminal matters. This list allows to defendants to choose the most qualified lawyers and to exercise the right to defend in most professional manner. It is the unquestionable right of all people to choose the most qualified lawyer who can represent him/her in front of the court. The fact that someone is not in the position (from various reasons) to pay the lawyer should not mean that the quality of the service will be lower or not equal with the one who can pay the lawyer. Also, chambers should install the software which could track all the ex-officio lawyers, including number of cases, track records, successfulness and all other relevant data. The software could provide randomness in the appointment of the layers. The accurate data in the software provides the opportunity for all defendants to have full overview of the possible ex-officio lawyers and to choose freely on the basis of clear evidences of results. Apart from the chamber' software, it is also necessary to adjust Case Management System which is applied in all courts in Bosnia and Herzegovina. The CMS has to be update with the data regarding ex-officio lawyers. It can provide the rightful appointment procedure in the cases when the court needs to appoint the ex-officio lawyer.

In order to improve this area, it is also necessary to change the implementation of lawyers' fees policy. There are a lot of issues and misconducts in existing practice. The majority of these issues could be solved with stricter implementation of the law. Some of them require new legal provisions. The fee should be unified in whole country and all the courts should have the same tariff for the same legal businesses. The tariff should be very carefully considered due to the fact that there are some strange solutions (some lawyers' jobs are not paid at all and some are too much expensive, for instance). The existing practice which includes payment after the whole process is unacceptable and unfair, bearing in mind the length of the court proceedings in Bosnia and Herzegovina. Payments could be provided several times during the proceedings. For the rights of defendants it will be very helpful if free legal aid services could be also include in ex-officio defense system.

Training and skill improvements for the ex-officio lawyers are important part of the reform of the whole system. Lawyers with the lack of the capacities could make serious damage for the accused and significantly jeopardize the substance of the rights of the accused. The whole system of capacity building for the ex-officio lawyers should be responsibility of

lawyers' chambers in BH. Chambers should organize the trainings and other forms of education but also keep the records on all the lawyers. These records requires accurate data on specific knowledge and skills of the lawyers, experience in special proceedings as well as clear evaluation results for all participants in education process. Trainings should be more specialized and minimum of the lawyers' capacities should be prescribed by the rule book of the Chambers. It is the best way that Chambers organized special unit within themselves which will deal with the education of ex-officio lawyers.

In order to achieve all the results from the paper, following practical steps should be done:

- Update of the ex-officio lawyers' lists in Chambers;
- Creation of the special list of lawyers in criminal matters;
- installing the software which could track all the ex-officio lawyers;
- Update of the CMS with the data regarding ex-officio lawyers;
- Unified fees for the ex-officio lawyers in the whole country;
- Unified tariff for all legal procedures;
- Changing the practice of payment of ex-officio lawyers;
- Inclusion of free legal aid services in ex-officio defense system;
- Full responsibility of Chambers over the education and tracking the records of ex-officio lawyers;
- The new body within the Chambers which are dealing with ex-officio defense and the clear Rule book on ex-officio defense system produced by the Chambers.

6.1.3. Kosovo

a) Overview of the Criminal Law Reforms: According to the UN Security Council Resolution (1999), Kosovo was placed under a transitional administration of the UN Interim Administration Mission in Kosovo (UNMIK). Since that period, Kosovo has experienced different levels of involvement of the international community in order to determine its permanent status. Kosovo declared itself an independent state in February 2008.[51] Following the reconfiguration of the international presence, the EU's rule of law mission EULEX has been deployed throughout Kosovo with the support of authorities, operating in the fields of justice, police, and customs. EULEX staff is active at all instances before the courts in Kosovo. This Mission has limited power to investigate, prosecute and adjudicate serious and sensitive crimes in cooperation with the justice institutions.

The Constitution of Kosovo determines that judicial power is independent and exercised by the court. According the Law on the Courts, the court system consists of Basic Courts (first-instance courts), Courts of Appeal (second-instance courts) and the Supreme Court. The **Supreme Court of Kosovo** is the highest judicial authority and has jurisdiction throughout the territory of Kosovo.[52] The **Constitutional Court** is the final authority for the

51 To date, Kosovo has been recognized by 110 UN member countries, including 23 EU Member States and United States.

52 Law on the courts of the Republic of Kosovo, Articles 4-8, adopted, July 24, 2010.

interpretation of the Constitution and the compliance of laws with the Constitution. The **Kosovo Judicial Council** (KJC)[53] is an independent institution with the aim to ensure that the Kosovo Courts are independent, professional and impartial. This institution is responsible for recruiting and proposing candidates for appointment and reappointment to judicial office. Also, the KJC is responsible for transfer and disciplinary proceedings of judges in Kosovo.

The Provisional Criminal Code and the Criminal Procedure Code were adopted in 2004 as a first step towards the introduction of a *quasi-adversarial* or a *hybrid* adversarial criminal justice system, where the court preserved some of its inquisitorial powers, but the prosecutor and defense counsel have greater roles in investigation and at trial. The new Criminal Procedure Code (entered into force in 2013) has changed the main principles for investigations of serious complicated crimes, and application of the Criminal Procedure Code to human rights law. Bearing in mind the complexity of the new Criminal Procedure Code, one of the greatest challenges for the justice system in Kosovo today is the successful implementation of the new criminal code in practice.

b) The situation of the legal assistance in Kosovo in the context of present justice reform process

The Law on Advocacy in Kosovo requires lawyers to provide legal aid in a professional, conscientious and dignified manner in line with current law, statutes and codes.[54] The continuing legal education requirements for Kosovo lawyers depend on the level of experience and the age spent in the justice system. According the existing law in Kosovo, lawyers who have practiced for less than three years must obtain 15 hours of credit per year. Lawyers that have more than three years of practice must obtain 10 credit hours, while lawyers who are older than 70 years of age must obtain 5 hours of the Contract Law Enforcement (CLE) Program credit.[55]

The Training Center within the Kosovo Bar Association was founded with the aim of supporting the establishment of a sustainable system for continuous capacity building of lawyers, advocacy interns and the legal community in Kosovo, in line with international practice and standards. The core competencies of the Training Center are: organization of Compulsory Training for Lawyers (CCLE);[56] organization of specialization processes for lawyers; an ethics exam for lawyers; training for candidates who will undergo the Bar Examination; provision of a comprehensive training program for interns; monitoring the program for female students; providing an eligibility exam for foreign lawyers; providing

53 The KJC is composed of 13 members; as of early 2014, there are 11 current members and two vacancies.

54 Kosovo Law on Advocacy, Chapter III, Article 12.

55 The Contract Law Enforcement (CLE) Program is a three-year USAID program launched in May 2013. The goal of this Program is to improve and strengthen the rule of law in Kosovo and create a better environment for economic development and increased investment.

56 The training program defined by the Law on the Bar, the Kosovo Bar Association Statute and the Regulation on the Continuous Compulsory Legal Education adopted by the Steering Council of the Kosovo Bar Association, which entered into force on January 1, 2014. The purpose of this training program is to fulfill the needs and expectation of an advocacy with high professional and ethical integrity, which is impartial, independent and modern.

training for trainers; performing researches from various fields of interest to the beneficiaries of Kosovo Bar Association and disseminating the results and publications.

The Kosovo Constitution states that free legal aid will be provided to those who lack financial resources, if such aid is necessary to ensure effective access to justice.[57] The Legal Aid Commission (LAC) established by UNMIK[58] has the task of providing free legal aid in criminal, civil and administrative matters to all citizens with economic difficulties (e.g., receiving or eligible to receive social assistance, or whose household income is below the mean income and insufficient for judicial proceedings). The LAC currently has 11 local district offices for the provision of civil and administrative legal aid and mobile legal aid clinic that reaches citizens in need who live outside the respected areas. Criminal cases are handled through an ex officio system under which the courts appoint lawyers for indigent defendants and payment is handled through funds allocated to the courts. Although the lawyers are encouraged by the Code of Ethics to provide pro bono legal services to indigent people without remuneration, in practice lawyers rarely provide legal services for free.

Mandatory defense: According to the Kosovo Criminal Procedure Code, defendants have the right to be assisted by defense counsel during all stages of the criminal proceedings. Before every examination of a suspect or defendant, the police or other competent authority, the state prosecutor, the pre-trial judge, the single trial judge or the presiding trial judge shall instruct the suspect or defendant that s/he has the right to engage defense counsel and that a defense counsel can be present during the examination.[59]A defendant must have counsel in the cases of mandatory defense such as: when the defendant is mute, deaf, or displays signs of a mental disorder or disability and is therefore incapable of effectively defending himself/herself; in case of mandatory defense, if the defendant does not have a defense counsel and no one engages a defense counsel on his/her behalf; in case of mandatory defense, if the defendant remains without a defense counsel (i.e. when counsel quits or is fired) in the course of the proceedings and if s/he fails to obtain substitute counsel; if the indictment has been brought against him/her for a criminal offence punishable by imprisonment of at least ten years or longer, and in all cases where an agreement to plead guilty has been negotiated.

In cases of mandatory defense, if a defendant does not have counsel the pretrial judge or other competent judge shall appoint ex officio defense counsel at public expense. Only a member of the Bar Association of Kosovo may be engaged as defense counsel, but an attorney in training may replace him/her. A defense attorney is not allowed to represent two or more defendants in the same case. The defendant may engage alternate counsel or be appointed new defense counsel. Appointed defense counsel may seek to be dismissed only in the circumstance justify such as.

---

57 Kosovo Constitution, Article 31.

58 United Nations Interim Administration Mission in Kosovo (UNMIK) in Regulation No. 2006/36 on Legal Aid. The Assembly of Kosovo on February 2, 2012 adopted Law No. 04/L-17 on Free Legal Aid, replacing the UNMIK regulation with an independent institution with the same purposes and objectives.

59 Kosovo Criminal Procedure Code, Chapter V, Article 53.

Defense at public expense in case when there is not mandatory defense: If the defendant has insufficient resources to pay for legal assistance and for this reason cannot engage defense counsel, an independent defense counsel having the experience and competence commensurate with the nature of the offense shall be appointed for the defendant at his or her request. If the conditions are not met for mandatory defense, a defense counsel shall be paid from budgetary resources, if: there exists no conditions for mandatory defense and the criminal proceedings are being conducted for a criminal offence punishable by imprisonment of eight years or more; when in the interest of justice defense counsel is appointed to the defendant if he/she is financially unable to pay the cost of defense.[60] Upon the request for appointment of defense counsel at public expense, the president of the court or the competent authority conducting the proceedings in the pre-trial phase shall appoint a defense counsel. The procedure of requesting defense counsel at public expense includes an official request and authorization of president of the court or competent authority as well an affidavit from the defendant declaring that s/he cannot afford legal counsel.

***Eligibility criteria for appointing defense lawyer*:** In the process of appointment of ex-officio defense, the Bar Association provides a list of ex officio lawyers, which is centralized for the entire country, to the relevant court. Theoretically, when a person needs a lawyers/he calls a centralized hotline and the regional coordinator assigns an advocate from the centralized list. But in practice, the judge and prosecutor are responsible for obtaining a good advocate for the defendant, so that the defendant can have adequate representation. Although it is not in accordance with existing regulations and accepted practice, some judges and prosecutors select advocates who will only do the bare minimum and will not challenge the judge or prosecutor. Judges and prosecutors usually choose lawyers that will speed up a case whether by the professional knowledge and practice experience or in any other manner. Accordingly, certain advocates chosen by judges and prosecutors have reached almost "privileged status" to be appointed ex officio.

In order to respond to the accusations that the current ex officio system is becoming unfairly *privileged*, the Bar Association has sent notice to the police stations, courts, and prosecutor's office that the list of advocates would only be sent to the administrator of Regional Branches of the Bar Association. Accordingly, in minimizing the branches that have access to the list of advocates, the Bar Association expects that the Regional Branches will be the only group to appoint defense counsel by order and region in which s/he is required by the courts or indigent defendants. In addition, the Bar Association has initiated a pilot program in Prizren through which police, prosecutors and judges can call a central employee of the Bar Association, who then contacts licensed advocates in the area[61] to provide legal assistance to persons in need. In practice, this system has significantly improved the ability of the court personnel to secure advocates for defendants in a timely manner. It also turned out that advocates are more willing to appear as ex officio defense

60 Kosovo Criminal Procedure Code, Chapter V, Article 58.

61 But not necessarily from the ex officio list of advocates

counsel if they receive a direct call instead of being placed on the list for use at sometime in the future.

Reimbursement of attorney fees as quality assurance: Ex officio defense attorneys are paid by the Kosovo Judicial Chamber in cases where they appear before the courts and by the Prosecutorial Council in cases where they are called upon to defend a suspect/defendant under investigation by the prosecution and the police. According to the *Administrative Instruction on Procedures and Height Compensation of Ex-officio Defense Counsels*[62], ex-officio defense counsel shall be compensated by public expenses for: a) Review of case files; b) Defense of the defendant; and c) Compilation of regular legal remedies. Compensation of ex-officio defense counsel cannot exceed the amount of €500.00 for a month including their engagements in all Kosovo courts. When it comes to the *Procedures for Compensation of Defense at Public Expenditures,*[63] a defense counsel at public expenditures shall be compensated for: a) Review of the documents; and b) Defense of the defendants. In this case, compensation to ex officio defense counsel cannot exceed the amount of €500.00 per month, which includes their engagement in all prosecutions of the Republic of Kosovo. Currently, payment for ex officio services is difficult to obtain and affects the availability of defense counsel. If funding for ex officio defense continues to break down there will be a continued shortage of defense counsel, and the backlog of payments will continue to grow within the Kosovo judiciary.

c) Issues related to practical implementation

Kosovo Bar Association, Kosovo Judicial Council, Kosovo Prosecutorial Council and Kosovo Police (Signatory Parties) signed Memorandum of Understanding on the establishment and co-ordination mechanism for free legal representation in criminal matters on 26th April 2016. This document was created in order to implement the right to free legal representation in line with applicable legislation in Kosovo and recognized international instruments. The purpose of the Memorandum of Understanding is to establish a functional mechanism for free legal representation in criminal matters among Signatory Parties to provide the effective and professional services of the free legal representation/assistance in line with obligations deriving by the applicable legislation in Kosovo and international standards and practice applicable in Kosovo. According to this document, Signatory Parties will promote and protect the right of defendant to be provided with effective and professional legal representation/assistance at public expense, if required by interest of justice at all stages of proceedings, from preliminary police investigation to final judgment.

6.1.4. Macedonia

62

Kosovo Judicial Counsel, Administrative Instruction on Procedures and Height Compensation of Ex-officio Defense Counsels, http://www.kgjk-ks.org/repository/docs/Administrative-Instruction-on-procedures-and-Compensation-height-_329154.pdf

63

Kosovo Prosecutorial Council in the meeting held on 5th of September, 2014, http://www.psh-ks.net/repository/docs/No.985.2014-Administrative_Instruction_No.02.2014_on_Compensation_Proced....pdf

a) Overview of the Criminal Law Reforms: The judicial system of the Republic of Macedonia consists of the Basic Courts, the Administrative Court, Appellate courts, and the Supreme Court. The **Constitutional Court** as an independent judicial branch decides on the conformity of laws, agreements, and other regulations with the Constitution; protects the rights of individuals; decides on conflicts of jurisdiction among the legislative, executive, and judicial branches, among state bodies, and among units of local self-government; and decides on the constitutionality of political parties and citizens' associations; and decides on other constitutional issues.[64] Recent reforms conducted in Macedonia have changed the criminal justice system from a mixed criminal procedure with inquisitorial elements to a more adversarial system, where the parties, more than the court, have the leading role in the investigation and trial. It could be argued this model of mixed criminal procedure lasted too long and was insufficient in terms of investigations as well as in the court guaranties of the protection of human rights of suspects or other parts in criminal proceedings. Accordingly, the main challenges for the criminal justice system in the past decade in Macedonia were the international standards for human rights, which had a profound impact on the law and judicial practice, as well as the increased level of crime and corruption.

Currently, there are two different laws on the criminal procedures that are applied in Macedonia – the "old law" that is characterized by the European continental tradition as well as the court-led investigations and the "new law" that entered into force in December 2013 through adoption of the new Code of Criminal Procedure. The new Criminal Procedure Code: extends the role of the public prosecutor in pretrial proceedings and gives prosecutors control over police in the investigation; introduces new procedures for evidence, putting the burden of proof in the hands of the parties; and gives the defense the right to take an active part in the investigation. It also gives the parties the right to cross-examine witnesses, introduces plea bargaining, increases prosecutors' discretion to defer prosecution, sets procedural deadlines, and streamlines and simplifies the judicial process.

According to the results of research conducted in Macedonia[65], a majority of examinees were partially satisfied and believed that the implemented reforms have partially improved the situation of the defense, but that the system is still not sufficiently effective. Interestingly, the majority of prosecutors believe that the new Criminal Procedure Code is more favorable for the defense than the previous CPA, and the majority of judges and the monitors of non-governmental sector agree. Contrary to this, defense attorneys are the most dissatisfied with the new law. In the investigation stage, they have a large number of objections, especially in the part of police and previous procedure during which, despite the legislator expectations, they are practically isolated from the so-called prosecutorial investigation. In their comments and through interviews conducted with eight examinees, defense attorneys complain mostly about not being familiar with the evidence and about not having access to files, practically until the end of the prosecutorial investigation. Besides that, in a number of summary proceedings, which under the new law present about 70% of all cases, they are not thoroughly familiar with the prosecution's evidence until the trial. It is not clear from the questionnaire whether the disadvantages about which the defense attorneys complain are the result of legal norms or inconsistencies in implementation, but

64 The Constitution of Republic of Macedonia, Articles 109 and 110.

65 In total of 55 respondents in Macedonia answered on the previously prepared questionnaire, where 23 of them were lawyers, 9 were judges and 8 were prosecutors at the respective courts. Besides that 15 respondents were members of the Helsinki Committee for Human Rights of the Republic of Macedonia and the Coalition of Civil Association "All for Fair Trails".

one gets the impression that the inconsistencies defense attorneys complain about are more a product of new practices than directly caused by the new law.

