The research on the effectiveness of the legal protection system of the accused in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia

HELSINKI COMMITTEE FOR HUMAN RIGHTS IN REPUBLIKA SRPSKA

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2. INTRODUCTION

Through its participation in the European integration process Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia took over the obligation to adopt the domestic legal systems with the EU legal practice. In order to meet EU standards in the judicial systems of all five countries are going through a long process of reform. The judicial reform in BH started in 2003, while Serbia, Kosovo and Macedonia started their legal reforms in 2013. Albania has yet not introduced a comprehensive reform of the criminal procedure, but has recently introduced changes to the criminal law. 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 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 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 or to clients who are appointed according to a decision of the Chamber of lawyers". 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 payment 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 what harms the profession of lawyers but far more important it harms the rights of accused to be legally properly represented and protected. Although the relevant data indicate that there is 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. At the other hand, 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

[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 wasformed with theaim to improve therule of lawin Albania, Bosniaand Herzegovina, Kosovo, Macedonia and Serbia by introducingmechanismsfor cooperation andexchange ofbest practicesbetweenthe bar associationsin the regionand civil society organizationsdealing withthe judiciary.

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 results of performed comparative analysis on the criminal defense advocacyin five countries in the region 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, 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.

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 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 officioin 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.

[3]Starting from the resultsof the analysisformed a total offiveexpert workinggroup, whichconsisted often members(two membersfrom each of thefivemember statesBRRLNNetwork) -LegalAid andExOfficioDefense; Mediaand PublicAwareness; ContinuingLegalEducation and Training; BarChamberCapacity; Criminal Law. Members of theWorking Groupswere furtherdiscussedpreviously identifiedproblems andchallenges withinthe criminal defensefaced bycountries in the regionand possibilitiesfor overcoming themand improvingthe current situationin this area.

4. METHODOLOGY

Research on the effectiveness of the legal protection of the accused has 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 support of project partners and analysts engaged for the purposes of the successful implementation of these activities. The research methodology is 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.

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;3)competence to provide defense for ex officio.** Method of implementation of this research stems from the aim and objects, and use of appropriate methods and techniques for data collection. During the realization of this research questioning methods are applied in order to collect the necessary data on the basis of statements of the examinees. The quantitative - qualitative content analysis of documents is also used in order to collect necessary data from the secondary sources. Given that there are different legal and cultural environment in Albania, Bosnia and Herzegovina, Kosovo, Macedonia and Serbia a comparative analysis is applied to compare the achievedresults 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 focus groups discussion 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. 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. Analysis of secondary sources of information includes 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]

b) A written survey of target groups (lawyers who can represent the accused persons by 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** is carried out in

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

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 is conducted in Macedonia and Albania in order to verify in practice the data previously collected on the basis of conducted researches in the field of criminal defense. 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", who observe the judicial proceeding before the competent courts. In addition, 32 respondents were female while 23 of them were male. Respondents in Albania have completed in total of 46 questionnaires. Among them, 30 questionnaires were filled by lawyers in Tirana and other local cities in Albania, while 10 questionnaires were filed by prosecutors, judges, and academics. Representatives of the organizations that provide legal aid answered on 6 questionnaires.

c) Thefocus groups conducted in BiH were attended by lawyers who may be representatives of accused persons by ex officio, representatives of bar associations, representatives of civil society organizations that are active in the field of Justice/provide legal aid, 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 reordered and transcribed for later analyses. After transcription, coordinator of the research listened 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. Moderatoraskedthequestionsusingtheguidelinesspecifically developedfor the session. The participantswere mainlyaskedto expresstheir opinions andstatements,to describe theirexperience orto testify about theexperiences of othersin connectionwith thetopic. When analyzing thedata collectedduring the focus group discussions, special attention was paid tothe statementswhichparticipantsuse in order to validate their expressed views and sources of informationwhichthe participants usedto justify theirviews and experienceson the topicof discussion. Realized focus groups with representatives of the target groups provided 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. The research is conducted parallel in Albania, BiH, Kosovo, Macedonia and Serbia in the period of September 2015 - January 2016.

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 of national or international documents access to justice is one of the fundamental principles to the protection of human rights. In order to ensure that obligations imposed by law are properly met all of these documents recognize that a person has a right to legal representation in case when his/her fundamental rights to liberty and life are put at risk. Among the fundamental standards in securing justice of anyone being investigated or charged with a criminal offence *The Universal Declaration on Human Rights* provides the presumption of innocence, the right to be tried without unnecessary delay, the equality before the law, the right on fair and public hearing by an independent tribunal established by law. Also, *The International Covenant on Civil and Political Rights* provides that anyone has right to "defend in person or through legal assistance of own choosing in all stages of criminal proceedings; to be informed of this rights if doesn't have a legal assistance; to have legal assistance assigned to in case where interests of justice so require and without payment if there is no sufficient means to pay for it; to have adequate time and facilities for the preparation of defense; to communicate and cooperate with counsel of own choosing."[5]

According to *International Bar Association* standards the independence of legal profession is one of essential guarantee for the promotion and protection of human rights and it 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 trail, a fundamental right that is recognized by numerous of international human rights instruments. According the *UN Basic Principles on Role of Lawyers "*all persons have equal access to lawyers and that such access is 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] Also, the basic principles listed in this document have determined that the government is responsible to ensure all people that are in custody be 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 person, 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 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,

[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.
[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).