As regards the compatibility of the existing criminal legislation with international standards on the protection of human rights, the majority of examinees agree that the international human rights standards are incorporated in the new Criminal Procedure Act and other laws that relate to this matter (the law on juvenile justice, the law on police, etc.). However, it is seen from the discussions with experts that local lawyers are quite familiar with the European Convention on Human Rights and especially with cases related to Macedonia, while a relatively small number of examinees are familiar with the directives and other regulations and standards of the European Union. In particular, the European directives concerning the rights of suspects are not known to the general public including most attorneys (i.e. they are known only to the academic public).

The majority of examinees believe that, despite the fact that most standards are incorporated into national laws, they only partially provide effective defense in practice (73%). Only 5% of examinees believe that the reforms provide a fully effective defense, while 13% believe that they do not provide the defense at all. The remaining 9% of respondents declared that they do not know. When it comes to issues that affect the establishment of an effective defense, the ones most often mentioned are: *the lack of judicial control over preliminary procedure; insufficient time to prepare the defense; the lack of access to records; the lack of easy access to a defense attorney; misuse of communication as a new method to speed up the procedure; the short duration of the contact between the defense attorney and the detained persons; the monopoly of the police and prosecutor over the evidence; the lack of easy access to expert witnesses and professional analysis.*

b) The situation of legal assistance in Macedonia in the context of present justice reform process[66]

Pre-trial proceedings: The right to a defense lawyer in criminal proceedings is considered as one of the fundamental rights of defendants in the criminal justice system in Macedonia. According to the new Law of Criminal Proceedings (LCP), the role of defense lawyers has been significantly reduced during the process of investigations undertaken by the prosecutor, partially because they are not provided with the possibility to review in all the prosecution's documents and the records in the early stage of proceedings.[67] Defense lawyers are now allowed to be present during searches, interrogation of suspects, forensic activities and insights. As one of guarantees of the rights of suspects it is allowed to their defense lawyers to be present at the police line-ups and to take certain activities, from the moment of assuming the duty, in order to find and collect the evidence to the benefit of defense. There are no detailed and standardized written procedures and mechanisms that guarantee and facilitate the right to a defense attorney in cases where suspects are summoned for questioning at the police station and by the public prosecutor, especially

66 These findings are based on the results of conducted research on *Effective Defense in Criminal Proceedings in Republic of Macedonia*. The research was conducted in June2014 in Skopje. The author of the research is professor Gordan Kalajdzijev, PhD .

67 The Law on Criminal Proceedings, Article 49.

when they are deprived of liberty, arrested or detained. This is likely one of the reasons why suspects in Macedonia almost never have a defense attorney present at the police station. The new LCP try to fix this in part by stipulating that the suspects should be provided with the list of on-duty attorneys[68] who are available instead of informing suspects about practicing attorneys in the Republic of Macedonia. Suspects summoned to the police station (or in front of the public prosecutor) are entitled to select an attorney *of their choice,* but the LCP anticipates a limited right of choice for suspects or persons deprived of liberty. When they are available and responsive, defense attorneys chosen by suspects need time to arrive at the police station or the public prosecutor's office. The LCP does not stipulate a particular period of time in which the attorney must arrive to police station or the public prosecutor, except in cases of deprivation of liberty and police custody, given the narrowly defined deadlines for the duration of police custody of 6 to maximum 24 hours. The fact that the LCP and other laws and bylaws do not provide a detailed procedure for implementation of the right to a defense attorney at the police station and the fact that the police and the public prosecutor have not allocated budget funds for this purpose clearly show that this right is not going to be easily exercised in practice.[69]

Mandatory defense[70]***:*** The LCP stipulates mandatory defense by means of court-appointed defense attorney in cases when, due to gravity of criminal charges or any other obvious handicap, defendants are not able to represent themselves. If defendants do not have an attorney, the president of the court appoints an ex officio defense attorney for the course of the criminal proceedings, until the court's ruling becomes enforceable. Also, defendants who have been ordered to *detention* must have a defense attorney for the entire duration of their detention. In cases of indictment for a criminal offence which, by law, is liable to a sentence of imprisonment in duration of ten years or more, defendants must have a defense attorney at the time they are presented with the indictment.

Defense at public expense in case when there is not mandatory defense: In the cases when the indigent defendants do not qualify for mandatory defense and they are charged with criminal offences which, by law, are liable to a sentence of imprisonment, on defendants' request the court may appoint a defense attorney at the cost of the state, provided that the person's financial status prevents them from covering defense costs and counsel is required by the interest of justice and fair trial. According to the legal provisions, the president of the court council decides in these matters and the president of the court appoints defense attorneys. The new LCP in Macedonia allows defendants to indicate a

68

One must differentiate between attorneys who have expressed preparedness and interest to be engaged by people in urgent need of defense attorney and on-duty attorneys who are prepared to instantly appear in given situations, including during night hours or weekends and holidays.

69

Data obtained from the Criminal Court Skopje 1 provide the conclusion that attorneys have been engaged in a relatively low number of cases (average of 1,500 cases annually) and were awarded modest fees in the amount of around 5,500.00 MKD for an average of two court hearings per case. Comparison of total number of resolved cases and payments made on the ground of attorney fees (which are *de facto* reimbursed only for completed cases) provides the conclusion that attorneys acting as "official" defence attorneys in criminal proceedings have been engaged in only 2% of all cases.

70

Mandatory defence and defence for indigent people are different instruments, but having in mind that mandatory defence accounts for most (and maybe only) cases in which indigent people are awarded "official" defence attorney.

particular defense attorney from the list of attorneys compiled by the local bar association.[71] In practice, this phrase indicates that defendants do not enjoy the explicit right to choose their court appointed attorney, but mandates the court to make due consideration of their preference. This solution does not mean that defendants are at liberty to select their defense attorney from the presented list, because not all attorneys are available or willing to accept ex officio cases. Indigent defendants have faced difficulties in exercising this right in criminal proceedings and the defense services they do receive are inadequate and do not guarantee them justice. Except incases of mandatory defense, there are practically no cases in which defendants have been appointed attorneys only on the basis of their poverty status.

Eligibility criteria for appointing defense lawyer to indigent people*: *gravity *of the criminal offence and severity of the law-stipulated sanction*, ***complexity*** of the given case, ***financial status*** of people eligible for free legal aid. The court practice does not include precise eligibility criteria (on the financial status) for free legal aid in criminal proceedings. Judges do not consider this a serious problem and believe that the financial status of defendants can be easily established on the basis of documents presented as evidence in support of their unemployment status, absence of income sources or property tenure, or their status of social allowance beneficiary. The fees of ex officio attorneys for indigent people fulfilling the criteria for mandatory defense are temporarily paid in advance from the budget of the state, and imply due assessment of defendants' financial status at the time their application for free defense services, irrespective of whether they will be convicted or their financial situation will improve. When the criminal proceedings are completed, by means of a separate decision on court proceeding costs, the court may exempt convicted persons from reimbursement of criminal proceeding costs, fully or in part, on the ground of poverty, provided that payment thereof would threaten their or their family's sustenance.

Reimbursement of attorney fees as quality assurance: The court-appointed attorneys should be reimbursed in compliance with the tariff for attorneys. Due to a lack of funds, courts reimburse them in different amounts, depending on complexity of the case, number of defendants, etc.[72] Defense attorneys are paid lump sums that should be paid immediately, as an advance, but in reality attorneys are paid after completion of criminal proceedings, usually with a delay of one year or more. Unlike fees collected in cases when they are paid by defendants, court-appointed defense attorneys are allegedly reimbursed at rates significantly below the tariff. In fact, the Tariff Code and Code of Conduct, including the Law on Bar Activity, stipulate that attorneys have a moral obligation to charge lower fees or work without reimbursement in cases of indigent clients. However, the fact that courts reimburses ex officio defense counsels in amounts lower than the minimum fee established in the relevant Tariff Code, indisputably impacts the quality of defense services.

There are no written rules on payment of attorneys, so judges rely on past practices of their colleagues, which may vary from judge to judge, and from court to court. In some

71 LCP, Article75, Paragraph 1

72 The average reimbursements for court-appointed attorneys in criminal cases range from 2,000.00 to 5,000.00 MKD per court hearing held, i.e., per day. Similar amount is paid for attending investigation activities, usually for their presence when investigative judges' question suspects or witnesses.

cases when court-appointed attorneys submit their list of expenses, the court accepts only those expenses that are justified, but this practice is not established as rule. In addition, defense attorneys are paid their indicated fee only for court hearings held, and are not reimbursed for cancelled court hearings. The financial compensation is not the only factor that impacts the quality of defense. A large number of attorneys, not only beginners, express interest in being appointed as ex officio attorneys, knowing that they will be paid less. Accordingly, lower attorney fees are not the exclusive factor that affects quality of defense in criminal cases. Unlike states that are economically developed and richer, a very small elite of renowned attorneys finds it undignified to work as court-appointed defense attorneys for modest fees. But, when working on such cases, attorneys dedicate less time compared to criminal cases in which they are privately engaged.

While the LCP requires the president of the court to appoint ex officio defense attorneys in cases of mandatory defense, practices vary from court to court and sometimes from case to case. Underperformance of ex officio defense attorneys is contrary to the legal regulations requiring judges and attorneys to conduct their practice in a professional and conscious manner. In such cases, defendants can lodge a complaint to the courts or the Bar Association about the poor quality of their attorney, which does not exempt the courts from their responsibility to ensure professional and conscious performance of court-appointed attorneys. Very often courts, which use the list of practicing attorneys under their jurisdiction, do not have a list of attorneys to be appointed in criminal proceedings, but rely on the general registry maintained by the Bar Association. This list is available for all judges, and there are no special rules governing selection of ex officio defense attorneys.

c) Issues related to practical implementation

Appointment of the ex officio lawyers: Most respondents believe that there are no rules governing a fair and transparent procedure of appointing a lawyer. The majority of respondents, 54%, are partially satisfied, while 35% are not satisfied. From the questions posed and answers given, it is apparent that there is confusion in practice as to what circumstances call for ex officio defense. The largest number of practitioners under these circumstances put situation where the legislator determined the mandatory defense for cases of serious crimes, custody of minors, as well as cases where the defendant is deaf, mute or is obviously unable to defend himself. Despite this, cases in which poverty is the main reason for appointing a lawyer at the public expense are very rarely encountered in practice, which is very strange if we know that a very high percentage of the defendants are poor.[73]

A primary reason for dissatisfaction with the system of ex officio defense is that defendants are not adequately informed about the right to free assistance. They are provided with information about their right to a defense attorney, but are not informed about the possibility of acquiring an attorney at the expense of the state if they cannot afford an attorney. Additionally, they are not informed that they have an absolute right to a lawyer even if they cannot pay in cases of mandatory defense. Another issue is that there is no unified system under which the defense attorneys are registered, so every police station and every court has a different list. A list of attorneys is rarely prepared by the Bar Association (as for example in Bitola), despite the suggestion of the new Criminal Procedure Act. In practice, defense attorneys often complain that only attorneys that have a friendly

73 According to the official data of the State Statistical Office, 1/3 of the citizens of Macedonia are poor, available at: www.stat.gov.mk.

relationship with the President of the court are included on the list. Attorneys and defendants are also facing the same problems with the lists of attorneys that are used at the police stations. These lists usually serve more as lists of the attorneys that are interested in cases of mandatory defense than lists of on-duty attorneys who are really ready to accept ex officio defense. All in all, most lawyers complain that the court and the police prefer certain defense attorneys, which leads to the justified suspicion that there is a sort of "unfair coalition," which causes both lawyers and defendants to suffer.

A large number of respondents believe that there are no mechanisms for enforcing fair appointment of attorneys. In this area, too, the presidents of the court are to blame along with the Bar Association and the Criminal Procedure Act itself. The new Criminal Procedure Act's retention of the old Act's method of ex officio appointments – i.e., selection by the court – is inadequate for the investigative stage, which leads to procedural complications. This can have budgetary implications as well, because some courts consider that funds for the costs of the procedure led by the prosecutor do not have to be allocated from their budget. The majority of respondents (69%) consider the current method of appointing lawyers ex officio to be unfair, while 22% believe that the current way of appointing, in general, does not provide an effective defense of the accused. Only 9% of respondents were generally satisfied with the system. The main reasons for dissatisfaction are: lack of transparency in the procedures; favoring certain lawyers; low levels of interest in representing defendants ex officio, due to the low fees; unclear criteria regarding the financial situation of the defendant – e.g., some courts consider the financial condition of the defendant's family (or household) in determining whether the defendant is indigent while others do not; lack of clarity in documentation that confirm the poverty situation vague criteria as to when the defendant is to defend him/herself adequately, different criteria being applied, starting from the complexity of the case, the physical and mental condition of the defendant, the publicity of the case, and the like.

The majority of respondents (60%) believe that the current method of assigning lawyers only partially provides an effective defense; 28%feel that an effective defense is not provided at all, and only 12% believe that it is ensured completely. The **reasons** for dissatisfaction with the existing system are the same as those discussed above, with one important addition: the system is completely dysfunctional in terms of legal remedies, because no funds are allocated in the budget of the Appellate courts for ex officio cases. Another significant, problem raised by respondents relates to the use of legal remedies in the system. Specifically, some defense attorneys claim that the bond between the judges and favored ex officio defense attorneys leads those attorneys to appeal to their judgments less frequently than they should. Allegedly, this is particularly true in cases of trial in absentia where the defense attorneys ex officio never complain, and, according to some, are not always even present at the hearing despite the fact that the minutes indicate they were present. In these cases, there are no witnesses to confirm whether the defense attorney was indeed present, and whether and how s/he defended the accused in his/her absence. These claims are serious and merit further examination, though it was not possible to do so in the preparation of this report. There is no reliable information whether members of ethnic and other marginalized groups are represented on the list of lawyers who work ex officio, so it is logical that a substantial majority of respondents (78%) answered with "I do not know" or "I cannot answer."

Payment to the ex officio lawyers: Although the majority is partially satisfied with the fact that lawyers are paid below the amount set by the price list of the Bar Association, there are in fact two positions on this matter. As is the case across Central and Western Europe, many lawyers are not satisfied because low compensation yields poor quality representation and there is a perception that mainly younger, inexperienced lawyers are engaged. Despite these traditional stances, represented by a part of our respondents, others point out that renowned defense attorneys have been engaged recently in organized crime and other complex cases. Moreover, although attorneys receive only about 50 Euros per hearing, the quality of the defense is not undermined, because collection of fees is more certain. A large number of respondents believed that this does not significantly affect the quality of the defense.

Of course, there have been some objections that the collection and delays in the payment of funds is a problem, that not all courts pay these funds as diligently as they should and that there are no guarantees that they are paid following a chronological order. There are also claims that attorneys sometimes have to pay bribes in order to obtain money from the court faster – which indicates a form of judicial corruption. Lawyers particularly complained about the previous police and court practice when the defense attorneys were not paid for the cases involving the defense of minors until recent amendments to the law on the rights of children were adopted. The system of legal aid to the poor is poorly regulated and therefore significantly lags behind the general system of free legal aid, which is organized using clear criteria but which does not apply to criminal proceedings. There is general dissatisfaction with the overall functioning of the system and with the amount allocated for these purposes by the state.[74]

Competencies of the ex officio lawyers: The majority of respondents think that all lawyers who are listed in the Bar Association Directory should have general competencies, given that the conditions for being registered in the Bar Association directory area law degree, completion of legal training and passage of the bar exam. In certain cases, the law still requires that in more serious cases lawyers can represent a client only if they have certain experience (which is a precondition in the region more and more often). Unlike judges and prosecutors only a certain percentage of lawyers were involved in training on the implementation of the new CPC. The problems are organizational and financial in nature, since the training of lawyers organized by the Bar Association is financed by funds received on an ad hoc basis from the OSCE and some foreign embassies. The respondents are only partially satisfied with the professional development program because they significantly lag behind in what is understood as an international standard and practice of developed countries. Moreover, the need for training has increased in recent years, due to the large number of major reforms to the criminal legislation. Lawyers were trained on a completely different model of criminal procedure that is now outmoded, and important innovations have been introduced, such as the possibility for settlement, mediation, a new system of determining sanctions and the like.

By law, the court is explicitly authorized to monitor the quality of defense and should react on its own initiative or at the defendant's initiative if the defense attorney provides low or weak quality services. It also implies that the court should notify the Bar Association, which is authorized to conduct a disciplinary procedure. However, despite numerous

74

The answer by the Judicial Budget Council on the amount that is to be allocated for this purpose for 2014 and 2015 has not been available yet.

complaints and criticisms of both the overall system and the specific engagement of individual defense attorneys, no disciplinary proceedings have been taken against ineffective ex officio attorneys. There are a relatively large number of disciplinary proceedings against defense attorneys, but none of those proceedings is about the quality of the service provided by ex officio defense attorneys.

d) Conclusions and recommendations

Despite the fact that Macedonia mostly satisfies international standards for the protection of human rights in legislation, there is significant lack of the implementation of these provisions. This creates the situation in which defendants' rights are jeopardized as well as the whole ex-officio defense system. The obvious complexity of the issue requires whole set of policy measures which should be done in order to improve the ex-officio defense system in Macedonia. The measures should cover all necessary aspects of the system and fulfill the gaps in the procedure and practice. The most important for the people who are using the system is that right to the fair trial is respected in accordance to international standards, particularly these set by European Court for Human Rights. That requires full respect the rights of the ex-officio lawyers to be paid and treated in fair way.

The existing practice in Macedonia is burden with absence of clear rules for appointment of the ex-officio lawyers, non-equal treatment of the lawyers, serious lack of the lawyers' capacity and dedication and variety of practical solutions which are different from court to court. The non-equal practice creates fertile ground for corruption and ruins the whole system. The practical consequence is jeopardizing the right to the fair trial. There are very few cases that legal support is provided for people without means which clearly shows that people are not informed or familiar with their rights. This fact deepens the gap in the society and put the poor people in non-equal position in front of the law. The appointment of the lawyers, including the lists and all other components should be responsibility of the lawyers' chamber. This body needs further capacity building and more important role in the process. The selection criteria need to be very strictly prescribed and respected. The system which provides the fair treatment of the lawyers is not important only for the lawyers themselves but also for the rights of the accused. The accused needs to have possibility to be represented in front of the court by the lawyers who are selected in fair process and not on the basis of corruption. The corrupted system produces the lower level of quality and seriously endangered rights of the persons which are part of court proceedings. It also ruins the whole system of rule of law and human rights protection in the country. The cooperation of the courts is absolutely necessary for the reform of appointment system and the courts should be sanctioned in all cases when the chamber' list of ex-officio lawyers is not respected.

It is the unquestionable right of all people to choose the most qualified lawyer who can represent him/her in front of the court. The fact that someone is not in the position (from various reasons) to pay the lawyer should not mean that the quality of the service will be lower or not equal with the one who can pay the lawyer. Chamber should install the software which could track all the ex-officio lawyers, including number of cases, track records, successfulness and all other relevant data. The software could provide randomness in the appointment of the layers. The accurate data in the software provides the opportunity for all defendants to have full overview of the possible ex-officio lawyers and to choose freely on the basis of clear evidences of results. This also requires necessary changes in Criminal

Procedure Code in order to meet standards from the practice of European Court of Human Rights. The lawyers' chamber should adopt rules and procedures which will prescribe whole procedure and all important steps as well as rights and obligation of the lawyers. For their work, lawyers need to be adequately paid. The right system of lawyers' fees is important for exercising the right on fair trial. Existing practice in Macedonia is not consistent and there is a lack of motivation among lawyers to accept ex-officio defense cases. Payments could be provided several times during the proceedings. The present situation which is characterized by late payments and insufficient means for this purpose could seriously jeopardize the rights of the defendant and influence the quality of the provided services. State is obliged to secure the budget for ex-officio defense and this cannot depend on financial situation in the court nor vary from the place to place.

Training and skill improvements for the ex-officio lawyers are important part of the reform of the whole system. Lawyers with the lack of the capacities could make serious damage for the accused and significantly jeopardize the substance of the rights of the accused. New laws and procedures and implementation of the best practice of European Court for Human Rights, as well as implementation of the EU recommendations makes this process even more important. It is crucial for the fair trials that both sides, prosecution and defense, are equally capable for the process. The whole system of capacity building for the ex-officio lawyers should be responsibility of lawyers' chamber. Chamber should organize the trainings and other forms of education but also keep the records on all the lawyers. These records requires accurate data on specific knowledge and skills of the lawyers, experience in special proceedings as well as clear evaluation results for all participants in education process. The disciplinary proceedings against the lawyers have to be notified in their dossiers. Trainings should be more specialized and minimum of the lawyers' capacities should be prescribed by the rule book of the chamber.

In order to achieve all the results from the paper, following practical steps should be done:

- New regulation within the chamber with all rules and procedures for ex-officio lawyers' appointments;
- Unification of the rules for appointment of the ex-officio lawyers in all courts;
- Update of the ex-officio lawyers' lists in chamber at least once in the year;
- Installing the software which could track all the ex-officio lawyers;
- Sanctions for the courts which are not respecting the chamber list of ex-officio lawyers;
- Unified tariff for all legal procedures with clear differences based on objective criteria;
- Changing the practice of payment of ex-officio lawyers;
- Regular payments in prescribed terms without delay;
- Separate budgets in the courts for ex-officio defense' payments;
- Full responsibility of Chamber over the education and tracking the records of ex-officio lawyers;
- Inclusion of the disciplinary proceedings against the lawyers into their dossiers;
- Changing the Law on free legal aid in order to provide legal aid for the people faced with criminal charges;
- Raised awareness among general public on the right to the ex-officio lawyer in cases when the accused has no sufficient means for legal services.

6.1.5. Serbia

a) Overview of the Criminal Law Reforms: The judicial system in Serbia is based on the courts of general and special jurisdiction. Jurisdiction over criminal proceedings belongs to the courts of general jurisdiction (The Supreme Court of Cassation, appellate courts, higher courts, basic courts) and is shared between four levels. The courts of special jurisdiction (The Administrative Court, The Appellate Commercial Court, the first instance commercial courts, The Appellate Misdemeanor Court, the first instance misdemeanor courts) act in certain areas of law that require particular expertise or have some other specific characteristic demanding special procedure or conditions.[75]The Constitutional Court is not a part of judicial branch. This court has limited jurisdiction, which among other competences, has exclusive jurisdiction over claims of constitutionality and or legality of the general acts.[76]Courts in Serbia have been reformed twice in the recent past – the first time in 2010 and the second time in 2013 by amendments to the Law on Court Organization. Although the organization of the court system in Serbia is relatively new, numerous national and international organizations reported that the criteria for determining the number and location of the courts was not transparent, as well as that files and data could be lost in the case management system during the transfer process.

The High Judicial Council (HJC)[77] is positioned by the Constitution as an independent and autonomous body and guardian of the independence of the courts and judges.[78] This institution has jurisdiction to appoint judges for permanent tenure and to dismiss judges. Also, it proposes to the National Assembly candidates for election to the positions of judge, President of the Supreme Court of Cassation and president of courts. The autonomy of the prosecutorial organization is guarded by the State Prosecutorial Council, which has a similar composition and competence in prosecutorial organization as the HJC. There were several unsuccessful attempts to replace the 2001 Criminal Procedure Code before the successful reforms of 2010 and 2013. During the reforming process, several different versions of this document were created, but never entered into force.

The new Criminal Procedure Code was implemented in stages and brought a number of changes–the largest being that the prosecutor instead of the court now leads the investigation, and that main hearings are now adversarial instead of inquisitorial. The role of the parties has also changed, and parties now take a more active role during the proceedings, conduct investigations, collect evidence, and cross-examine witnesses. In addition, the Criminal Procedure Code was amended several times in recent years. Following

75 The courts in territory of Kosovo that are still under dispute and are one of the main of negotiation between the governments of Serbia and Kosovo will be regulated by *lex specialis.*

76 The Constitution of the Republic of Serbia, Article 167.

77 High Judicial Council has 11 members – seven out of them are judges, while one out of the reaming four members must be an advocate.

78 The Constitution of the Republic of Serbia, Article 153.

these changes, there was a shift in the material and territorial jurisdiction of the courts and prosecutors' offices, which entered in force on January 1, 2014.

b) The situation of legal assistance in Serbia in the context of present justice reform process

The legal profession in Serbia is established as an independent, autonomous activity that consists of providing legal assistance to physical and legal persons.The autonomy and independence of the profession is maintained through the independent work of its legal professionals as well as the rights of clients to freely choose their lawyers.[79] According to the Code of Ethics, lawyers are required to act independently and autonomously, and must base their representation of clients on the effective law, jurisprudence, practice and international legal standards and obligations. According to theexisting legislation, lawyers in criminal cases may not refuse representation based on the personal traits of the accused, the nature of the alleged offense, the defense strategy, public indignation caused by the alleged offense, or the behavior of the alleged victim. Also, lawyers are obliged toapproach all cases with equal conscientiousness and expertise; represent the client without undue delay; inform the client of all significant developments or changes in the advocates' opinion of the legal and factual issues about the case; and avoid incurring unnecessary expenses and prolonging proceedings by preparing superfluous motions or creating undue delays.

Mandatory defense: According to the criminal law, the defendant is entitled to be informed in the shortest possible time, and always before the first interrogation, in detail and in a language he understands, about the charges against him, the nature and grounds of the accusation, as well as that everything he says may be used as evidence in proceedings. The defendant is obliged to have a defense counsel in the following situations: from the moment of first interrogation to the final conclusion of proceedings, if the defendant is mute, deaf, blind, or otherwise incapable of conducting his own defense; from the moment of first interrogation to the final conclusion of proceedings, if the proceedings concern an offense punishable by a term of imprisonment of eight years or more; from the moment of deprivation of liberty if the suspect or defendant is deprived of liberty or prohibited from leaving his or her home; if the defendant is being tried in absentia or has been removed from the courtroom for disturbing the proceedings; if proceedings for ordering compulsory psychiatric treatment are being conducted; and from the beginning of plea negotiation proceedings.[80] One or several defense counsel may be chosen and authorized with a power of attorney by the defendant or his legal representative.

In the case of mandatory defense, when defense counsel is not chose nor the defendant is left without a defense counsel during the criminal proceeding sand does not select another defense counsel, the public prosecutor or the president of the court before which the proceedings are being conducted shall issue a ruling appointing defense counsel, according to the order on the list of attorneys provided by the competent Bar Association. The defense counsel who is appointed by the court may seek recusal only on justifiable

79 The Law of Advocacy of the Republic of Serbia, Article 2.

80 The Criminal Procedure Code of the Republic of Serbia, Articles 68 and 74. Available: file:///D:/My%20Documents/Downloads/Serbia_2011%20CPC%20English_.pdf

grounds. The president of the trial panel, the trial panel or an individual judge, upon a proposal of the public prosecutor or ex officio, decides on motions to relieve the defense counsel of duty. When compiling the list of attorneys the Bar Association is required to take into account the fact that the practical or professional work of an attorney in the area of criminal law provides a foundation for an assumption that the defense will be effective. The list of available attorneys is posted on the web pages as well as the notice boards of the relevant Bar Association.

Defense at public expense in case when there is not mandatory defense If the indigent cannot afford to pay the costs of defense because of his/her financial status, defense counsel must be appointed at the defendant's request if the criminal proceedings are being conducted in connection with an offense punishable by a term of imprisonment of three years or more, or if reasons of fairness so demand. In response to the defendant's request, the preliminary proceedings judge, president of the trial panel, or individual judge orders defense counsel to be appointed by the president of the court before which the proceedings are being conducted. The costs of defense in these cases are borne from the budget of the court before which the proceedings are being conducted.

The Law on the Legal Aid in Serbia has not been adopted yet. There are no state-organized legal aid agencies currently operating in Serbia,[81] which forces indigent defendants to turn to lawyers appointed ex officio in cases where defense is mandatory and they cannot pay for it themselves. In order to ensure that indigent defendants are provided with defense counsel, the Bar Association cooperates with the relevant institutional bodies by providing the courts with a list of defense counsel who are wiling to be appointed for the ex officio defense. Attorneys are selected from the roster of advocates provided by the relevant Bar Association, in accordance with the order of the list. However, professional practice experience indicates that judges and prosecutors are hesitant to appoint counsel for indigent defendants except in cases where it is required by law, primarily in cases where the defendant is facing a sentence of eight years or more and is deprived of liberty.

Reimbursement of attorney fees: Lawyers appointed ex officio by the courts are generally paid 50%of their usual tariff. Bearing in mind that ex officio defense requires large budget expenditure, the courts have a significant backlog of debt owed to lawyers who represented indigent defendants. This situation could affect the quality of representation, because lawyers may not be in a position financially to provide indigent defendants with the same quality of defense as they provide defendants who have financial resources to pay for their defense.

c) Issues related to practical implementation[82]

81

A number of justice-sector civil society organizations are active in providing legal assistance to indigent persons in Serbia, although generally these NGOs are more active in providing civil, rather than criminal, legal assistance.

82

These findings are based on the results of analysis that was conducted in Serbia in order to define the proposals for improving current ex-officio system. The analysis was conducted in 2015 and the author is Jugolsav Tintor, lawyer from Belgrade. These findings are also based on data that are collected during the realization of the consultation meetings with stakeholders (i.e. lawyers, representatives of bar associations, judges, prosecutors, police officers, representatives of civil society organizations active in the field of Justice) in Kragujevac, Niš and Belgrade.

Appointment of the ex officio lawyers: There are no clearly defined rules of procedure that regulate the assignment of ex officio defense attorneys, nor the criteria that lawyers must meet in order to be considered capable of providing high-quality and efficient defense to their clients. Thus, the method of assignment of ex officio defense attorneys leads to a very serious problem in practice. Namely, the under-regulated procedure for assignment of ex officio attorneys makes room for different types of manipulation, as well as numerous opportunities for corrupt behavior, since the assignment of ex officio attorneys is not performed evenly and fairly. In practice, some lawyers benefit from the insufficiently defined rules and procedures for assignment of ex officio defense attorneys, because this allows them to keep "privileges" acquired in the process of assignment. Moreover, complaints of detained/accused people as to the quality of the performance of ex officio defense attorneys, who try to convince them very often to confess the criminal act in order to complete the procedure as soon as possible, have become very frequent.

One of the many problems in the assignment of ex officio defense attorneys is the fact that the appointment process is not centralized, but is conducted by the police, Prosecutor's office and the Court.[83] Previously, there was a phone service in the premises of the Bar Association of Belgrade. This service would respond to the public authorities' requests for ex officio defense attorneys 24 hours a day. Although existence of this service provided respect for the list order in assignment of ex officio defense attorneys, a certain number of prosecutors and Court Presidents refused to cooperate with this method for appointing ex officio defense attorneys. As an explanation of the negative attitude towards this way of assignment of defense attorneys, they specified that neither the Criminal Procedure Act nor the by-laws permit assignment in this way.

In cases in which the ex officio defense attorneys are assigned ad-hoc in insufficiently transparent procedures, is more likely that ex officio defense attorneys will be assigned "based on their friendship" with "influential people." This can be concluded from the reality that only several names appear in cases of assigned ex officio defense attorneys, while there are many lawyers with significant practice experience in the field of the Criminal Law who have never been invited to defend someone ex officio. Additionally, young lawyers are deprived of possibility to participate equally in the assignment of ex officio defense lawyers. Although the number of young lawyers whose profession is advocacy is increasing, these individuals generally believe that before they become lawyers, they have to spend some time in the court or prosecutor's office in order to make acquaintances and connections necessary for a successful practice of law. This often forces them to spend part of their career outside the advocacy, to acquire certain knowledge and experience in order to be competitive to other which prevents them from representing clients ex officio and gaining experience early in their careers in the field of criminal defense.

Payment to the ex officio lawyers: In all criminal proceedings, including those for the most serious crimes, ex officio defense attorneys are entitled to 50% of the amount fixed by the attorney tariff. Accordingly, it is disputable to what extent the lawyers are motivated to work, especially if one considers the irregular payment that ex officio lawyers receive

83

For example, in the territory of Belgrade, there are 4 Courts, 4 Prosecutor Offices, 14 Police Stations and 6 Departments of the Criminal Police GSUP and each of these state bodies independently appoints lawyers in the order from the unique list, without the possibility of another state body to have an insight into the appointment, which means without possibility of respecting the order and without control.

from the state. Aforementioned factors can indirectly affect the quality of defense, and therefore impact the rights to a fair trial and equality of all citizens before the law. Due to the lack of funds for payments of defense services, a number of lawyers claim significant sums of money from the state, on the basis of already-provided ex officio defense. The lawyers who are owed compensation often face the problem of debt repayment to the state for taxes and contributions. As a solution to the existing problem, it was proposed to carry out mutual compensation claims. However, it was not possible to solve the problem in this way, because the settlement of claims with the state is allowed only in cases where the amount owed by the taxpayer is twice as high as the amount of the state's debt to the taxpayer.[84]

Another circumstance that decreases lawyers' motivation to accept ex officio defense cases is the fact that their claims from the state, based on ex officio defense, are not interest-bearing, while the interests on the debts lawyers have towards the state, based on tax claims, are calculated and forcibly achieved. As one of the possible solutions to the problem, representatives of the Ministry of Justice of Serbia proposed the introduction of "state lawyers" who would receive a fixed monthly compensation/salary instead of the 50% reduced tariff for the provision of official defense. According to this proposal, the Ministry of Justice of Serbia would determine the criteria for the selection and number of required lawyers, according to the number of persons who may be in need of ex officio defense. However, this concept of "nationalization of advocacy" did not meet with the approval of the majority of lawyers, who believe that advocacy, as an independent profession, is incompatible by its nature with the civil service.

Competencies of the ex officio lawyers: When drawing up a list, the Bar Association is obliged to take into account the fact that the lawyers have a professional obligation to provide effective defense. On the basis of this provision, the legal obligation of the Bar Association is to take the necessary action to ensure that the attorneys on the list are experienced and capable of providing professional and effective criminal defense. Lawyers are also obliged to "continually acquire and improve the knowledge and skills necessary for a professional, independent, autonomous, effective and ethical practice of law service, in accordance with the program of professional development brought by the Bar Association of Serbia."[85] Despite these legal obligations, there are no defined written criteria based on which it is possible to classify lawyers on the list into those who can demonstrate effective defense and those who are not able to do so. If the only criterion for providing an effective defense is relevant working experience as a lawyer, this does not mean that the length of the professional experience automatically means experience in particular area of the law (i.e. criminal law). Practical experience indicates that the list of ex officio defense attorneys contains a large number of lawyers with no experience in criminal proceedings whose participation in the ex officio system mainly serves as a source for generating additional revenue. The fact that the list includes lawyers with significant professional experience cannot be the basis for the assumption that the defense will be effective, because lawyers must also possess knowledge and expertise in relevant area of the law in order to provide an

84 The Serbia Ministry of Finances regulation from 2013

85 Advocacy Law in Serbia, Article 17

effective defense. But lawyers in Serbia are not obliged to attend trainings or seminars that are organized with aim to improve their knowledge and skills in the field of criminal law before they are placed on list of ex officio defense attorneys.