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 law, 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 are often loaded with the large number of cases, trying to focus all their personal capacity to provide effective representation of accused.Also, the effectiveness and quality of representation of accused person can be reduced if defense lawyer has no access to needed resources or sufficient time to investigate and prepare the case, or the prosecution does not provide with the evident that lawyer intends to use in trail in order to prepare a defense. But the legal framework could not protect the rights of the people if they are unaware or do not understand those rights, that can be especially harmful during the criminal investigation and proceedings. With regard to, 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 (TheU.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 awell-developed system thatcontemplates the use ofpublic defenders, community legal aid organizations and private attorneys.Armenia and Ukrainehistorically did not have systems in place for the appointment of independent and effective defense counsel.

In recent years, though, both countries have enacted sweeping 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 who provide representation of indigent defendants in the overwhelming majority of cases, while Ukraine has implemented a free legal aid system, which uses otherwise qualified private attorneys to provide legal aid to indigent defendants.

[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).

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 governmenthave implementedsystems forensuring that indigent defendants have access to counsel. In the federal court system, theCriminal 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 thecircuit 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 asat 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 theSixth 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 achange in the status of supervised release (e.g., revocation or imposition of a new condition);

d) Under arrest, in circumstances whererepresentation 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.

Representationalso 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 indigentdefendant 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.

[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.

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 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 containsnothreshold qualificationsfor attorneys wishing to serve as appointed counsel.Individual district plans require different qualifications and levels of experience.Many but not allmandate thatpanel members 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, andFederal Sentencing Guidelines; and recommendations from judges, prosecutors and/or other defense attorneys.Finally, some districts have implemented mentorship and/or CLE programs and conditionmembership on a CJA panel on participation in those programs. In the District of Connecticut,[11] for example, less experienced attorneys are often admitted to the CJA panel 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 officeare expectedto serve as mentors to probationary panel members. Every attorney on the panel must complete relevant CLEcourses, 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 attorneyswishing 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 Chief Judge of the District with a recommendation, in writing, for approval, denial or admission on a probationary basis**.**

Approved attorneys are admitted to the CJA panel – i.e., the list of eligible attorneys –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 mayremove 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 probationary members should be granted full membership or be removed from the panel, and whether other attorneys should be removed as well. Appointment of CJA panel attorneysas 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

[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.

be appointed to ensure that the accused receives effective representation.For example, a particular attorney may be appointed if she possesses special expertise on the issues involved the case.CJA panel attorneys mayrefuse appointments, but three successive refusals mayconstitute grounds for removal.

Fees and Payment of AppointedCounsel – TheJudicial 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 ahigher amountisnecessary to provide fair compensationand theChief Judge of the relevantCircuit 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 standardizedpayment-request voucher within forty-five days of the disposition of the case. The Clerk's office reviews the formfor completeness, compliance with the guidelines and mathematical accuracy. The presiding judge then review sits for reasonableness.The Chief Judge of the Circuit or his designee conducts the reviewfor 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 defendantsin 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 policiesand budget, as well as employment of attorneys and formal decisionmaking. 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 the 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 thoseattorneys are located in Yerevan;the othersare 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 are generally 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 selectpublic defenders. Attorneys must first pass a written exam, and then an oral interview. After successfully completing the competition, public defenders are hired for a one-year contract.Since2013, the PDO has conducted an annual review for each public defender, examining,*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 ne system, if problems are identified, the public defender will be counseled and given an opportunity to improve. If there is no improvement, then the attorney will receive a negative evaluation, whichmay result in sanctions and the non-renewal of his contract.

Training and Mentorshipof Public Defenders –There is no orientation training for newpublic defenders, but newer attorneysare often paired with more senior lawyers in co-defendant cases.Moreover, since 2014 two former public defenders and one current public defender haveserved as mentors to less experienced public defenders.These attorneys advise mentees, primarily over the telephone and via email, for a three-month period on case strategy and issues in criminal law. The PDO is expanding this program and is also in the process of finalizing a pilot web-based case management system, which will assist mentors and all public defenders in theorganization 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 attorneysretained 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. Anew Criminal Procedure Code ("CPC") was adopted in 2012, 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:engaginglawyers 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 detaineeand 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 therelevant law enforcement agency.[12] Either way, upon verifying a

[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.

detention the FSLACassignsan eligible attorney,whois 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 inthe 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 lawyersin 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, primarilyrelated to the CPC, which FSLA lawyers may participate in on a voluntary basis. CCLAP has also developed guidelines for FSLA lawyersin an effort to share best practices and support on-going training.[13]Finally, CCLAP is making use of social media, moderating 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 unitsare 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 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 – such as 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

[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.

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 CONDECTED RESEARCH

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

Albania, Bosnia and Herzegovina (BiH), Kosovo, Macedonia and Serbia are located on the territory of the Western Balkans, which is political term created by European Union (EU) in order to indicate a new approach towards these countries in the context of the accession process. All countries that are under this analysis have chosen EU membership as its main political goal and have undertaken some reforms needed to fulfill accession criteria and to harmonize the national legislation with the standards of the EU. At present countries in the region are at different levels of 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. Due to this different stages in the EU accession process, there is no clear timeline for them neither to complete previously initiated economic and political reforms nor to enter in the EU.

The countries in the region have undergone the major reforms which significant transformed their economies in the past 20 years. They have experienced transformation toward market-based systems, privatization of inefficient state owned enterprises, rapidly adoption of modern banking systems and the external orientation of their economies. The challenges in economic systems have usually been reflected through high unemployment rate and functioning of the market 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 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 implied difficult diplomatic relations and by extension also affected cooperation and communication among countries in the region.