Legal provisions require the Bar Association to establish a system that will provide opportunities to all who wish to educate themselves to participate in training programs related to the provision of effective defense.[86] The Bar Association is therefore obliged to undertake certain activities designed to check whether the list of assigned defense attorneys ex officio contains lawyers whose practical/professional work in the field of criminal law indicates that they will be able to provide effective defense. The Bar Association is further obliged to organize training in order to enable lawyers to provide effective defense. In accordance with that, it is necessary to provide continuous education of lawyers build the skills necessary for the provision of effective defense, as well as opportunities to check their experience based on the determined criteria. In this way, lawyers without knowledge or experience in the field of criminal law would not be found on the lists of ex officio defense attorneys, while at the same time all interested lawyers would have the opportunity to educate themselves on ways toprovide effective defense.

Practical experience indicates that a large number of criminal proceedings end at the first hearing, because, with the advice and consent of the assigned defense attorneys, defendants generally admit the criminal offense charged. They often do so even when there is no other evidence that the defendant committed the criminal offense. Accordingly, a large number of judgments are issued solely on the basis of the defendant's admission of guilt, which can lead to the assumption that defense attorneys because they're basically just pawns of the prosecution/court, helping get convictions and speeding up the process.

d) Conclusions and recommendations

The most obvious issue in the matter of protection of the rights of accused is appointment of ex-officio lawyers. The existing practice allows significant level of corruption and seriously jeopardizes the rights of accused. The issue requires public debate and full awareness of all stakeholders. There is no simple solution for the complex issue of ex-officio defense system in Serbia. The issue requires whole set of measures and changes of practice which will be conduct by all relevant stakeholders in the system. Official procedures are not clear and allow significant space for misuses and corruption. Even though Lawyers' chamber plays important role in Serbian legal system and showed the strength in several occasions its position in this matter is still not on adequate level. Without strong and independent Lawyers' chamber it is hard to set up the whole system and provide necessary protection of human rights of defendants.

The most important part of the solution should be strengthening the role of Lawyers' chamber. On the first place, they need to update the list of ex-officio lawyers on more frequent base (several times per year). Chambers should be integral part of the process and their role is very important in securing the just system of appointment. The system which provides the fair treatment of the lawyers is not important only for the lawyers themselves but also for the rights of the accused. The accused needs to have possibility to be represented in front of the court by the lawyers who are selected in fair process and not on the basis of corruption. The corrupted system produces the lower level of quality and

86 Criminal Procedure Act of Serbia, Article 76, paragraph 2; Advocacy Law in Serbia, Article 17.

seriously endangered rights of the persons which are part of court proceedings. It also ruins the whole system of rule of law and human rights protection in the country.

The list of the Lawyers' chamber should be for the whole city or region covered by the chamber. The existing solution allows courts, police and prosecutors to use the list without any criteria and without track records. That provides situation that some of the lawyers have more than 100 cases per month while others have none. The police and prosecutors are fully aware that some of the lawyers are more willing to cooperate with them and they are often chosen to be ex-officio defenders. The chambers should install the software which could track all the ex-officio lawyers, including number of cases, track records, successfulness and all other relevant data. The software could provide randomness in the appointment of the layers. The accurate data in the software provides the opportunity for all defendants to have full overview of the possible ex-officio lawyers and to choose freely on the basis of clear evidences of results. The Lawyers' chamber in Serbia has already started with the implementation of call center which will receive all the requests from the police, prosecutors and courts. On this way, the Chamber could control at least frequency of the ex-officio lawyers and establish if some of the institutions choose more often specific names from the lawyers' list.

In order to improve this area, it is also necessary to change the implementation of lawyers' fees policy. There are a lot of issues and misconducts in existing practice. The majority of these issues could be solved with stricter implementation of the law. The tariff should be very carefully considered. The existing practice which includes payment after the whole process is unacceptable and unfair, bearing in mind the length of the court proceedings in Serbia. Payments could be provided several times during the proceedings. It is unacceptable that state postponed the payments to the lawyers without any kind of interest or other way of compensation.

Training and skill improvements for the ex-officio lawyers are important part of the reform of the whole system. Lawyers with the lack of the capacities could make serious damage for the accused and significantly jeopardize the substance of the rights of the accused. The whole system of capacity building for the ex-officio lawyers should be responsibility of lawyers' chambers in Serbia. Chambers should organize the trainings and other forms of education but also keep the records on all the lawyers. These records requires accurate data on specific knowledge and skills of the lawyers, experience in special proceedings as well as clear evaluation results for all participants in education process. Trainings should be more specialized and minimum of the lawyers' capacities should be prescribed by the rule book of the Chambers.

In order to achieve all the results from the paper, following practical steps should be done:

- Update of the ex-officio lawyers' lists in Chambers;
- Legally obliged agreements with the High judicial council, Prosecutor office and police;
- Installing the software which could track all the ex-officio lawyers;
- Installing the call center in the Chamber which could track all the calls from the state institutions;
- Review of the tariff for all legal procedures;
- Changing the practice of payment of ex-officio lawyers;

- Inclusion of interest or other form of compensation for the lawyers in cases of state' payment delay;
- Full responsibility of Chambers over the education and tracking the records of ex-officio lawyers.

6.2. The comparative analysis of effectiveness of the legal protection system of the accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia

An impartial and effective judiciary requires that the independence of judges and autonomy of prosecutors is assured to avoid political influence on their work. This will only be possible with an adequate legal structure, institutional setting and political commitment. Drawing on the experience of previous accession processes, the European Union proposed a *new approach* for countries that intend to become a part of the EU in the future. This *new approach* is based on the principle that issues relating to the judiciary and fundamental rights[87]*should be tackled early in the accession process and the corresponding chapters opened accordingly on the basis of action plans, as they require the establishment of convincing track records.*[88]But, reforms relating these issues provide a particular challenge for all countries in the region, due to high levels of corruption, the fact that different solutions work in particular contexts and it is difficult to identify which models are most suitable for each individual country, and the fact that the countries are at different stages of the accession process regarding judicial reform.

In order to harmonize national legislation with the standards of the EU, all countries analyzed in this assessment have undertaken major reforms needed to fulfill accession criteria. However, although improvement of the rule of law is one of the main preconditions for EU accession, all five countries have encountered number of challenges with respect to their judiciaries. In accordance with the EU accession requirements, all counties in the region except Albania have reformed their criminal procedure codes and introduced adversarial or quasi-adversarial systems based on the common law instead of inquisitorial systems that were considered as ineffective at protecting the rights of defendants. Despite a clear evidence of progress in securing judicial independence, it is obvious that the conducted reforms implemented in the field of criminal law in all countries have not achieved the expected results. There are certain challenges in the functioning of ex officio systems that significantly impair their efficiency and affect the provision of effective defense to defendants in criminal proceedings.

There is general dissatisfaction with the overall functioning of the ex officio defense system. Although persons deprived of liberty have a right to defense counsel in criminal proceedings as required by the interests of justice, fair trial and fundamental human rights instruments, when it comes to the representation of minority and vulnerable groups in all countries in the region, it is evident that members of these groups often face problems in exercising their right to counsel and adequate representation in criminal cases. The rights of defendants to an effective defense conflicts with the normative solutions in all these countries that impose the idea that ex officio counsel in most cases represents one of the

87 The European Union, Chapter 23 of the Acquis Communautaire

88 The European Commission 2011b: 5.

procedural presuppositions that the trial could take place. In most cases, ex officio appointed defense counsels do not have enough time to prepare a quality defense for their clients. Yet, defense counsel typically decide that is better to do their best in the time allotted rather than to require postponement of the trial in order to prepare the defense, because if they cause a delay in the proceedings they cannot realistically expect to be appointed again by the relevant authority. Therefore, it is obvious that some practical solutions adopted by attorneys affect the quality of ex officio defense.

The existing legislation in all countries does not guarantee a fair distribution of ex officio appointments among available defense counsel. All five countries face a lack of the transparent procedures of appointment of defense counsel. In practice, it is difficult to ensure that counsel are selected neutrally, according to the order of the list, and it is also difficult to verify statements that certain counsel are not appointed because they could not be reached. In practice, it is common for only a few favored lawyers, particularly those with connections to judges and prosecutors, to be appointed ex officio. There are respectable and prominent lawyers with many years of professional experience who have never had a single case where they were engaged as ex officio defense lawyers. Thus, all five countries should include the introduction of records and provision of adequate evidence that the selection of lawyers follows the order of the list.

Due to insufficient funds for payment of ex officio defense counsel who represent defendants before the courts in all countries, a large number of lawyers claim significant amounts of money from the state for provided services. The payment for ex officio services is generally low and difficult to obtain, though a significant number of lawyers did state that although the fees are significantly lower in ex officio cases, their payment is more certain. The relevant authorities in all countries have a huge backlog of debts towards lawyers appointed ex officio, which will continue to grow within the judiciary sector in the future. This situation could affect the ability and motivation of defense counsels to accept ex officio defense and to provide defendants with the same quality of representation in these cases. Thus, the issues related to payment implicate the rights of suspects or accused persons to a fair trial and equality before the law.

An increased number of detected criminal cases require the further development of continuous legal education and training for lawyers in all countries in order to be able to provide efficient and adequate representation to all citizens. Although the lawyers are obliged to improve their knowledge and professional skills necessary for effective practice of law, there are no continuous programs of professional development implemented by the Bar Associations or other relevant bodies, except the Training Center within the Kosovo Bar Association and the Criminal Defense Support Section (OKO) in BiH.[89] These are the only organizations in the region that provide continuous capacity building of lawyers or legal professionals in accordance with international obligations and standards. Defendants can be provided with a quality defense only if ex officio lawyers have good professional knowledge and practice experience; therefore, the development of additional continuing legal education programs is necessary as well.

7. CONCLUSIONS

89 But the only in the cases before the War Crimes Chamber of the Court of Bosnia and Herzegovina.

The effective judiciary requires that the independence of judges and autonomy of prosecutors is assured in order to avoid political influence on their work. Reforms that have been conducted relating these issues in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia provide a particular challenge for all countries, due to high levels of corruption, the fact that different solutions work in particular contexts and it is difficult to identify which models are most suitable for each individual country. Despite the fact that certain progress has been made in securing judicial independence, it is obvious that the conducted reforms implemented in the field of criminal law have not achieved the expected results in all countries. There are certain challenges in the functioning of ex-officio systems in all countries that significantly impair their efficiency and affect the provision of effective defense to defendants in criminal proceedings.

Results of conducted research have confirmed that there is a general dissatisfaction with the overall functioning of the ex-officio defense systems in all countries. Although persons deprived of liberty have a right to defense counsel in criminal proceedings, the right of defendants to an effective defense usually conflicts with the normative solutions in all these countries that impose the idea that ex-officio counsel in most cases represents one of the *procedural presuppositions* that the trial could take place. It is evident that existing legislation in all countries does not guarantee a fair distribution of ex-officio appointments among available defense counsel. All five countries face a lack of the transparent procedures of appointment of defense counsels so it is difficult to ensure that ex-officio counsels are selected neutrally. Due to insufficient funds for payment of ex-officio defense counsels the relevant authorities in all countries have a huge backlog of debts towards lawyers, which will continue to grow within the judiciary sector in the future. Thus, the issues related to payment could affect the ability and motivation of defense counsels to accept ex-officio defense and to provide defendants with the same quality of representation in these cases. Although the lawyers in all five countries are obliged to improve their knowledge and professional skills necessary for effective practice of law, there are no continuous programs of professional development implemented by the Bar Associations or other relevant bodies in accordance with international obligations and standards. Defendants can be provided with a quality defense only if ex-officio lawyers have good professional knowledge and practice experience.

According to research results, all five countries in the region are facing serious challenges in ensuring the quality of access to justice for all citizens. The most important problems in providing adequate ex-officio defense for accused persons is mostly referred to: the lack of transparency in the appointment of lawyers by ex-officio, and inadequate measures to guarantee that those appointed provide competent defense for the accused. Accordingly, it is necessary for all countries to establish a transparent system of ex-officio defense - particularly in the areas of assigning counsel ex-officio, determination and payment of fees to lawyers involved, ensuring that lawyers have the skills and competence necessary to provide effective ex-officio defenses to accused persons.

ANNEX 1: POLICY PAPERS OF ALBANIA, BOSNIA AND HERZEGOVINA, MACEDONIA AND SERBIA

ENHANCING THE PROTECTION OF RIGHTS OF ACCUSED IN ALBANIA

Executive Summary

The Policy Paper has the intention to offer the best possible solution for the reform of the ex-officio defense system in Albania. All the facts and evidence base is taken from the document *The Research on the effectiveness of the legal protection system of accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia,* which was created by the Helsinki Committee for Human Rights in Republika Srpska in January 2016 under the program "Balkans regional rule of law network (BRRLN)". The policy recommendations from the document are referring to several key topics identified by the stakeholders in all five countries which are subject of research. These topics are: appointment of ex-officio lawyers, payment to the ex-officio lawyers and competence of the ex-officio lawyers. Each of these topics is important for reform of the whole system and for securing guarantees for people who are accused and need legal support. The Paper proposes solution in accordance with the wide consultation process conducted in Albania organized by Tirana Legal Aid Society. The proposed solution requires some legislative changes but far more excessive changes in existing practice in ex-officio defense system in Albania. Paper also proposes deeper involvement of Lawyers' Chambers in all segments of the system in order to decentralize it and secure better expertise and more efficient procedures for the protection of human rights of people which are in front of the court.

Introduction

Research on the effectiveness of the legal protection system of the accused in the five countries in the region was conducted within the project "Enhancing the protection of the rights of the accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia". This project has been implemented by the Helsinki Committee for Human Rights in Republika Srpska in cooperation with partner organizations in the region with the aim to contribute to reinforcing the system of legal protection of the accused in the five countries in the region. The starting point for the realization of this research is the document *Comparative analysis on the criminal defense advocacy in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia,* which was created in February 2014 under the program "Balkans regional rule of law network (BRRLN)". Pursuance of analysis was used to determine how the establishing of a regional network of defense lawyers can contribute to the establishment of a strong, independent and effective advocacy in criminal defense. The evidence base for this paper was this Comparative analysis.

The results of performed comparative analysis on the criminal defense advocacy in five countries in the region and the work of the members of the expert work groups, which discussed problems in the functioning of the criminal defense, showed that all five countries in the region are facing serious challenges in ensuring the quality of access to justice for all citizens. In accordance with the recommendations of the above mentioned analysis, it is necessary to identify the most important issues affecting the establishment and operation of a transparent system of ex officio defense - particularly in the areas of assigning counsel ex officio determination and payment of fees to lawyers involved, competence assigned to the lawyers necessary to provide effective defenses by officio to accused persons and possibilities for setting up alternative models in ex officio defense. In accordance with the provisions of the criminal law in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia free legal assistance is provided to all persons accused of certain crimes that are not able to pay for a lawyer. However, experience so far has shown that all five countries are

facing problems of law enforcement in practice, and ensuring adequate access to justice for all citizens. As the most important problems in providing adequate defense ex officio for accused persons is mostly referred to: the lack of transparency in the appointment of lawyers by ex officio, inadequate compensation for appointed lawyers, as well as their competence in providing defense for the accused.

The subject of the research is to evaluate the existing legislation and practice in the provision of defense by ex officio in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia, with reference to existing international standards and practices in this area. Therefore, the focus of research will be the manner of appointment, payment and competency of lawyers, who provide the defense for the accused by ex officio. Bearing in mind that members of minority/vulnerable groups often face problems in exercising their right to counsel and adequate representation in criminal cases, a special segment of the research will be devoted to these issues. The aim of the research is to identify the most important obstacles and challenges to the establishment of a transparent and efficient system of ex officio defense in accordance with national and international standards in all five states, and define recommendations for improving the existing defense system of ex officio in the region in order to improve the quality of representation of accused persons. The basic premise is that the reforms implemented in the field of criminal law in all five countries in the region have not achieved the expected results, and that there are certain problems in the functioning of the defense system of ex officio that significantly impair its efficiency which affects the provision of effective defense to defendants in criminal proceedings.

Problem description

Albania has made recent changes to criminal law and criminal justice procedures in order to harmonize national legislation towards the international obligation and human rights standards. The process of the criminal law reforms has been focused on the accountability, impartiality and professionalism of judges and prosecutors and improving the position of defense lawyers in trials as well as on increasing the quality of service provided by lawyers in criminal cases. The Ministry of Justice approved in 2012 amendments to the Law on Legal Representing in order to improve the courts' performance. The aim of these changes was to solve problems regarding postponement of hearings due to frequent absence of lawyers by establishing a procedural law that introducing changes to the rights and obligations of lawyers. These amendments also prescribe foundation of National School of Lawyers (as a body of the lawyers' chamber) that will conduct educational trainings in order to prepare fresh lawyers for practice as well as to help licensed lawyers to maintain and upgrade their professional knowledge and competences through educational trainings.