Independent and efficient judiciary is the crucial component of every democratic state. Because of these reasons the issues of judicial reforms become significant part of the EU accession process. All countries in the region share a number of challenges with respect to their judicial systems. The judiciary was mostly influenced by Romano-Germanic traditions as well as with legacy of forty-year communists/socialists rule. During this period political non-conformism and in performing judicial service as well as independence of judiciary principles were hindered by *higher state interest,* which usually led to political instrumentalisation of the law. Accordingly, improvement of the rule of law became one of the main preconditions for all countries in the region. Besides the independence, efficiency and accountability an essential feature of judicial reforms also became effectiveness, which means that undertaken policies should comply with the normative values of rule of law in order to improve its quality.

In the light of EU accession, the countries in the region (except Albania) have reformed their criminal procedure codes and introduced adversarial or quasi-adversarial

systems modeled on common law instead of the inquisitorial systems thatwere considered as ineffective at protecting defendants' rights. Regarding this, the role of the court and judges in the entire process has significantly changed. The court does not played a major role in conducting the criminal procedure and deterring the evidences, while the judges are required to ensure the procedural fairness of the proceedings, instead of to lead them. Compared to previous period, the new systems provided defendants and their lawyers with an active role in the criminal proceedings. Also, the other instrument based on common law (such as plea bargaining and deferral of prosecution) have 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 the Constitutional Court that is provided outside of judiciary system and guarantees respect for Constitution and has exclusive right of its final interpretation.[15]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 interest. The process of the criminal law reforms 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; adding to the list of cases in which criminal defendants must have a defense advocate.

The Ministry of Justice approved in 2012 amendments to the Law on Advocacy 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 provide for creation of the National School of Advocates (As a body of the National Chamber of Advocates) that will conduct educational trainings in order to prepare advocate-trainees and for practice as well as to help licensed lawyers to maintain and upgrade their professional knowledge and competences through educational trainings. The last amendment to the Criminal Code also predict 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.[16]

*Present legalization:*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 the lawyers presence. The reward for lawyers is determined: by the court or the prosecutor's office, when he is primarily appointed or the person represented does not have the financial possibilities and the legal assistance for him is free

[15] The Constitution of the Republic of Albania, adopted in November 28, 1998, part eight.
[16] The Criminal Code of the Republic of Albania, last amended June 2013

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.[17] The governing council of the BAR association has the following competencies: when required by the court, it appoints a lawyer for the judiciary proceedings; it appoints a lawyer in case abandoned by a lawyer, when the client could not find another one.[18]

*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 act 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".[19] This Order is conditioned by the entry into force with the publication on the Official Gazette, which has not occurred yet. This act has replaced with *Regulation No 2 on the tariffs of maximal reward for legal assistance given by the lawyers of the Ministry of Justice* (1996). This act also provides for the possibility to determine the remuneration with an agreement between parties as well as 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 when 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[20]

Before the legislative changes of 2012, the conduct of the disciplinary process in NCA had specific problems with regard to the malfunctioning of the structures assigned with the examination of 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 violation 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 only regarding this case by the Court of Serious Crimes, claiming that the court appointed advocates had failed to appear at court hearings. The Disciplinary Committee has suspended the license of the first advocate of this case, 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 which mission is to provide primary or secondary legal aid to persons who have the right to benefit legal aid: a) request to be defended by a lawyer in all phases of the

[17]Article 11 of Law 9109, date 17/07/2003, "On the profession of the lawyer in the Republic of Albania,
[18]Article 22 of the Law 9109, date 17/07/2003, "On the profession of the lawyer in the Republic of Albania"
[19]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"
[20] 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.

criminal process, and who because of lack of financial means could not choose a lawyer or who have do not have a lawyer; b) need legal aid in civil or administrative cases but do not have the sufficient means to pay for such legal aid or cases are extremely complex from the procedural or substantial aspect.; c) legal aid is provided to minor during their criminal proceedings. The cases in relation to which legal aid is provided are followed by the State Commission for Legal Aid, which is the institution following implementation of the budget for the granting of legal aid. The State Commission for Legal Aid is functioning within the Ministry of Justice with task to select lawyers and CSOs to grant free of charge legal aid to the categories in need. Primary and secondary legal aid is afforded by the state budget funds, under a separate item in the budget of the State Commission for Legal Aid. 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 is 13,700,000 ALL. From the data obtained by the Commission it results that the funding from the state budget for such legal aid amounts to a figure of 4,180,000 ALL. No additional information may be provided as there is lack of information about the way such financial means are used and how did this Commission work throughout these years. According the CEPEJ report "during2014, 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."[21]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 judicially budget should have with GDP because this ensures the budgetary independence of judiciary as well as the non-interference of the Ministry of Finances through guidelines or laws which limit or reduce this budget.

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

In the arrest and detention stage: Despite the fact that the Constitution guarantees such right for the persons who are subject to such limitation, he 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.

[21]CEPEJ reportonthe European judicial systems, justice effectiveness and quality, CEPEJStudyno. 20,Series 2014 (2012) pg 69.

In the stage of preliminary investigations:In this stage, the possibility for people in difficult economic situation to benefit from free lawyer's assistance is generally functioning. The above quoted legal acts provide for the agency of preliminary investigations (prosecution office) at the court of first instance the legal obligation 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 prosecuting body has the authority to appoint the defense attorney to the defendant who has none.[22] 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 main difference is the authority to appoint a lawyer, which at this stage 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 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. 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 were we think the biggest problems exist in practice. In the initial judgment, including the review of the case by the Appellate Court, 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 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 deliberates that "the provisions of the Constitution and the European Convention on Human Rights defend the interests of the defendant in a process, because it's him/her who will be directly affected by the

[22] The Code of Criminal Procedure, Article 49.

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 (HC 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".[23]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 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.

Quality of defense: There is no unified opinion on this issue. The opinion changes 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 a limited number of defense lawyers exercise their activity, the predominant opinion is that there is no difference between the professional level of defenses rewarded by the defendants themselves or their relatives and the defenses in which the attorneys are 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 big 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 part of the lawyers, mainly those who do not have a great work load as lawyers, show a greater willingness to be included voluntarily in the attorneys' list, where the prosecutor chooses the defense lawyer for each case. 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 their defense.[24]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 the 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 criterion for the concept "lack of sufficient means to pay the lawyer". In these cases the prosecution

[23]Decision No. 23, date October 13, 2005

[24]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.

offices act based only on the statement and request 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[25], 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."[26]

Defendants – minors under trial: This category of persons who need legal assistance receive a special treatment due to the specifics of the group. The Republic of Albania has adhered to a number of Conventions and other international acts which bring obligations regarding the protection of the rights of minors. Since the criminal law recognizes their criminal responsibility (14-18 years), they can be subject of the criminal proceedings. The special protection provided for 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 as a result, the judgment is unconstitutional.[27] The above mentioned provisions of the *Criminal Procedure Code* constitute a guarantee for the application of Article 54 of the Constitution, which provides for a special state protection for children.The studies carried out, especially by the non-profit organizations, have identified a total lack of care to take into consideration the specifics of their defense.

[25]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"
[26]The decision No. 222, date November 4, 2002
[27]The decision No. 13, date June 10, 2005

There is a lack of a special group of lawyers who should undertake the defense of this category of defendants. As a result, the lack of specialization causes the lack of professionalism in this specific defense. As a result, instead of the obligation coming from the 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", the judicial practice is full of paradoxes of arrest and imprisonment of children even for non grave criminal offenses. Obviously, the existence of specialized prosecutors or judges has its negative impact on these indicators, but on the other hand 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 BAR association does not supervise the quality of the legal assistance is well known. This monitoring is not carried out even by other governmental/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.

Individual damaged by a criminal act: This category of people, 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 for this category, to provide legal assistance in cases when they cannot afford the costs of legal assistance.

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 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 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 BiH** is composed of nine judges,[28]and its main duty is to be the interpreter and guardian of the Constitution of BiH. The Parliament of BiH adopted the Law on the Court of BIH (July 3, 2002) which was earlier promulgated by the Office of High Representative in BiH (OHR). The **Court of BiH** was formally established by the Decision of the High Representative (2002), when the first seven judges of the Court were appointed.[29]**The High Judicial and Prosecutorial Council (HJPC)** is a state-level body established by law in 2004 with aim to ensure an independent, impartial and professional judiciary in BiH. This judicial institution is not explicitly written into the constitution, but uses the constitutional provisions to justify its establishment.

[28]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 BiH. The judges selected by the President of the European Court of Human Rights cannot be citizens of BiH or of any neighboring country.
[29]Presently the Court of BiH has 53 judges, and all of them are citizens of BiH. At the beginning the Court had international judges as well.

The Federation of BiH: The **Constitutional Court of the FBiH** is composed of nine judges, which are finally selected and appointed by the High Judicial and Prosecutorial Council (HJPC). This Court decides on the constitutionality of Federal, Cantonal and Municipal regulations and decides on questions which arise under legislation regulating immunity. **The Supreme Court** of 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 High Judicial and Prosecutorial Council. 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 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, 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 ensure unified enforcement of laws. The **Basic Courts** are established for municipalities in the RS and encompasses first instance jurisdiction in criminal and civil cases, as well as jurisdiction in other matters prescribed by the Law.

The Brcko Distric: 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 BiH (started in 2003) has reflected through the adoption of new criminal and criminal procedure codes[30], restructuring of the court and prosecutorial system as well as the establishment of some new judicial institutions. When it comes to criminal law, BiH has introduced the mixed system that contains both inquisitorial and adversarial elements. The process of introduction of new adversarial elements in BH judiciary was accompanied by various difficulties. One of the biggest challenges was the complete removal of investigative judges and transfer of investigative responsibilities to prosecutors. Also, plea bargaining as one of adversarial instruments was introduced in BiH judiciary in order to speed up the proceedings. In the light of these reforms in criminal law,

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

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

The Constitution of Bosnia and Herzegovina as well as the laws of state, two entities, Brcko District, the international law protects the rights ofpersons who are suspected or charged with a crime offence. The rights contained in the European Convention of Human Rights are applied directly to all citizens of BIH and have priority over all other law. In accordance with the administrative organization of the state, there are four Criminal Procedure Codes in effect - BiH Criminal Procedure Code, FBIH Criminal Procedure Code, RSCriminal Procedure Code and District Brcko Criminal Procedure Code. All these documents are substantially similar and provide the same protection of the rights of defendants. "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.[31]

Access to justice for the poor and marginalized persons in BiH is not guaranteed due to fragmented and underdeveloped Free Legal Aid system within the country as well as the lack of harmonized legislation at the state level.[32]The free legal aid agencies in the Republika Srpska and Federation of BiH primarily provide legal aid in civil matters, while in some cantons of the FBiH legal aid lawyers are included on the list of advocates willing to be appointed to represent indigent defendants. 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. The Free Legal Aid Network (FLAN) in BiH was established by the governmental agencies and civil society organization in order to ensure uniform quality of legal aid services to all citizens in needas well as to improve continuing monitoring of newand modification of existing regulations and the case law. A total of 26 organizations and governmental institutions have signed the agreement to provide free legal aid services to citizens in BiH. 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.[33]

The free legal assistance in BiH is only available in a limited number of jurisdictions. At the different levels of the state, where relevant legalization is in place, governmental free legal aid services are underequipped, understaffed, and lack quality monitoring tools and professional training.[34] Citizens in general are not aware of their rights on the 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 BiH, insufficient funding also hinders the systematic approach to developing legal standardsand the capacities of free legal aid providers in accordance with

[31] 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.