Before the legislative changes of 2012, the conduct of the disciplinary process in the chamber had various problems such as: malfunctioning of the structures assigned with the examination of complaints against lawyers; very complicated way the examination of these complaints had to go through; the meeting of the formal conditions by the complainants; compliance with the deadlines etc. As a result of these problems, only a limited number of disciplinary measures were taken against lawyers for violation of professional standards or rules of ethics. This did not respond to the scope of problem affecting lawyers and the quality of the service delivery. The legal amendments which came into force at the end of January 2013, addressed the issue of the complaints which do not meet the formal

conditions for filing the complaint, by providing the establishment of the chamber' Complaints Commissioner. The commissioner not only receives the complaints, but also explains to the complainants the process of their review, as well as guarantees the proper recording and acceptance of the valid complaints. With the establishment of the Disciplinary Committee in 2013, a total of 167 complaints were registered only regarding this case by the Court of Serious Crimes, claiming that the ex-officio lawyers had failed to appear at court hearings. The Disciplinary Committee has suspended the license of the first lawyer of this case, and has given a written warning to three other advocates.

The possibility for people in difficult economic situation to benefit from free lawyer's assistance is generally functioning in the stage of preliminary investigation. The law provides the legal obligation for the prosecutor office to cover the remuneration of the lawyers appointed for the compulsory defense cases, or in cases when the lawyer is appointed by the defendant himself and the defendant has no means to cover the costs of this service. The prosecutor office has the authority to appoint the defense attorney to the defendant who has none. Though the prosecutor is a public official who, during his/her duty, represents public interests, he/she cannot have no "interest" in the case under investigation since the results of the investigations are considered an indicator of the results of their professional work. In the essence of the procedure, there is the principle of contradictoriness, i.e. considering the prosecutor and the defendant as "opposing parties" in front of an independent and impartial court, as the essential elements of the constitutional requirement for a "fair legal (judicial) process". If the above rule is assessed by this clash between the interests of the prosecutor with the defendant, when one party appoints the defender of the other party creates the image of "choosing your opponent". It is understandable that between the prosecutor and the defendant there are conflicts of interests. After he/she has created a doubt about the involvement of the defendant in the criminal act, it is difficult that the prosecutor be conceived as a person who is not influenced by this conviction during proceedings.

In the stage of first instance judgment the judge takes over this obligation from the prosecutor. Different practices are seen in different courts regarding the appointment of lawyers. There are functioning models, but also models that create practical concerns. The concerns exist mainly in the "big" judicial districts. In some of them chamber does not participate in determining the criteria used by the court in appointing a lawyer. In these courts the practice has created a group of "ready" lawyers from which the judges select the lawyer based on the communication availability. In some other courts, the chamber has deposited lists of lawyers and contact details. In these cases, the judges are the ones making direct contact and selection. Some chambers have determined a group of "ready" lawyers, according to a schedule. In these cases, based on the schedule drafted by the chamber, the judge appoints the lawyer who will take on the defense. In the first and second instance procedure, there is an almost consolidated practice for providing the legal counsel either appointed in the cases foreseen in Criminal Procedure Code or with the demand of the defendant "with lack of sufficient means". But in some other proceedings such as the recourse in High Court, or the examination of the request for "sentence review" in High Court, such practice does not exist. The concern increases after the position of the Constitutional Court that the legal counsel in determined circumstances is indispensable even in these judgment stages.

After the verdict there is a lack of practice or normative act which would make the implementation of legal assistance effective. Despite the great need for legal assistance in this stage of the process, there is no usable normative ground for this type of assistance. It is clear that the jurisprudence of Strasbourg Court has clearly stated that "the stage of execution of court sentences is part of judicial process". As a result, the requirements of Article 6 of the Convention are applicable for this stage too. This emphasizes the need to create the framework to protect the rights of the individual in this stage of the process.

Policy Proposal

The obvious complexity of the issue requires whole set of policy measures which should be done in order to improve the ex-officio defense system in Albania. The measures should cover all necessary aspects of the system and fulfill the gaps in the legislation, procedure and practice. The most important for the people who are using the system is that right to the fair trial is respected in accordance to international standards, particularly these set by European Court for Human Rights. That requires full respect the rights of the ex-officio lawyers to be paid and treated in fair way. The existing practice in Albania is burden with non-equal treatment of the lawyers, serious lack of the lawyers' capacity and dedication and variety of practical solutions which are different from court to court. The non-equal practice creates fertile ground for corruption and ruins the whole system. The practical consequence is jeopardizing the right to the fair trial.

Due to the fact that lawyers' chamber should be responsible for selection of the ex-officio lawyers, its role need to be strengthened. Chamber should take important part in the whole process of selection and monitoring of lawyers' work in these cases. The selection criteria need to be very strictly prescribed and respected. The system which provides the fair treatment of the lawyers is not important only for the lawyers themselves but also for the rights of the accused. The accused needs to have possibility to be represented in front of the court by the lawyers who are selected in fair process and not on the basis of corruption. The corrupted system produces the lower level of quality and seriously endangered rights of the persons which are part of court proceedings. It also ruins the whole system of rule of law and human rights protection in the country. The cooperation of the courts is absolutely necessary for the reform of appointment system and the courts should be sanctioned in all cases when the chamber' list of ex-officio lawyers is not respected.

It is the unquestionable right of all people to choose the most qualified lawyer who can represent him/her in front of the court. The fact that someone is not in the position (from various reasons) to pay the lawyer should not mean that the quality of the service will be lower or not equal with the one who can pay the lawyer. Chamber should install the software which could track all the ex-officio lawyers, including number of cases, track records, successfulness and all other relevant data. The software could provide randomness in the appointment of the layers. The accurate data in the software provides the opportunity for all defendants to have full overview of the possible ex-officio lawyers and to choose freely on the basis of clear evidences of results. This also requires necessary changes in Criminal Procedure Code in order to meet standards from the practice of European Court of Human Rights. The lawyers' chamber should adopt rules and procedures which will prescribe whole procedure and all important steps as well as rights and obligation of the lawyers.

For their work, lawyers need to be adequately paid. The right system of lawyers' fees is important for exercising the right on fair trial. Existing practice in Albania is not consistent and there is a lack of motivation among lawyers to accept ex-officio defense cases. Payments could be provided several times during the proceedings. Also, one of the useful improvements should be change of a payment method. The payments should be based on working hours instead on number of hearings. Complicate bureaucracy in the payment system is also one of the issues which are making lawyers' work harder. This could be easily changed with small adjust of the practice. For the rights of defendants it will be very helpful if free legal aid services could be also include in ex-officio defense system.

Training and skill improvements for the ex-officio lawyers are important part of the reform of the whole system. Lawyers with the lack of the capacities could make serious damage for the accused and significantly jeopardize the substance of the rights of the accused. The whole system of capacity building for the ex-officio lawyers should be responsibility of lawyers' chamber. Chamber should organize the trainings and other forms of education but also keep the records on all the lawyers. These records requires accurate data on specific knowledge and skills of the lawyers, experience in special proceedings as well as clear evaluation results for all participants in education process. The disciplinary proceedings against the lawyers have to be notified in their dossiers. Trainings should be more specialized and minimum of the lawyers' capacities should be prescribed by the rule book of the chamber.

Policy Recommendations

In order to achieve all the results from the paper, following practical steps should be done:

- New regulation within the chamber with all rules and procedures for ex-officio lawyers' appointments;
- Update of the ex-officio lawyers' lists in chamber;
- Installing the software which could track all the ex-officio lawyers;
- Sanctions for the courts which are not respecting the chamber list of ex-officio lawyers;
- New tariff for the ex-officio lawyers ;
- Unified tariff for all legal procedures;
- Changing the practice of payment of ex-officio lawyers and payments on the basis of working hours;
- Simplification of the administrative procedures for payments to the ex-officio lawyers;
- Inclusion of free legal aid services in ex-officio defense system;
- Full responsibility of Chamber over the education and tracking the records of ex-officio lawyers;
- Inclusion of the disciplinary proceedings against the lawyers into their dossiers;
- Changing the Criminal Proceeding Code that foresees that the lawyer is selected exclusively from the accused;

ENHANCING THE PROTECTION OF RIGHTS OF ACCUSED IN BOSNIA AND HERZEGOVINA

Executive Summary

The Policy Paper has the intention to offer the best possible solution for the reform of the ex-officio defense system in Bosnia and Herzegovina. All the facts and evidence base is taken from the document *The Research on the effectiveness of the legal protection system of accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia,* which was created by the Helsinki Committee for Human Rights in Republika Srpska in January 2016 under the program "Balkans regional rule of law network (BRRLN)". The policy recommendations from the document are referring to several key topics identified by the stakeholders in all five countries which are subject of research. These topics are: appointment of ex-officio lawyers, payment to the ex-officio lawyers and competence of the ex-officio lawyers. Each of these topics is important for reform of the whole system and for securing guarantees for people who are accused and need legal support. The Paper proposes solution in accordance with the wide consultation process conducted in Bosnia and Herzegovina organized by Helsinki Committee for Human Rights in Republika Srpska. The proposed solution requires some legislative changes but far more excessive changes in existing practice in ex-officio defense system in BH. Paper also proposes deeper involvement of Lawyers' Chambers in all parts of BH and more responsibility for these institutions in order to decentralize the whole system and secure better expertise and more efficient procedures for the protection of human rights of people which are in front of the court.

Introduction

Research on the effectiveness of the legal protection system of the accused in the five countries in the region was conducted within the project "Enhancing the protection of the rights of the accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia". This project has been implemented by the Helsinki Committee for Human Rights in Republika Srpska in cooperation with partner organizations in the region with the aim to contribute to reinforcing the system of legal protection of the accused in the five countries in the region. The starting point for the realization of this research is the document *Comparative analysis on the criminal defense advocacy in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia,* which was created in February 2014 under the program "Balkans regional rule of law network (BRRLN)". Pursuance of analysis was used to determine how the establishing of a regional network of defense lawyers can contribute to the establishment of a strong, independent and effective advocacy in criminal defense. The evidence base for this paper was this Comparative analysis.

The results of performed comparative analysis on the criminal defense advocacy in five countries in the region and the work of the members of the expert work groups, which discussed problems in the functioning of the criminal defense, showed that all five countries in the region are facing serious challenges in ensuring the quality of access to justice for all citizens. In accordance with the recommendations of the above mentioned analysis, it is necessary to identify the most important issues affecting the establishment and operation of a transparent system of ex officio defense - particularly in the areas of assigning counsel ex officio determination and payment of fees to lawyers involved, competence assigned to the lawyers necessary to provide effective defenses by officio to accused persons and

possibilities for setting up alternative models in ex officio defense. In accordance with the provisions of the criminal law in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia free legal assistance is provided to all persons accused of certain crimes that are not able to pay for a lawyer. However, experience so far has shown that all five countries are facing problems of law enforcement in practice, and ensuring adequate access to justice for all citizens. As the most important problems in providing adequate defense ex officio for accused persons is mostly referred to: the lack of transparency in the appointment of lawyers by ex officio, inadequate compensation for appointed lawyers, as well as their competence in providing defense for the accused.

The subject of the research is to evaluate the existing legislation and practice in the provision of defense by ex officio in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia, with reference to existing international standards and practices in this area. Therefore, the focus of research will be the manner of appointment, payment and competency of lawyers, who provide the defense for the accused by ex officio. Bearing in mind that members of minority/vulnerable groups often face problems in exercising their right to counsel and adequate representation in criminal cases, a special segment of the research will be devoted to these issues. The aim of the research is to identify the most important obstacles and challenges to the establishment of a transparent and efficient system of ex officio defense in accordance with national and international standards in all five states, and define recommendations for improving the existing defense system of ex officio in the region in order to improve the quality of representation of accused persons. The basic premise is that the reforms implemented in the field of criminal law in all five countries in the region have not achieved the expected results, and that there are certain problems in the functioning of the defense system of ex officio that significantly impair its efficiency which affects the provision of effective defense to defendants in criminal proceedings.

Bosnia and Herzegovina, among other countries, accepted the obligation to adjust the legal system and to meet the EU standards in this area. The judicial reform in BH started in 2003. Although a number of significant reforms have been conducted in the field of criminal legislation, reports of relevant institutions/organizations indicate that the criminal law system is still not fully functional and do not fully ensure adequate protection to all persons that need legal protection and assistance throughout the entire criminal proceeding. The relationship between the lawyers and their clients is regulated by inter alia the Codes of Ethics of the Chambers of attorneys and by the Law on the Legal Profession. According these documents and international standards in this field lawyers are obligated to provide effective legal assistance for clients who are not in position to pay for services. When it comes to fulfilling of these obligations in practice, lawyers in BH have been faced with diverse problems. There is no transparent mechanism in place when lawyers are appointed and payment ex officio. Further, their fees are usually not paid on time. Lawyers believe that the appointment, payment and competence development of ex officio lawyers needs to be enhanced as it is burdened by lack of transparency, corruption and inequality what harms the profession of lawyers but far more important it harms the rights of accused to be legally properly represented and protected. Despite the fact that there are some organizations providing free legal aid it is much more often in civil then in criminal cases. There is still significant level of misunderstanding between lawyers and CSOs in the country.

Problem description

Appointment of the ex officio lawyers: Although large amounts of money are allocated for funding the ex officio defense in BH in recent years, the data available from practice indicate that only few favored lawyers, for whom it is often claimed that they obtain the cases on the basis of personal contacts, have the greatest benefit from providing ex officio defense. The existing BH legislation does not guarantee a fair distribution of ex officio defense and it often happens in practice that only few lawyers appear as defense attorneys assigned ex officio. At the same time, there are prominent lawyers with many years of professional experience in the field of criminal law, who never had a single case where they were engaged as ex officio defense attorneys. Also, it happened in practice that, even though they are invited by an official body to work as ex officio attorneys, it is usually emphasized that they have to come to the court immediately, which in most cases is not manageable (due to for example geographical distance, the fact they are currently outside the state, have scheduled trials).

Legal provisions in Bosnia and Herzegovina stipulate that at the first court appearance suspects must be presented with a list with ex officio attorneys if they are unable to defend themselves or to hire a lawyer, and they must be enabled to independently choose a defense attorney to represent them. Although judicial employees are prohibited from suggesting or influencing the suspects in any way in the choice of the ex officio defense attorney, in practice it happened that some of the suspects/accused individuals have not had the opportunity to independently choose their defense attorney, that they were assigned a defense attorney without their knowledge or the court did not accept their choice of the ex officio attorney. Also, it happened in practice that certain officials "suggest" or "promote" certain lawyers to suspects and the suspected individuals often appear before the court with the already pre-selected name of the defense attorney even before he/she was offered the list. In these cases, it is obvious that the choice of a lawyer has been suggested to the suspects but these claims are very difficult to prove. Court transcripts from interrogations which often do not contain enough information on the choice of a lawyer, mainly state that the suspect was presented with the list of ex officio defense attorneys and then the information about the chosen defense attorney is given. As a suspect does not confirm the accuracy of these statements by his/her signature it cannot be accurately argued that his/her right to independently choose ex officio attorney has been respected.

The experience from the practice up to now indicates the examples of different kinds of irregularities in the allocation of the ex officio attorneys by various official bodies. Consequently, it is often stated that the legal provision that allows the suspect to select a defense attorney is precisely one of the problems. However, the practice indicates that in fact there is no real possibility for the suspect to choose a lawyer. Situations in which excellent lawyers have very few or no ex officio defense cases indicate that such situation is not the result of the suspect's independent will and that there is a mix of different influences - the impact of the police, the influence of the prosecutor, the direct decision of the court, the impact of the judicial police. All these statements indicate that there are instances of corruption when setting the defense ex officio which cause damage to all those who perform their job professionally, conscientiously and correctly. However, in this case the court cannot influence the situation when a suspect appears at the hearing, at which it is being decided on the choice of ex officio defense attorney, with the already pre-selected name of defense attorney whom he wants to hire. The court must respect the provisions of the

Criminal Procedure Code, where the suspect is given freedom of choice of defense attorney, although in some cases there are indications that this right is abused. Also, in practice there have been cases in which the suspect would hire a lawyer, and then, after two or three actions taken by the lawyer, the suspect would declare that he doesn't have money to pay the lawyer. So, the court assigns a lawyer ex officio.

Until 2009 The Criminal Procedure Code of Bosnia and Herzegovina allowed the Court Chamber to choose a defense attorney ex officio in the name of the suspect when the suspect refuses to do so. After the amendment to the law, in cases when the suspect refuses to choose a defense attorney, the attorney will be assigned in the order as given in the list of lawyers. Although this amendment to the law should have allowed equal choice of all lawyers, in practice it still occurs the cases are being assigned to only a few lawyers. According to the existing legal provisions, one of the arising problems is the possibility that the suspect can have more hired lawyers while there is a limit when it comes to the ex officio defense - one suspect, one defense attorney. So, it happens in practice that there are cases in which there are up to ten accused, where the defense attorney is paid for each of them, which unnecessarily creates enormous costs. Although a large number of lawyers appear on the lists, in general only a small group of lawyers are known for their representation of criminal defendants and are the most frequently selected by indigent defendants. The advocates who are frequently selected to represent indigent defendants take so many cases that they earn an income substantially above the average for the lawyer in Bosnia and Herzegovina.