[32]The law on legal aid at the state (BiH) level is still pending. Therefore it is possible to find different solutions, applied in practice, at entity/cantonal level.

[33]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.

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

relevant international standards. Lack of 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. A person suspected or accused of a crime, at his first interrogation, 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; must 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.[35]

According to criminal law proceedings, the suspect or accused personsare 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; or after an indictment has been brought for a criminal offense carrying a sentence of 10 years or more.[36] Also, a defense counsel is mandatory if the suspect or accused person in the case of mandatory defense if the suspect or accused in the case of mandatory defense does not hire a lawyer or have one lawyer for him by the family member, the preliminary proceeding judge, hearing judge, trial judge, or presiding judge must appoint counsel. 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 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/accused/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. Also, the current legislation provides the defense counsel/suspect/accused with possibility to make copies of all files or documents after the indictment has been issued.[37]

Defense for indigent people: In case of mandatory defense when suspect/accused person does not retain a lawyer or have no retained for him by a family member, defense counsel will be appointed by the preliminary proceeding judge, hearing judge, trial judge, or presiding judge. Also, defense counsel must be appointed if the court finds that 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. When appointing the defense lawyer, the

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

[36] 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.

[37] 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.

suspect/accused person will first be asked to choose a defense council from presented list of available lawyers. In case that the suspect/accused does not select his/her counsel the court will appoint the 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. Until the verdict has not become legally bounded, the suspect or accused have the right to defense counsel.[38]

The courts usually issue decisions on the payment of the cost of ex officio lawyers at the end of the trial. If the accused persons can't prove that he/she is in disadvantaged economic position, the courts can request from them to pay for the defense. It has to be noted that the procedure on proving the economic wealth of the accused differs from court to court.[39] But, when appointing the ex officio defense lawyer and by the end of the trial in most cases, it is not checked whether the accused has other property that the one, he/she has stated in the beginning. This can significantly increase the costs for ex officio defense. Further, in many cases, the accused has not registered the property on his/her name what makes it very hard prove that the property belongs to him/her.

***Eligibility criteria for appointing defense lawyer*:** The existingFBiH 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.[40] 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 BiH.

c) Issues related to practical implementation

Appointment of the ex officio lawyers: Although large amounts of money are allocated for funding the ex officio defense in BiH[41] 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 BiH legislation does not guarantee a fair distribution of ex officio defense and it often happens in practice that only 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 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

[38] Bosnia and Herzegovina Criminal Procedure Code, Article 45; Federation of BIH Criminal Procedure Code, Article XX; Republika Srpska Criminal Procedure Code, Article XX; District Brcko CriminalProcedure Code, Article XX.

[39] BeforetheCourt 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.

[40] Federation of BiH Ethics Code rule XI; Republika Srpska Ethics Code rule II

[41] 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 BiH. Available at: https://www.cin.ba/ekstra-profiti-za-odabrane-po-sluzbenoj-duznosti/

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.[42] 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.[43]

[42]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.

[43]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

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 "chosen 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 BiH.

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.[44] 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.[45] 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.

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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

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

[45] 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.

Ex officio lawyers' fees are paid in accordance with the Decision of the Court of BiHas well as the tariffs determined by the relevant Bar Associations.[46]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, BiH 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 BiH 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 BiH 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 BiH. 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 office 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 Federation of BiH are primary responsible for the professional training and development of the lawyers. Regarding this issue, FBiH Bar Association organizes the training sessions for lawyers but primarily

[46]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.

encourages lawyers to attend seminars organized by relevant institutions on changes in law, including the seminar on criminal law organized by the Court of BiH. 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 BiH is established and updatedby the Criminal Defense Support Section (OKO)[47]on a monthly basis.[48]In order to ensure the highest standards of representation of suspect/accused, the Court of BiH 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 FBiH 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 theOKO.The War Crimes Chamber of the Court BiH 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.[49] 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 theWar Crimes Chamberlawyers 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 BiH. Until now, approximately 250 advocates have been certified by OKO to defend war crimes cases before the Court of BiH. In addition, a number of NGOs have cooperated with the Bar Associations in RS and FBiHas 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 BiH, the Law of the Court of BiH has provision for lawyers to be *specially admitted.* Judges will be able to specially admit lawyers from BiH 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.[50]Any application for Special Admission must be made to the Court.

Quality defense of suspect/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.

[47]InaccordancewiththeLawontheCourtofBH, andinorderto 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 BiH No 60/11, Article 41.

[48]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. CurriculumVitae, 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.

[49]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

[50]The Additional Rules of Procedure for Defense Lawyers, Article 3.4 (4).

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.[51]The defense counsel, suspect or accusedhas the right to make copies of all files or documents after the indictment has been issued.But in practice, lawyers involved in defendingsuspect 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 BiH 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.[52] 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.

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 international community in order to determine its permanent status. Kosovo declared itself an independent state in February 2008.[53]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 is consisted of Basic Courts (first-instance courts), Court 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.[54] The **Constitutional Court** is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution. The **Kosovo Judicial Council** (KJC)[55] is an independent institution with 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 to introduction of a *quasi-adversarial* or a *hybrid* adversarial criminal justice system, where the court preserved some of its inquisitorial powers, but prosecutor and defense counsel have got greater roles. The new Criminal Procedure Code

[51] 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.

[52] Official Gazette of BH, 54/05, http://www.sudbih.gov.ba/files/docs/zakoni/en/zakon_o_zastiti_tajnih_podataka_54_05_-_eng.pdf
[53] To date, Kosovo has been recognized by 110 UN member countries, including 23 EU Member States and United States.
[54]Law on the courts of the Republic of Kosovo, Articles 4-8, adopted, July 24, 2010.
[55]The KJC is composed of 13 members; as of early 2014, there are 11 current members and two vacancies.

(entered into force in 2013) has changed the main principles for investigations of serious complicated crimes, and simplifies application of the Criminal Procedure Code to human rights law. Bearing in mind the complexity of the new Criminal 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 defines that lawyers are required to provide legal aid in professional, conscientious and dignified manner in line with current law, statutes and codes.[56] The requirements of 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.[57]

The Training Center within the Kosovo Bar Association was founded with aim to support the establishment of a sustainable system for continuous capacity building of lawyers, advocacy interns and the legal community in Kosovo in the line with international practice and standards. The core competences of the Training Center are: organization of Compulsory Training for Lawyers (CCLE);[58] organization of specialization process for lawyers; ethics exam for lawyers; training for candidates who will undergo Bar Examination; comprehensive training program for interns; monitoring program for female students; eligibility exam for foreign lawyers; training for trainers; research and publications from various fields of interest to the beneficiaries of the professional activities of Kosovo Bar Association.

In Kosovo Constitution is stated that free legal aid will be provided to those who lack financial resources, if such aid is necessary to ensure effective access to justice.[59] The Legal Aid Commission (LAC) established by UNMIK[60] has the taskto provide free legal aid in criminal, civil and administrative mattersto all citizens with economic difficulties (e.g., receiving or eligible to receive social assistance, or whose household income in below the mean income and insufficient for judicial proceedings). The LAC currently has 11 local district offices and there is a mobile legal aid clinic that reaches citizens in need who live outside the respected areas.Besides the civil and administrative cases, the criminal cases are also within the mandate of LAC. These 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 Ethic to provide pro bono legal services to indigent people without remuneration, in practice this is rarely met by most lawyers.

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[56]Kosovo Law on Advocacy, Chapter III, Article 12.

[57]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.

[58] 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.

[59] Kosovo Constitution, Article 31.

[60] 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.

Mandatory defense: According Kosovo Criminal Procedure Code,the defendants have the right to be assisted by a defense counsel during all stages of the criminal proceedings. Before every examination of the suspect or the 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 the defendant that he/she has the right to engage a defense counsel and that a defense counsel can be present during the examination.[61]A defendant must have a defense counsel in the cases of mandatory defense such as: when defendant ismute, deaf, or displays signs of mental disorder or disability and is therefore incapable of effectively defending himself/herself; if the defendant does not have a defense counsel and no one engages a defense counsel on his/her behalf; if the defendant remains without a defense counsel in the course of the proceedings and if he/she fails to obtain another defense counsel; if the indictment has been brought against him/her for a criminal offence punishable by imprisonment of at least ten years or long, and in all cases where an agreement to plead guilty has been negotiated.

In cases of mandatory defense, if defendant does not have a defense counsel the pretrial judge or other competent judge shall appoint ex officio a defense counsel at public expense.A member of the Bar Association of Kosovo may only be engage as defense counsel, but an attorney in training may replace him/her. At the same case in criminal proceedings a defense counsel is not allowed to represent two or more defendants in the same case. The defendant may engage another defense counsel instead of appointed defense counsel, while the appointed defense counsel may seek to be dismissed only justified causes.

Defense for indigent people: If the defendant has insufficient resources to pay for legal assistance and for this reason cannot engage a defense counsel, an independent defense counsel having the experience and competence commensurate with the nature of the offense shall be appointed for the defendant on his or her request and paid from budgetary resources.A defense counsel shall be appointed at public expense for the defendant at his/her request: if there exists no conditions for mandatory defense and the criminal proceedings are being conducted for a criminal offence punishable by imprisonment of eight yearsor more; when in the interest of justicedefense counsel is appointed to the defendant if he/she is financially unable to pay the cost of defense.[62]

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 to the president of the court or competent authority authorization as well as the defendant completely an affidavit listing declaring that defendant cannot afford legal counsel.

***Eligibility criteria for appointing defense lawyer*:** In theprocess of appointment of ex-officio defense, theBar Association provides a list of ex officio lawyers,which is centralized for entire country, to the relevant court. When any person needs a lawyer then he/she calls a centralized hotline and the regional coordinator assigns an advocate from the centralized list.But in practice, the judge and prosecutor are responsible to obtain a

[61]Kosovo Criminal Procedure Code, Chapter V, Article 53.
[62] Kosovo Criminal Procedure Code, Chapter V, Article 58.

goodadvocate to defendant,so that the defendant could have adequate representation.Although it is not in accordance with existing regulations an accepted practice, it happens that some judges and prosecutors select advocates who will only do the bare minimum and will not challenge the judge or prosecutor. Accordingly, certain advocates have reached almost *privileged* status where 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.