Payment to the ex officio lawyers: A lawyer is entitled to receive payment for his/her work according to the tariff which is established by the Bar Association in agreement with the Ministry of Justice. The amount of reward for the work of lawyers is based on the type of procedure, the action taken, the value of litigation or the prescribed penalty, as well as the other parameters established by the tariff. Decisions on procedural expenses made by court and other authorities determine the amount of compensation for legal assistance performed by lawyer, according the tariff which was in force at the time of providing legal aid. After the completion of the judicial proceeding, the lawyer compiles the amount of expenses for his/her work, which is approved by the relevant court. But in practice lawyers are waiting to receive payments up to several years due to insufficient budget funds. Following the practice of some countries in the region, the Law on Advocacy of Republika Srpska foresees the amount of the payment for defense lawyers will be determined by the RS Government and in accordance with the proposal of the Minister of Justice. Further, it is foreseen that the Government will approve an amendment to the Law on the amount of fees and payments of ex officio counsels by respecting the deadline of 60 days after the Law has entered into force. The amendment has not been made public, yet. As one of the reasons for bingeing those decisions, it has been stated that the costs for ex officio defense are paid from the entity budget what makes it needed that the RS Government has a certain influence as it has in all other cases where the funds are paid from the budget. Further, it has been stated that the ex officio defense lawyers has certain benefits compared to lawyers that has not been appointed based on these grounds.

Ex officio lawyers' fees are paid in accordance with the Decision of the Court of BH as well as the tariffs determined by the relevant Bar Associations. Therefore, ex officio defense

lawyers charge their clients in accordance with the existing tariffs for defense attorneys (100%), what represents significant expenses from budgets on all levels in Bosnia and Herzegovina. In accordance with this, BH is an exception compared to other countries of the region, where the fee for defense lawyers is mostly paid in the amount of about 50% of the tariffs established by the Bar Association. Most of the contacted lawyers agree that the existing tariffs for ex officio defense are high and put a burden on the budgets. They agree that the payments should be adjusted to the economic situation in the country. Further, ex officio defense seems to be attractive to some lawyers as it offers them the possibility for enormous income that is mostly beyond the average income in the country. In spite of different initiatives for decreasing the existing tariffs, even by lawyers, significant steps in this regard have not been made, yet.

Ex officio lawyers, who have the highest number of cases per year, mainly state that they get the cases on the basis of many years of experience and reputation and thanks to the fact that they have many friends and acquaintances who give recommendations to the people who need their help. Financing of the ex officio defense is often emphasized as one of the leading problems the lawyers deal with in practice, because of low rates that are paid for ex officio defense, and because of irregular payment of costs for this kind of defense. The lack of funds in the budget for this purpose in one of the main reasons stated for delays of payments for ex officio defense. Besides that, some lawyers express the possibility that some costs are never paid due to obsolescence of financial claims. However, lawyers are obliged to pay taxes to the state regardless the delay of payments for ex officio defense. The delays of payments of ex officio defense from courts to engaged lawyers might influence the quality of defense and thus on the rights of the suspect or accused to fair trial. Experiences from the practice show that ex officio defense lawyers that represent accused before cantonal and district courts waited for the refund of their costs for several years and use their own funds to pay the defense. Tariffs for lawyers in the Court of BH are significantly lower in comparison with other courts, although this institution deals with the most serious crimes. However, the compensation for the work of the lawyer before the Court of BH are regular and that is one of the main reasons why some of lawyers more often have accepted the cases before this court. Information gathered by lawyers suggests that this tariff is acceptable mostly for colleagues who live in and around Sarajevo, where is the seat of the Court of BH. Trials last for a very short time, the tariff is significantly lower in comparison with other courts, the presence at hearings is only paid, which affects the abilities of lawyers who come from other places of BH to participate in the trials.

Competences of the ex officio lawyers: In accordance with existing laws, lawyers are obliged to constantly participate in professional trainings and to obtain new knowledge and skills that are needed for professional, independent, efficient and ethical conduction of their advocacy work and in line with the programs for professional trainings of the Bar Association. The Bar Associations in Republika Srpska and BH Federation are primary responsible for the professional training and development of the lawyers. Regarding this issue, FBH Bar Association organizes the training sessions for lawyers but primarily encourages lawyers to attend seminars organized by relevant institutions on changes in law, including the seminar on criminal law organized by the Court of BH. The RS Bar Association includes discussion of legal issues at its annual conference. The list of the lawyers that are authorized to represent the suspect/accused persons before the Court of BH is established and updated by the Criminal Defense Support Section (OKO) on a monthly basis. In order to ensure the highest standards of representation of suspect/accused, the Court of BH requires lawyers to

demonstrate their knowledge of relevant law before they are placed on the list or they are allowed to appear before this Court. The applicant for the list must be current and valid member of the Bar Associations in RS or FBH and must poses as a lawyer, judge or prosecutor at least seven years of relevant working experience on legal matters in order to be appointed as the only lawyer or primary lawyer. When it comes to the knowledge criteria, lawyers must possess knowledge and expertise in relevant areas of law in accordance with the criteria published by the OKO. The War Crimes Chamber of the Court BH requires all advocates defending persons charged with war crimes who have less than seven years' experience and/or have never defended a war crimes case to complete a special one-day training course. These knowledge criteria can be satisfied by experience or by participation in an alternative training that is provided by OKO and it has been required for the War Crimes Chamber lawyers only.

This system works for the previous 10 years and it has been consider as one of the best options regarding the criteria for appointment of defense lawyers in BH. Until now, approximately 250 advocates have been certified by OKO to defend war crimes cases before the Court of BH. In addition, a number of NGOs have cooperated with the Bar Associations in RS and FBH as well as the government bodies in order to provide educational trainings for the lawyers and other legal professionals. In the cases where lawyers do not fulfill the standard criteria for appearing before the Court of BH, the Law of the Court of BH has provision for lawyers to be *specially admitted.* Judges will be able to specially admit lawyers from BH who are not on the list of authorized advocates where it is in the interests of justice to do so, and Judges can also specially admit foreign lawyers, where their expertise and fair trial rights demand it. Any application for Special Admission must be made to the Court. Quality defense of accused persons can be provided only by the lawyers who have relevant professional knowledge and experience. In order to increase both the competence of lawyers and the quality of the defense it is necessary to organize trainings for lawyers at the lower courts (district and cantonal) and to create mandatory continuing legal education. When it comes to the quality of the ex officio defense, it happens in practice that lawyers have more hearings during a day, so it is virtually impossible to prepare an adequate defense for each case. In such a situation, a suspect cannot have quality defense.

The judge, panel of judges, or the prosecutor must submit all new evidence, information, or facts that could serve as evidence at the trial to the defense. The defense counsel, suspect or accused has the right to make copies of all files or documents after the indictment has been issued. But in practice, lawyers involved in defending suspect or accused persons pointed out that prosecutor do not give them access to the case file or to evidence prior to the issuance of an indictment. For instance, lawyers that are involved in defending war crimes cases before the Court of BH asserted that the report on the evidence is given to them on a CD-ROM at the time of the hearing, but lawyers are not allowed to bring their laptops to court. In addition, the use of evidence declared to be secret pursuant to the Law on the Protection of Secret Data. Based on this, only the prosecution and court is permitted to see this evidence that could be a serious problem for suspect/accused because it is impossible for the lawyer to present the defense without seeing the evidences against defendant. All these factors could affect the quality of defense.

Policy Proposal

The most obvious issue in the matter of protection of the rights of accused is appointment of ex-officio lawyers. The existing practice allows significant level of corruption and seriously jeopardizes the rights of accused. The issue requires public debate and full awareness of all stakeholders. In order to prevent the corruption and non-equal treatment of lawyers, one of the possible solutions is strict prevention of the corruptive practice and higher involvement of the court. This includes rigorous fight against corruption, the high frequent contacts between court and Lawyers' chamber as well as administrative and criminal procedures against the court officials and lawyers which are part of the forbidden practice. The solution is quick and simple and do not require changes of existing legislation neither the additional costs for the budget. On the other side, the solution also requires high level of integrity and awareness about the importance of rule of law among all relevant decision makers in court and chambers. This is hard to expect in the countries which have not developed democracy and legal tradition. Unfortunately, all Balkan states are in this group, including Bosnia and Herzegovina.

The other possible solution requires some legislative changes and new mechanisms for improving practice of ex officio lawyers' appointment. The most important part of this solution is strengthening the role of lawyers' chambers. On the first place, they need to update the list of ex-officio lawyers on more frequent base (several times per year). Chambers should be integral part of the process and their role is very important in securing the just system of appointment. The system which provides the fair treatment of the lawyers is not important only for the lawyers themselves but also for the rights of the accused. The accused needs to have possibility to be represented in front of the court by the lawyers who are selected in fair process and not on the basis of corruption. The corrupted system produces the lower level of quality and seriously endangered rights of the persons which are part of court proceedings. It also ruins the whole system of rule of law and human rights protection in the country.

The other important thing is creation of the special list of lawyers in criminal matters. This list allows to defendants to choose the most qualified lawyers and to exercise the right to defend in most professional manner. It is the unquestionable right of all people to choose the most qualified lawyer who can represent him/her in front of the court. The fact that someone is not in the position (from various reasons) to pay the lawyer should not mean that the quality of the service will be lower or not equal with the one who can pay the lawyer. Also, chambers should install the software which could track all the ex-officio lawyers, including number of cases, track records, successfulness and all other relevant data. The software could provide randomness in the appointment of the layers. The accurate data in the software provides the opportunity for all defendants to have full overview of the possible ex-officio lawyers and to choose freely on the basis of clear evidences of results. Apart from the chamber' software, it is also necessary to adjust Case Management System which is applied in all courts in Bosnia and Herzegovina. The CMS has to be update with the data regarding ex-officio lawyers. It can provide the rightful appointment procedure in the cases when the court needs to appoint the ex-officio lawyer.

In order to improve this area, it is also necessary to change the implementation of lawyers' fees policy. There are a lot of issues and misconducts in existing practice. The majority of these issues could be solved with stricter implementation of the law. Some of them require new legal provisions. The fee should be unified in whole country and all the courts should

have the same tariff for the same legal businesses. The tariff should be very carefully considered due to the fact that there are some strange solutions (some lawyers' jobs are not paid at all and some are too much expensive, for instance). The existing practice which includes payment after the whole process is unacceptable and unfair, bearing in mind the length of the court proceedings in Bosnia and Herzegovina. Payments could be provided several times during the proceedings. For the rights of defendants it will be very helpful if free legal aid services could be also include in ex-officio defense system.

Training and skill improvements for the ex-officio lawyers are important part of the reform of the whole system. Lawyers with the lack of the capacities could make serious damage for the accused and significantly jeopardize the substance of the rights of the accused. The whole system of capacity building for the ex-officio lawyers should be responsibility of lawyers' chambers in BH. Chambers should organize the trainings and other forms of education but also keep the records on all the lawyers. These records requires accurate data on specific knowledge and skills of the lawyers, experience in special proceedings as well as clear evaluation results for all participants in education process. Trainings should be more specialized and minimum of the lawyers' capacities should be prescribed by the rule book of the Chambers. It is the best way that Chambers organized special unit within themselves which will deal with the education of ex-officio lawyers.

Policy Recommendations

In order to achieve all the results from the paper, following practical steps should be done:

- Update of the ex-officio lawyers' lists in Chambers;
- Creation of the special list of lawyers in criminal matters;
- installing the software which could track all the ex-officio lawyers;
- Update of the CMS with the data regarding ex-officio lawyers;
- Unified fees for the ex-officio lawyers in the whole country;
- Unified tariff for all legal procedures;
- Changing the practice of payment of ex-officio lawyers;
- Inclusion of free legal aid services in ex-officio defense system;
- Full responsibility of Chambers over the education and tracking the records of ex-officio lawyers;
- The new body within the Chambers which are dealing with ex-officio defense and the clear Rule book on ex-officio defense system produced by the Chambers.

ENHANCING THE PROTECTION OF RIGHTS OF ACCUSED IN MACEDONIA

Executive Summary

The Policy Paper has the intention to offer the best possible solution for the reform of the ex-officio defense system in Macedonia. All the facts and evidence base is taken from the document *The Research on the effectiveness of the legal protection system of accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia,* which was created by the Helsinki Committee for Human Rights in Republika Srpska in January 2016 under the

program "Balkans regional rule of law network (BRRLN)". The policy recommendations from the document are referring to several key topics identified by the stakeholders in all five countries which are subject of research. These topics are: appointment of ex-officio lawyers, payment to the ex-officio lawyers and competence of the ex-officio lawyers. Each of these topics is important for reform of the whole system and for securing guarantees for people who are accused and need legal support. The Paper proposes solution in accordance with the wide consultation process conducted in Macedonia organized by Helsinki Committee for Human Rights in Macedonia. The proposed solution requires some legislative changes but far more excessive changes in existing practice in ex-officio defense system in Macedonia. Paper also proposes deeper involvement of Lawyers' Chambers in all segments of the system in order to decentralize it and secure better expertise and more efficient procedures for the protection of human rights of people which are in front of the court.

Introduction

Research on the effectiveness of the legal protection system of the accused in the five countries in the region was conducted within the project "Enhancing the protection of the rights of the accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia". This project has been implemented by the Helsinki Committee for Human Rights in Republika Srpska in cooperation with partner organizations in the region with the aim to contribute to reinforcing the system of legal protection of the accused in the five countries in the region. The starting point for the realization of this research is the document *Comparative analysis on the criminal defense advocacy in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia,* which was created in February 2014 under the program "Balkans regional rule of law network (BRRLN)". Pursuance of analysis was used to determine how the establishing of a regional network of defense lawyers can contribute to the establishment of a strong, independent and effective advocacy in criminal defense. The evidence base for this paper was this Comparative analysis.

The results of performed comparative analysis on the criminal defense advocacy in five countries in the region and the work of the members of the expert work groups, which discussed problems in the functioning of the criminal defense, showed that all five countries in the region are facing serious challenges in ensuring the quality of access to justice for all citizens. In accordance with the recommendations of the above mentioned analysis, it is necessary to identify the most important issues affecting the establishment and operation of a transparent system of ex officio defense - particularly in the areas of assigning counsel ex officio determination and payment of fees to lawyers involved, competence assigned to the lawyers necessary to provide effective defenses by officio to accused persons and possibilities for setting up alternative models in ex officio defense. In accordance with the provisions of the criminal law in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia free legal assistance is provided to all persons accused of certain crimes that are not able to pay for a lawyer. However, experience so far has shown that all five countries are facing problems of law enforcement in practice, and ensuring adequate access to justice for all citizens. As the most important problems in providing adequate defense ex officio for accused persons is mostly referred to: the lack of transparency in the appointment of lawyers by ex officio, inadequate compensation for appointed lawyers, as well as their competence in providing defense for the accused.

The subject of the research is to evaluate the existing legislation and practice in the provision of defense by ex officio in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia, with reference to existing international standards and practices in this area. Therefore, the focus of research will be the manner of appointment, payment and competency of lawyers, who provide the defense for the accused by ex officio. Bearing in mind that members of minority/vulnerable groups often face problems in exercising their right to counsel and adequate representation in criminal cases, a special segment of the research will be devoted to these issues. The aim of the research is to identify the most important obstacles and challenges to the establishment of a transparent and efficient system of ex officio defense in accordance with national and international standards in all five states, and define recommendations for improving the existing defense system of ex officio in the region in order to improve the quality of representation of accused persons. The basic premise is that the reforms implemented in the field of criminal law in all five countries in the region have not achieved the expected results, and that there are certain problems in the functioning of the defense system of ex officio that significantly impair its efficiency which affects the provision of effective defense to defendants in criminal proceedings.

Problem description

The reforms conducted in Macedonia have changed the criminal justice system from a mixed criminal procedure with inquisitorial elements to a more adversarial system, where the parties, more than the court, have the leading role in the investigation and trial. The main directions for the criminal justice system in the past decade in Macedonia are the international standards for human rights and fundamental freedoms, which had a profound impact on the law and judicial practice, as well as the increased level of crime and corruption. During the process of reforming the criminal proceedings was mainly focused on the investigations. Serious issues regarding long lasting processes and weak court guaranties of the protection of human rights of accused burden the system in transition. Currently, there are two different law on the criminal procedures that are applied in Macedonia – the "old law" that is characterized by the European continental tradition as well as the court-led investigations and "new law" that are entered in force in December 2013. The new Criminal Procedure Code extend the role of public prosecutor in pretrial proceedings and gives prosecutors control over police in the investigation; introduces new procedures for evidence, putting the burden of proof in the hands of the parties; and gives the defense the right to take an active part in the investigation. It also gives the parties the right to cross-examine witnesses, introduces plea bargaining, increases prosecutors' discretion to defer prosecution, sets procedural deadlines, and streamlines and simplifies the judicial process.

The new system did not satisfy all parts in the proceedings and there are still too many open issues in the whole process. Defense lawyers are the most dissatisfied with the new law. They have a large number of objections, especially in the part of police and previous procedure in which, despite the legislator expectations, they are practically isolated from the so-called prosecutorial investigation. According the research done by Helsinki Committee for Human Rights in Macedonia, prosecutors complain mostly about not being familiar with the evidence and about not having access to files, practically until the end of the prosecutorial investigation. Besides that, in a number of summary proceedings, which under the new law

present about 70% of all cases, they are not thoroughly familiar with prosecution evidence until the trial. Far more obstacles are faced in practice then in the legal provisions. The situation is very similar with other Balkan countries where the new legal solutions are solid and in accordance with the highest European standards but the practical implementation is weak point of the whole reform process. The international human rights standards are incorporated in the new Criminal Procedure Act and other laws that refer to this matter (the law on juvenile justice, the law on police and the like). The local lawyers are quite familiar with the European Convention on Human Rights and especially with cases related to Macedonia, while the relatively small number of them is familiar with the directives and other regulations and standards of the European Union. In particular, the European directives concerning the rights of suspects are not known to the general public.