In order to response to the accusations that current ex officio system is becoming *privileged* the Bar Association have noticed the police stations, courts, and prosecutor's office that 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 he/she is required by the courts or indigent defendants.In addition, the Bar Association has initiated a pilot program in Prizren through which police, prosecutors or judges can call a central employee of Bar Association, who then contacts licensed advocates in the area[63] to provide legal assistance to the persons in need. In practice, this system has significantly improved the ability of the court personnel in order to secure timely advocates for defendants. It also turned out that advocates arewilling to appear as ex officio defense counsel if they receive a direct call instead of to be placed on the list foe use sometimes in the future.

Reimbursement of attorney fees as quality assurance: Ex officio defense counsel is paid by the Kosovo Judicial Chamberin case when he/she is called to deal with hearing sessions.In case whendefense counselis called upon to defend a suspect/defendant under investigation by the prosecution and the police then they are paid by the Prosecutorial Council. According to the *Administrative Instruction on Procedures and Height Compensation of Ex-officio Defense Counsels*[64], ex-officio defense counsel shall be compensated by public expenses for: a) Review of case files; b) Defense of the defendant; 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*[65]a defense counsel at public expenditures shall be compensated for the: a) Review of the documents; b) Defense of the defendants. In this case, compensation to ex office defense counsel cannot exceed the amount of 500,00Euros per month, which includes their engagements in all prosecutions of the Republic of Kosovo. Currently, payment for ex officio services is difficult to obtain and affects the problem of availability of the defense counsels. If funding for ex officio defense continues to break down there will be continued shortage of defense counsels and the backlog debt will continue to grow within the Kosovo judiciary.

c) Issues related to practical implementation

This part will be further explained and described by the partner organization CLARD that coordinates the activities in Kosovo within this ABA ROLI project.

[63]But not necessarily from the ex officio list of advocates

[64] 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

[65] 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

6.1.4. Macedonia

a) Overview of the Criminal Law Reforms: The judicial system of the Republic of Macedonia is consisted 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; decides on the constitutionality of political parties and citizens' associations; and decides on other constitutional issues[66].

The reforms conducted in Macedonia have changed thecriminal justice systemfrom 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. It could be argued that the model of combined proceedings lasted too long and was insufficient in terms of investigations as well as in the court guaranties of the protection of human rights and fundamental freedoms of suspect/accused or other parts in criminal proceedings

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 by adopting the new Code of Criminal Procedure. 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.

According the results of conducted research in Macedonia[67], the largest number of examinees was partially satisfied and they believe that the implemented reforms have partially improved the situation of the defense, but that the system is still not sufficiently effective. It is interesting that the majority of prosecutors believe that the new Criminal Procedure Code is more favorable for the defense than the previous CPA. The majority of judges and the monitors of non-governmental sector agree with that. Contrary to this, defense attorneys are the most dissatisfied with the new law. They have a large number of

[66]The Constitution of Republic of Macedonia, Articles 109 and 110.

[67] 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".

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. In their comments and through interviews conducted with eight examinees, 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. It is not clear, from the questionnaire, whether the disadvantages to which the defense attorneys complain are the result of legal norms or inconsistencies in implementation, but one gets the impression that the inconsistencies to which defense attorneys complain are more a product of new practices than they are 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 refer to this matter (the law on juvenile justice, the law on police and the like). 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 the 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 (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% believe that the reforms provide a fully effective defense, 13% believe that they do not provide the defense at all, while a very small number of respondents declare that they do not know. (9%). When it comes to issues that affect the establishment of an effective defense the most often mentioned ones are: the lack of judicial control over preliminary procedure;*insufficient time to prepare the defense; the lack of access to records; the defense attorney is not easily accessible; misuse of communication as a new method to speed up the procedure; the shortness of the contact between the defense attorney and the detained persons; the monopoly of the police and prosecutor over the evidence; the expert witness and professional analysis is not easily accessible.*

b) The situation of legal assistance in Macedonia in the context of present justice reform process[68]

Pre-trial proceedings: The right to defense lawyer in criminal proceedings is considered as one of the fundamental rights of defendants in the criminal justice system in Macedonia. According the new Law of Criminal Proceedings (LCP) the role of defense lawyers has been significantly reduced during the process of investigation taken by prosecutor, partially because the fact that they are not provided with possibility to have insight in all prosecutions' documents and the records in the early stage of proceedings.[69] In addition, 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

[68] 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 .
[69] The Law on Criminal Proceedings, Article 49.

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 guaranteeing and facilitating the right to defense attorney in cases when suspects are summoned for questioning at the police station and by the public prosecutor, especially when they are deprived of liberty, arrested or detained. Most probably, this is one of the reasons why suspects in Macedonia almost never have their defense attorney present at the police.Therefore, the new LCP stipulates that instead of informing suspects about practicing attorneys in the Republic of Macedonia, the police, in cooperation with the Bar Association, should present them with a list of on-duty attorneys who are available.