The Law on Criminal Proceedings in Macedonia stipulates mandatory defense by means of court-appointed defense attorney in cases when due to gravity of criminal charges or any other obvious handicap defendants are not able to represent themselves. If defendants do not have attorney, president of the court appoints them *ex officio* defense attorney for further course of criminal proceedings until the court ruling becomes enforceable. Also, defendants who have been ordered *detention* must have defense attorney for the entire duration of their detention. In cases of indictment for criminal offence which, by law, is liable to imprisonment sentence *in duration of ten years* or more, defendants must have a defense attorney at the time they are presented with the indictment. In the cases when the indigent defendants do not qualify for mandatory defense and they are charged with criminal offences which, by law, are liable to imprisonment sentence, on defendants' request the court may appoint them defense attorney at the cost of the state, provided that persons' financial status prevents them to cover defense costs and when it is required by the interest of justice and fair trial. According to legal provisions, president of the court council decides in these matters and president of the court appoints defense attorneys. This solution has been taken from the old LCP and implies dominant role of courts in pre-trial proceedings, but this solution is unsuitable for the new model and is considered highly impractical.

The court-appointed attorneys should be reimbursed in compliance with the tariff for attorneys. Due to lack of funds, courts reimburse them in different amounts, depending on complexity, number of defendants, etc. Defense attorneys are paid lump sums, depending on the judge or the case, criminal offence gravity, complexity. This amount should be paid immediately, as advance, but in reality attorneys are paid after completion of criminal proceedings, usually with a delay of one year or more. Unlike fees collected in cases when they are paid by defendants, court-appointed defense attorneys are reimbursed less, allegedly, significantly below the tariff. Moreover, the Tariff Code and Code of Conduct, including the Law on Bar Activity, stipulate attorneys' moral obligation to charge lower fees or work without reimbursement in cases of indigent clients. The fact that courts reimburses ex officio defense counsels in amounts lower than the minimum fee established in the relevant Tariff Code, is indisputably reflected in quality of defense services. There are no written rules on payment of attorneys, so judges rely on past practices of their colleagues, which may vary from judge to judge, from court to court. In some cases when court-appointed attorneys submit their list of expenses, the court accepts only justified, but this practice is not established as rule. In addition, defense attorneys are paid their indicated fee only for court hearings held, and are not reimbursed for cancelled court hearings.

There are different practices in terms of the financial aspects of court-appointed attorneys in Macedonia. Namely, high number of attorneys, not only beginners, express interest in being appointed as ex officio attorneys, knowing that they would be paid less. Accordingly, lower attorney fees are not the exclusive factor that affects quality of defense in criminal cases. Unlike states that are economically developed and richer, very small elite of renowned attorneys finds it undignified to work as court-appointed defense attorneys for modest fees. But, when working on such case, attorneys dedicate less time compared to criminal cases in which they are privately engaged. While LCP requires president of the court to appoint ex officio defense attorney in cases of mandatory defense, practices vary from court to court and sometime from case to case. Underperformance of ex officio defense attorneys is contrary to the legal regulations requiring judges and attorneys to conduct in professional and conscious manner. In such cases, defendants can lodge a complaint to the courts or the Bar Association about poor quality of their attorney, which does not exempt the courts from their responsibility to ensure professional and conscious performance of court-appointed attorneys. Most often courts, which use the list of practicing attorneys under their jurisdiction, do not have a list of attorneys to be appointed in criminal proceedings, but rely on the general registry maintained by the Bar Association. This list is available for all judges, and there are no special rules governing selection of ex officio defense attorneys.

Prevailing majority of the ex-officio defense cases are connected with the mandatory defense for cases of serious crimes, custody of minors, as well as cases where the defendant is deaf, mute or is obviously unable to defend himself. Despite this, cases in which poverty is the main (special) reason for using a lawyer at the expense of the state are very rarely (almost never) encountered in practice, which is very strange, if we know that a very high percentage of the defendants are poor (According to the official data of the Central Bureau of Statistics, 1/3 of the citizens of Macedonia are poor). The third case (situation) in which the defendants have the possibility of using a lawyer at the expense of the state is in some circumstances when they are arrested (at night). The reasons for dissatisfaction with the system of defense ex officio are the following circumstances: the defendants are not at all informed about the right to free assistance. Apart from the information about their right to the defense attorney they are not informed about the possibility of using the defense attorney at the expense of the state in the case when they do not have enough money for it. Also they are not informed about the fact that in some cases they do not have to pay a lawyer in case of mandatory defense. In the police and in courts, there is no unique and unified system under which the defense attorneys are registered, so every police station and every court has its list that have been made on different grounds. The list is very rarely prepared by the Bar Association as suggested by the new Criminal Procedure Act. Some kind of a hybrid system is more often present by which lawyers declare their interest in the court, but that is not according to some transparent criteria, meaning that all defense attorneys are not informed about that. Defense attorneys often complain about lists which are made on a friendly basis between the President of the court and some defense attorneys. The police stations are facing the same problem, only here it is even more evident as the lists of the defense attorneys are more lists of the attorneys interested in cases of mandatory defense than lists of real duty defense attorneys who are really ready to respond as such. It is obvious that the court and the police prefer one and the same defense attorneys which lead to the justified suspicion where both lawyers and defendants suffer.

There are no concrete mechanisms that ensure transparency, so some of the issues raised in response to the previous question are presented again, where the presidents of the courts are most to blame, the Bar Association itself, as well as the Criminal Procedure Act. It is especially emphasized that the solution, by which the court determines defense attorneys ex officio, which the new Criminal Procedure Act retained from the old, is inadequate for the police and prosecutorial part of the process, which in turn leads to procedural complications, and even to budgetary implications, where some courts consider that funds for the costs of the procedure led by the prosecutor do not have to be allocated from their budget. The system is completely dysfunctional in terms of legal remedies, because no funds are allocated in the budget of the Appellate courts. Another significant problem associated with the use of legal remedies in the system are two points presented by defense attorneys which indicate the obvious corruption in the system and which are in some way connected to some extent. In fact, some defense attorneys claim that the bond between the judges and defense attorneys, who they favor ex officio, leads to the fact that they, the attorneys, appeal to their judgments less. This is supposedly particularly true in cases of trial in absence where the defense attorneys ex officio allegedly never complain, and, according to some allegations, are not even present at the hearing, although it is stated in the minutes of the main hearing. In these cases there are no witnesses to confirm whether the defense attorney was indeed present, and whether and how he/she defended the accused in his/her absence. These points are certainly serious, but can be tested by examining the cases and by detailed research, for what we had no opportunities.

The system of legal aid to the poor is poorly regulated and therefore significantly lags behind the general system of free legal aid which is organized using clear criteria but which does not apply to criminal proceedings. There is general dissatisfaction with the overall weak implementation of the system and with the amount allocated for these purposes by the state. Regarding lawyers' competencies, in certain cases, the law still requires that in more serious cases lawyers can represent a client only if they have certain experience (which is a precondition in the region more and more often). Unlike judges and prosecutors only a certain percentage of lawyers were involved in training on the implementation of the new CPC. Anyway, general continuous training is less present with lawyers and a significant percentage of them are not included. The problems are organizational and financial in nature, since the training of lawyers organized by the Bar Association is financed by the funds irregularly received from the OSCE and some foreign embassies. The need for training increases due to the large number of major reforms to the criminal legislation and the simple reason that lawyers are trained by a completely different model of criminal procedure, the fact that other important innovations have been introduced, such as the possibility for settlement, mediation, a new system of determining sanctions and the like.

By law, the court is explicitly authorized to monitor the quality of defense and should react at its own initiative or at the defendant's initiative if the defense attorney provides low or week quality of engagement. It also implies that they should notify the Bar Association which is authorized to conduct a disciplinary procedure. However, despite numerous complaints and criticism of both the overall system and the specific engagement of individual defense attorneys, such cases can neither be found in the annals and documents of the Bar Association nor there has been any disciplinary proceedings despite the unconscientiously defense attorneys. Namely, there are a relatively large number of disciplinary proceedings against defense attorneys, but none of them is about the quality of the service provided by the ex officio defense attorneys.

Policy Proposal

Despite the fact that Macedonia mostly satisfies international standards for the protection of human rights in legislation, there is significant lack of the implementation of these provisions. This creates the situation in which defendants' rights are jeopardized as well as the whole ex-officio defense system. The obvious complexity of the issue requires whole set of policy measures which should be done in order to improve the ex-officio defense system in Macedonia. The measures should cover all necessary aspects of the system and fulfill the gaps in the procedure and practice. The most important for the people who are using the system is that right to the fair trial is respected in accordance to international standards, particularly these set by European Court for Human Rights. That requires full respect the rights of the ex-officio lawyers to be paid and treated in fair way.

The existing practice in Macedonia is burden with absence of clear rules for appointment of the ex-officio lawyers, non-equal treatment of the lawyers, serious lack of the lawyers' capacity and dedication and variety of practical solutions which are different from court to court. The non-equal practice creates fertile ground for corruption and ruins the whole system. The practical consequence is jeopardizing the right to the fair trial. There are very few cases that legal support is provided for people without means which clearly shows that people are not informed or familiar with their rights. This fact deepens the gap in the society and put the poor people in non-equal position in front of the law. The appointment of the lawyers, including the lists and all other components should be responsibility of the lawyers' chamber. This body needs further capacity building and more important role in the process. The selection criteria need to be very strictly prescribed and respected. The system which provides the fair treatment of the lawyers is not important only for the lawyers themselves but also for the rights of the accused. The accused needs to have possibility to be represented in front of the court by the lawyers who are selected in fair process and not on the basis of corruption. The corrupted system produces the lower level of quality and seriously endangered rights of the persons which are part of court proceedings. It also ruins the whole system of rule of law and human rights protection in the country. The cooperation of the courts is absolutely necessary for the reform of appointment system and the courts should be sanctioned in all cases when the chamber' list of ex-officio lawyers is not respected.

It is the unquestionable right of all people to choose the most qualified lawyer who can represent him/her in front of the court. The fact that someone is not in the position (from various reasons) to pay the lawyer should not mean that the quality of the service will be lower or not equal with the one who can pay the lawyer. Chamber should install the software which could track all the ex-officio lawyers, including number of cases, track records, successfulness and all other relevant data. The software could provide randomness in the appointment of the layers. The accurate data in the software provides the opportunity for all defendants to have full overview of the possible ex-officio lawyers and to choose freely on the basis of clear evidences of results. This also requires necessary changes in Criminal Procedure Code in order to meet standards from the practice of European Court of Human Rights. The lawyers' chamber should adopt rules and procedures which will prescribe whole procedure and all important steps as well as rights and obligation of the lawyers.

For their work, lawyers need to be adequately paid. The right system of lawyers' fees is important for exercising the right on fair trial. Existing practice in Macedonia is not consistent and there is a lack of motivation among lawyers to accept ex-officio defense cases. Payments could be provided several times during the proceedings. The present situation which is characterized by late payments and insufficient means for this purpose could seriously jeopardize the rights of the defendant and influence the quality of the provided services. State is obliged to secure the budget for ex-officio defense and this cannot depend on financial situation in the court nor vary from the place to place.

Training and skill improvements for the ex-officio lawyers are important part of the reform of the whole system. Lawyers with the lack of the capacities could make serious damage for the accused and significantly jeopardize the substance of the rights of the accused. New laws and procedures and implementation of the best practice of European Court for Human Rights, as well as implementation of the EU recommendations makes this process even more important. It is crucial for the fair trials that both sides, prosecution and defense, are equally capable for the process. The whole system of capacity building for the ex-officio lawyers should be responsibility of lawyers' chamber. Chamber should organize the trainings and other forms of education but also keep the records on all the lawyers. These records requires accurate data on specific knowledge and skills of the lawyers, experience in special proceedings as well as clear evaluation results for all participants in education process. The disciplinary proceedings against the lawyers have to be notified in their dossiers. Trainings should be more specialized and minimum of the lawyers' capacities should be prescribed by the rule book of the chamber.

Policy Recommendations

In order to achieve all the results from the paper, following practical steps should be done:

- New regulation within the chamber with all rules and procedures for ex-officio lawyers' appointments;
- Unification of the rules for appointment of the ex-officio lawyers in all courts;
- Update of the ex-officio lawyers' lists in chamber at least once in the year;
- Installing the software which could track all the ex-officio lawyers;
- Sanctions for the courts which are not respecting the chamber list of ex-officio lawyers;
- Unified tariff for all legal procedures with clear differences based on objective criteria;
- Changing the practice of payment of ex-officio lawyers;
- Regular payments in prescribed terms without delay;
- Separate budgets in the courts for ex-officio defense' payments;
- Full responsibility of Chamber over the education and tracking the records of ex-officio lawyers;
- Inclusion of the disciplinary proceedings against the lawyers into their dossiers;
- Changing the Law on free legal aid in order to provide legal aid for the people faced with criminal charges;
- Raised awareness among general public on the right to the ex-officio lawyer in cases when the accused has no sufficient means for legal services.

ENHANCING THE PROTECTION OF RIGHTS OF ACCUSED IN SERBIA

Executive Summary

The Policy Paper has the intention to offer the best possible solution for the reform of the ex-officio defense system in Serbia. All the facts and evidence base is taken from the document *The Research on the effectiveness of the legal protection system of accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia,* which was created by the Helsinki Committee for Human Rights in Republika Srpska in January 2016 under the program "Balkans regional rule of law network (BRRLN)". The policy recommendations from the document are referring to several key topics identified by the stakeholders in all five countries which are subject of research. These topics are: appointment of ex-officio lawyers, payment to the ex-officio lawyers and competence of the ex-officio lawyers. Each of these topics is important for reform of the whole system and for securing guarantees for people who are accused and need legal support. The Paper proposes solution in accordance with the wide consultation process conducted in Serbia organized by CHRIS network. The proposed solution requires some legislative changes but far more excessive changes in existing practice in ex-officio defense system in Serbia.

Introduction

Research on the effectiveness of the legal protection system of the accused in the five countries in the region was conducted within the project "Enhancing the protection of the rights of the accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia". This project has been implemented by the Helsinki Committee for Human Rights in Republika Srpska in cooperation with partner organizations in the region with the aim to contribute to reinforcing the system of legal protection of the accused in the five countries in the region. The starting point for the realization of this research is the document *Comparative analysis on the criminal defense advocacy in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia,* which was created in February 2014 under the program "Balkans regional rule of law network (BRRLN)". Pursuance of analysis was used to determine how the establishing of a regional network of defense lawyers can contribute to the establishment of a strong, independent and effective advocacy in criminal defense. The evidence base for this paper was this Comparative analysis.

The results of performed comparative analysis on the criminal defense advocacy in five countries in the region and the work of the members of the expert work groups, which discussed problems in the functioning of the criminal defense, showed that all five countries in the region are facing serious challenges in ensuring the quality of access to justice for all citizens. In accordance with the recommendations of the above mentioned analysis, it is necessary to identify the most important issues affecting the establishment and operation of a transparent system of ex officio defense - particularly in the areas of assigning counsel ex officio determination and payment of fees to lawyers involved, competence assigned to the lawyers necessary to provide effective defenses by officio to accused persons and possibilities for setting up alternative models in ex officio defense.

In accordance with the provisions of the criminal law in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia free legal assistance is provided to all persons accused of certain crimes that are not able to pay for a lawyer. However, experience so far has shown that all five countries are facing problems of law enforcement in practice, and ensuring adequate access to justice for all citizens. As the most important problems in providing adequate defense ex officio for accused persons is mostly referred to: the lack of transparency in the appointment of lawyers by ex officio, inadequate compensation for appointed lawyers, as well as their competence in providing defense for the accused.

The subject of the research is to evaluate the existing legislation and practice in the provision of defense by ex officio in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia, with reference to existing international standards and practices in this area. Therefore, the focus of research will be the manner of appointment, payment and competency of lawyers, who provide the defense for the accused by ex officio. Bearing in mind that members of minority/vulnerable groups often face problems in exercising their right to counsel and adequate representation in criminal cases, a special segment of the research will be devoted to these issues. The aim of the research is to identify the most important obstacles and challenges to the establishment of a transparent and efficient system of ex officio defense in accordance with national and international standards in all five states, and define recommendations for improving the existing defense system of ex officio in the region in order to improve the quality of representation of accused persons. The basic premise is that the reforms implemented in the field of criminal law in all five countries in the region have not achieved the expected results, and that there are certain problems in the functioning of the defense system of ex officio that significantly impair its efficiency which affects the provision of effective defense to defendants in criminal proceedings.

Problem description

Courts in Serbia have been reformed twice in the recent past – the first time in 2010 and the second time in 2013 by amendments to the Law on Court Organization. Although the organization of the court system in Serbia is relatively new, numerous national and international organizations reported that the criteria for the for determining the number and location of the courts was not transparent as well as that files and data could be lost in the case management system during the transfer process. There were several unsuccessful attempts in order to replace the 2001 Criminal Procedure Code. During the reforming process several different versions of this document were created, but never entered in the force. The new Criminal Procedure Code was implemented in the stages and brought a number of changes–the largest being prosecutor-led instead of court-led investigation and adversarial instead of inquisitorial main hearings. The role of parties has also changed that now take a more active role during proceedings, conduct investigations, collect evidence, and cross-examine witnesses. In addition, the Criminal Procedure Code was also amending several times in the recent years.

According to the criminal law, the defendant is entitled to be informed in the shortest possible time, and always before the first interrogation, in detail and in a language he understands, about the charges against him, the nature and grounds of the accusation, as well as that everything he says may be used as evidence in proceedings. The defendant is obliged to have a defense counsel in the following situations: from the moment of first

interrogation to the final conclusion of proceedings if the defendant is mute, deaf, blind, or otherwise incapable of conducting his own defense; from the moment of first interrogation to the final conclusion of proceedings; if the proceedings concern an offense punishable by a term of imprisonment of eight years or more; from the moment of deprivation of liberty if the suspect or defendant is deprived of liberty or prohibited from leaving his or her home; if the defendant is being tried in absentia or has been removed from the courtroom for disturbing the proceedings; if proceedings for ordering compulsory psychiatric treatment are being conducted; or from the beginning of plea negotiation proceedings. One or several defense counsel may be chosen and authorized with a power of attorney by the defendant or his legal representative.

In the case of mandatory defense, when defense counsel is not chosen, the defendant is left without a defense counsel during the criminal proceedings or defendant does not select another defense counsel, the public prosecutor or the president of the court before which the proceedings are being conducted shall issue a ruling appointing a court appointed defense counsel, according to the order on the list of attorneys provided by the competent Bar Association. The defense counsel who is appointed by the court may seek his recusal only on justifiable grounds. The president of the trial panel, the trial panel or an individual judge, upon a proposal of the public prosecutor or ex officio, decides on motions to relieve the defense counsel of duty when compiling the list of attorneys the Bar Association is required to take into account the fact that the practical or professional work of an attorney in the area of criminal law provides a foundation for an assumption that the defense will be effective. The list of available defense counsels is posted on the web pages as well as the notice boards of the relevant Bar Association.

If the indigent cannot afford to pay the costs of the defense because of his/her financial status, a defense counsel must be appointed at the defendant's request if the criminal proceedings are being conducted in connection with an offense punishable by a term of imprisonment of three years or more, or if reasons of fairness so demand. As response to the defendant request, the preliminary proceedings judge, president of the trial panel, or individual judge the defense council is appointed by the president of the court before which the proceedings are being conducted according to the list of advocates provided by order on the roster of attorneys provided by the relevant Bar Association. The costs of defense in this case shall be borne from the budget of the court before which the proceedings are being conducted. The Law on the Legal Aid in Serbia has not been adopted yet. There are no state-organized legal aid agencies currently operating in Serbia, which forces the indigent defendants to turn to lawyers appointed ex officio in cases where defense is mandatory and they cannot pay for it themselves. In order to ensure that indigent defendants are provided with defense counsel, the Bar Association cooperates with relevant institutional body by providing the courts with a list of defense counsels who are willing to be appointed for the ex officio defense. However, professional practice experience indicate that judges and prosecutors are hesitant to appoint counsel for indigent except in cases where it is required by law, primarily in cases where the defendant is facing a sentence of eight years or more and is deprived of liberty.

Lawyers appointed ex-officio by the courts are generally paid 50% of their usual tariff. Bearing in mind that ex officio defense requires large budget expenditure the courts have a

significant backlog of debt owed to lawyers who had represented indigent defendants. This situation could affect quality of representation in terms that lawyer could not be in position to provide indigent defendants with the same quality of defense as the defendant who has financial resources to pay for defense. There are no clearly defined rules of procedure that would regulate the assignment of ex officio defense attorneys, nor the criteria that lawyers must meet in order to be considered capable of providing high-quality and efficient defense to their clients. Thus, the method of assignment of ex officio defense attorneys leads to a very serious problem in practice. Namely, the under-regulated procedure for assignment of ex officio attorneys makes room for different types of manipulation, as well as numerous opportunities for corrupt behavior, since the assignment of ex officio attorneys is not performed evenly and fairly. In practice, some lawyers benefit from the insufficiently defined rules and procedures for assignment of ex officio defense attorneys, because this allows them to keep "privileges" acquired in the process of assignment of the ex officio defense attorneys. On the other hand, in practice, complaints of detained/accused people as to the quality of the performance of ex officio defense attorneys, who try to convince them very often to confess the criminal act in order to complete the procedure as soon as possible, have become very frequent.

One of the many problems in the assignment of ex officio defense attorneys is the fact that the assignment of lawyers from a unique list is not centralized, but they are also assigned by the police, Prosecutor's office and the Court. Earlier, there was a phone service in the premises of the Bar Association of Belgrade. This service would respond to the public authorities' requests for ex officio defense attorneys 24 hours a day. Although existence of this service provided the respect of the list order in assignment of ex officio defense attorneys, a certain number of prosecutors and Court Presidents refused this way of functioning of ex officio defense attorneys. As an explanation of the negative attitude towards this way of assignment of defense attorneys they specified that neither Criminal Procedure Act nor the by-laws obligate them to act this way. In cases in which the ex officio defense attorneys are assigned ad-hoc in insufficiently transparent procedures, it can be expected that ex officio defense attorneys will be assigned "based on their friendship" with "influential people". This can be concluded from the experience and practice where only several names appear in cases of assigned ex officio defense attorneys, whilst on the other hand, there are many lawyers with significant practice experience in the field of the Criminal Law, who have never been invited to defend someone ex officio. Equally, the number of young lawyers whose profession is advocacy is increasing. They think that before they become lawyers, they have to spend some time in court or prosecutor’s office in order to make some acquaintances and connections necessary for a successful practice of law. Consequently, young lawyers are deprived of possibility to participate equally in the assignment of ex officio defense lawyers. This often forces them to spend part of their career outside the advocacy, to acquire certain knowledge and experience in order to be competitive to other colleagues.

In all criminal proceedings, including those for the most serious crimes, ex officio defense attorneys are entitled to 50% of the amount fixed by the attorney tariff. Accordingly, it is disputable to what extent the lawyers are motivated to work, especially if one adds the irregular payment of financial resources to lawyers by the state. Afore-mentioned factors can indirectly affect the quality of defense, and therefore earning the rights to a fair trial and equality of all citizens before the law. Due to the lack of funds for payments of defense services, a number of lawyers claim significant sums of money from the state, on the basis of

provided ex officio defense. Also, these lawyers often face the problem of debt repayment to the state for taxes and contributions. As a solution to the existing problem, it is proposed to carry out mutual compensation claims. However, it was not possible to solve the problem in this way, because the settlement of claims with the state is allowed only in cases where the state claims the taxpayer the amount twice as high as the amount of the state's debt to the taxpayer. Also, another circumstance which de-motivates lawyers to accept ex officio defense is the fact that their claims from the state, based on ex officio defense, are not interest-bearing, while the interests on the debts lawyers have towards the state, based on tax claims, are calculated and forcibly achieved.

As one of the possible solutions to the problem, representatives of the Ministry of Justice of Serbia proposed the introduction of "state lawyers" who would, instead of 50% reduced tariffs for the provision of official defense receive a fixed monthly compensation / salary. According to this proposal, the Ministry of Justice of Serbia would determine the criteria for the selection and number of required lawyers, according to the number of persons who may be in need of ex officio defense. However, this concept of "nationalization of advocacy" did not meet with the approval of the majority of lawyers who believe that advocacy, as an independent profession, is incompatible by its nature with the civil service. The Bar Association is, when drawing up a list, obliged to take into account the fact that practical and professional work of lawyers in criminal law provides grounds for assuming that the defense will be effective. On the basis of this provision, the legal obligation of the Bar Association is to take the necessary action to ensure that the list of ex officio attorneys is made of the attorneys on the basis of the entire practical or professional work in the field of criminal law and it can be assumed that the offered defense is professional and effective. Also, lawyers are obliged to improve their knowledge and skills on permanent basis.

Having in mind the prescribed regulations we wonder on the basis of which criteria and with which mechanisms is it possible to classify lawyers into those who can demonstrate effective defense and those who are not able to do so. If the only criterion for providing an effective defense is internship carried out in the legal profession, this does not mean that the length of the practice in the legal profession automatically means experience in a particular area of law. Practical experience suggests that on the list of defense attorneys ex officio there is a large number of lawyers with no experience in criminal proceedings, and their official defense mainly serves as a source for generating additional revenue. Also, the fact that the list includes people with significant experience in the field of criminal law cannot be the basis for the assumption that the defense will be effective. Legal provisions prescribe that the Bar Association shall establish a system that will provide opportunities to all, if they want, to educate themselves for providing effective defense if they receive appropriate training in accordance with the obligations of the professional training and program which Bar Association provides. So, the Bar Association is obliged to undertake certain activities in order to check whether the list of assigned defense attorneys ex officio contains lawyers whose practical/professional work in the field of criminal law gives reason for the assumption that the given defense will be effective. The Bar Association is obliged to organize training in order to enable lawyers to provide effective defense. In accordance to that, it is necessary to provide continuous education of lawyers in order for them to be able to provide effective defense, as well as opportunities to check their experience based on the determined criteria. In this way lawyers who in general do not deal with the criminal law

could not be found on the lists with defense attorneys ex officio, while at the same time this would give all lawyers, if they want, the opportunity to educate themselves for providing effective defense. Practical experience indicates that a large number of procedures end at the first hearing, as the defendants generally admit criminal offense charged against them advised by/with the consent of the assigned defense attorneys, even when there is no other evidence of the defendant committing the criminal offense. In accordance to that, there are a large number of judgments issued solely on the basis of the defendants admitting the offense, which can lead to the assumption that the defense attorneys are associates of the proceeding or that they participate in the "repair" of the Justice Statistics.

Policy Proposal

The most obvious issue in the matter of protection of the rights of accused is appointment of ex-officio lawyers. The existing practice allows significant level of corruption and seriously jeopardizes the rights of accused. The issue requires public debate and full awareness of all stakeholders. There is no simple solution for the complex issue of ex-officio defense system in Serbia. The issue requires whole set of measures and changes of practice which will be conduct by all relevant stakeholders in the system. Official procedures are not clear and allow significant space for misuses and corruption. Even though Lawyers' chamber plays important role in Serbian legal system and showed the strength in several occasions its position in this matter is still not on adequate level. Without strong and independent Lawyers' chamber it is hard to set up the whole system and provide necessary protection of human rights of defendants.

The most important part of the solution should be strengthening the role of Lawyers' chamber. On the first place, they need to update the list of ex-officio lawyers on more frequent base (several times per year). Chambers should be integral part of the process and their role is very important in securing the just system of appointment. The system which provides the fair treatment of the lawyers is not important only for the lawyers themselves but also for the rights of the accused. The accused needs to have possibility to be represented in front of the court by the lawyers who are selected in fair process and not on the basis of corruption. The corrupted system produces the lower level of quality and seriously endangered rights of the persons which are part of court proceedings. It also ruins the whole system of rule of law and human rights protection in the country. The list of the Lawyers' chamber should be for the whole city or region covered by the chamber. The existing solution allows courts, police and prosecutors to use the list without any criteria and without track records. That provides situation that some of the lawyers have more than 100 cases per month while others have none. The police and prosecutors are fully aware that some of the lawyers are more willing to cooperate with them and they are often chosen to be ex-officio defenders.

The chambers should install the software which could track all the ex-officio lawyers, including number of cases, track records, successfulness and all other relevant data. The software could provide randomness in the appointment of the layers. The accurate data in the software provides the opportunity for all defendants to have full overview of the possible ex-officio lawyers and to choose freely on the basis of clear evidences of results. The Lawyers' chamber in Serbia has already started with the implementation of call center which will receive all the requests from the police, prosecutors and courts. On this way, the Chamber could control at least frequency of the ex-officio lawyers and establish if some of

the institutions choose more often specific names from the lawyers' list. In order to improve this area, it is also necessary to change the implementation of lawyers' fees policy. There are a lot of issues and misconducts in existing practice. The majority of these issues could be solved with stricter implementation of the law. The tariff should be very carefully considered. The existing practice which includes payment after the whole process is unacceptable and unfair, bearing in mind the length of the court proceedings in Serbia. Payments could be provided several times during the proceedings. It is unacceptable that state postponed the payments to the lawyers without any kind of interest or other way of compensation.

Training and skill improvements for the ex-officio lawyers are important part of the reform of the whole system. Lawyers with the lack of the capacities could make serious damage for the accused and significantly jeopardize the substance of the rights of the accused. The whole system of capacity building for the ex-officio lawyers should be responsibility of lawyers' chambers in Serbia. Chambers should organize the trainings and other forms of education but also keep the records on all the lawyers. These records requires accurate data on specific knowledge and skills of the lawyers, experience in special proceedings as well as clear evaluation results for all participants in education process. Trainings should be more specialized and minimum of the lawyers' capacities should be prescribed by the rule book of the Chambers.

Policy Recommendations

In order to achieve all the results from the paper, following practical steps should be done:

- Update of the ex-officio lawyers' lists in Chambers;
- Legally obliged agreements with the High judicial council, Prosecutor office and police;
- Installing the software which could track all the ex-officio lawyers;
- Installing the call center in the Chamber which could track all the calls from the state institutions;
- Review of the tariff for all legal procedures;
- Changing the practice of payment of ex-officio lawyers;
- Inclusion of interest or other form of compensation for the lawyers in cases of state' payment delay;
- Full responsibility of Chambers over the education and tracking the records of ex-officio lawyers.

ANNEX 2: SOURCES

- Access to justice, Legal Defence and Legal Aid, Criminal Justice Assessment Toolkit, United Nations, New York, 2006
- Administrative Instruction on Procedures and Height Compensation of Ex-Officio Defense Counsels
- Analysis on the achievement of the reforms for 2012 of the Ministry of Justice and the priorities for 2013, General Directory of Codification the Department of Drafting Legislation, December 27, 2012

- Armenia's Public Defenders Office Assessment and Recommendations for Building Capacity (February 2016)
- Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990)
- CEPEJ report on the European judicial systems, justice effectiveness and quality, CEPEJ Study no. 20, Series 2014 (2012)
- Comparative Analysis of Criminal Defense Advocacy in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia, American Bar Association, February 2014
- Council of Europe, Committee of Ministers, Recommendation No. R(93)1. On Effective Access to the Law and to Justice for the Very Poor, January 8, 1993
- Council of Europe, Committee of Ministers, Recommendation No. R(81) 7. On Measures Facilitating Access to Justice, May 14 1981
- Council of Europe, Committee of Ministers, Resolution 78(8) On Legal Aid, March 1978
- Criminal Justice Act, 18 U.S.C. § 3006A
- Criminal Justice Act Plan for the District of Connecticut, http://www.ctd.uscourts.gov/criminal-justice-act-info (last visited February 26, 2016)
- Criminal Code of the Republic of Albania, http://www.legislationline.org (last visited January 26, 2016)
- Criminal Procedure Code of Bosnia and Herzegovina (Federation of BIH Criminal Procedure Code, Republika Srpska Criminal Procedure Code, District Brcko Criminal Procedure Code), http://www.legislationline.org (last visited January 26, 2016)
- Criminal Procedure Code of Kosovo, http://www.legislationline.org (last visited January 26, 2016)
- Criminal Procedure Code of the Republic of Macedonia, http://www.legislationline.org (last visited January 26, 2016)
- Criminal Procedure Code of the Republic of Serbia http://www.legislationline.org (last visited January 26, 2016)
- DACI Jordan, Country Report on the State of the Independence of the Judiciary in Albania, Organisation for Security and Cooperation in Europe/Office for Democratic Institutions and Human Rights (ODIHR), May 2009
- Effective Defence in Criminal Proceedings in the Republic of Macedonia, Foundation Open Society – Macedonia, Skopje, June 2014
- European Convention for Human Rights and Fundamental Freedoms, http://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited January 22, 2016)
- Fundamental civil and political rights and liberties, Analysis of trials monitored for the period of 01.09.2013 through 30.06.2014, Skopje, July 2014
- IBA International Principles on Conduct for the Legal Profession, Adopted on 28 May 2011 by the International Bar Association
- IBA Standards for the Independence of the Legal profession, Adopted 1990
Instruction No. 02/2014 on Procedures for Compensation of Defence at Public Expenditures, Entry into force 5th 2014
- International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1, International Commission of Jurists, Geneva, 2007
- Joint Order No 1284/3 of the Ministry of Justice and No 212 of the BAR Association On the fees for the remuneration of lawyers providing legal assistance, May 16, 2005
- Kosovo Judicial Counsel, Administrative Instruction on Procedures and Height Compensation of Ex-officio Defense Counsels,

http://www.kgjk-ks.org/repository/docs/Administrative-Instruction-on-procedures-and-Compensation-height-_329154.pdf
- Law on the courts of the Republic of Kosovo, Articles 4-8, adopted, July 24, 2010
- Quality and Accessible Legal Aid in Ukraine Project, Baseline Assessment Report (October 2014)
- Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, Adopted by the Committee of Ministers on 25th October 2000 at the 727th meeting of the Ministers' Deputies
- Report on Legal Aid in Albania, Tirana Legal Aid Society (TLAS), 2012
- The International Covenant on Civil and Political Rights (Article 14), http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
- The Constitution of the Republic of Albania, adopted in November 28, 1998
- The Constitution of Kosovo
- The Constitution of Republic of Macedonia
- The Constitution of the Republic of Serbia
- Thematic Evaluation of Rule of Law, Judicial Reform and Fight against Corruption and Organized Crime in the Western Balkans – Lot 3, Service Contract Ref. No 2010/ 256 638, Final Main Report, Consortium: Berenschot/Imagos, December 2012
- TINTOR Jugolsav, Proposals for Improving Current Ex-officio System, Organisation for Security and Cooperation in Europe, 2015
- UN Basic Principles on Role of Lawyers, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990)
- United States Courts, Criminal Justice Act Guidelines, http://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines (last visited February 26, 2016)