Suspects summoned at the police (or in front of the public prosecutor) are entitled to select an attorney *of their choice,* butLCPanticipates 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. LCP does not stipulate particular period of time, except in cases of deprivation of liberty and police custody, given the narrowly defined deadlines for police custody in duration of 6 to maximum 24 hours.The fact that LCP and other laws and bylaws do not stipulate detailed procedure on implementation of the right to defense attorney at the police and that the police and the public prosecution have not allocated budget funds for this purpose, clearly shows that this right is not going to be easily practiced and exercised.[70]

Right to defense lawyer for indigent: The rights of indigent people to have defense counsel in criminal proceedings, as required by interest of justice and fair trial, is completely dysfunctional in practice. Indigent defendants have faced with difficulties in exercising this right in criminal proceedings and defense services they do receive are inadequate and do not guarantee them justice. Except for mandatory defense, there are practically no cases in which defendants have been appointed attorneys only on the basis of their poverty status. New Law on Criminal Proceedings in Macedonia allows defendants to *indicate* particular defense attorney from the list of attorneys compiled by the local bar association.[71] In practice, this phrases indicate that defendants do not enjoy 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 presented list, because not all attorneys are available or willing to accept ex officio cases.

Mandatory defense[72]: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

[70]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.

[71]LCP, Article75, Paragraph 1

[72]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.

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.

Defense for indigent people: 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.

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 poverty 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 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 the fact whether they will be convicted or their financial situation will improve. When the criminal proceedings are completed, by means of 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 threatens 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 lack of funds, courts reimburse them in different amounts, depending on complexity, number of defendants, etc.[73]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-appointeddefense 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

[73]The average reimbursementsfor 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.

of indigent clients. The fact that courtsreimburses ex officiodefense 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 ofthe 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 ofex 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.

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 whereby the majority of respondents, 54%, are only partially satisfied, 35% are not satisfied. From the questions and answers we can see that there is confusion in practice as to what is mainly considered to be ex officio defense. The largest number of practitioners under this put cases 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 (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 for example in Bitola) 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. All in all, most lawyers complain that the court and the police prefer one and the same defense attorneys which lead to the justified suspicion that we have here some sort of "unfair coalition", where both lawyers and defendants suffer.

As regards the control mechanisms, the greatest number of respondents believe that 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 majority of respondents, 69%, in accordance with the previous paragraphs, consider that the current method of appointing lawyers ex officio is not fair, 22% believe that the current way of appointing, in general, does not provide an effective defense of the accused, while only 9% is generally satisfied by the system. The main reasons for dissatisfaction are: the lack of transparency of procedures, favoring certain lawyers, lawyers' low interest in these cases because of the low fees, unclear criteria regarding financial situation whereby some courts have to consider the financial condition of the family (or household), various documents that confirm the property 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 largest number of respondents, 60%, believe that the current method of assigning lawyers only partially provides an effective defense; 28% consider that an effective defense is not provided at all, and only 12% consider that it is ensured completely. The **reasons** that influence dissatisfaction with the existing system are the same reasons from the issues mentioned previously, with one important addition that 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.

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 the highest number of respondents answered with *I do not know* or *can not answer,* 78%. In our earlier projects, information on who, how many were engaged and in how many cases, the court presidents intentionally do not give answers, but only data on the total number of cases and the total of how much was spent for this purpose.

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 stands. A common one is that lawyers are not satisfied, and this is seen in Comparative law in all countries of Western and Central Europe, when small compensation in these cases is considered a major factor in poor quality of service, in terms of less engagement of attorneys than is the case when they are normally engaged and paid (in other cases) or a stand that mainly younger and not so experienced lawyers, or perhaps lawyers who are not known in their profession, are engaged. Despite these traditional stands, represented by a part of our respondents, there is a stand that despite all this, renowned defense attorneys have been engaged recently in complex and other organized crime cases in which the sum of about 50 Euros per hearing is paid to defense attorneys in trials which last longer and where the sum may be less but the collection is more certain. There are even claims that, in order to gain the money from the court faster, a certain amount, as a form of judicial corruption, is paid somewhere.

Practically half of respondents agreed with this widely represented stand, but to our surprise there is a large number of those who believe that this does not significantly affect the quality of the defense due to the previously mentioned reasons which state that in these cases the fees are significantly lower but their payment is more certain. Of course, there have been some objections that the collection and delays in the payment of these 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. 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 disfunctioning of the system and with the amount allocated for these purposes by the state (Note: we're still waiting for an answer by the Judicial Budget Council on the amount that is to be allocated for this purpose for 2014 and 2015).

Competences of the ex office 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 is a law degree, performed legal training and passed 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). Lawyers are only partially satisfied with the training (60%). 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 is 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 respondents are partially satisfied with the professional development program in the sense that they significantly lag behind in what is understood as an international standard and practice of developed countries. This is particularly true because 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 is 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.

6.1.5. Serbia

a)Overview of the Criminal Law Reforms: Judicial system in Serbia is based on the courts of general and special jurisdiction. Jurisdiction over criminal proceedings belongs to the courts of the general jurisdiction (The Supreme Court of Cassation, appellate courts, higher courts, basic courts) and is shared between four levels. The courts of the 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.[74]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.[75]

[74] 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.*

[75] The Constitution of the Republic of Serbia, Article 167.

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.

The High Judicial Council (HJC)[76] is positioned by Constitution as an independent and autonomous body and guardian of the independence of the courts and judges.[77]This institution has jurisdiction to appoint judges for permanent tenure and to dismiss judges. Also, it proposes to the National Assembly candidates for first election to the position of the judge, the 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 similar composition and competence in prosecutorial organization as the HJC.

There were several unsuccessful attempts in order toreplace 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. Following these changes, there was a shift in material and territorial jurisdiction of 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 physical and legal persons.The autonomy and independence of the profession is maintained through independent work of the legal professionals as well as the right of clients to freely choose their lawyers.[78] According the Code of Ethics, lawyer are required to act independently and autonomous and must base their representation of the clients on the effective law, jurisprudence, practice and international legal standards and obligations. According the existing legislation, lawyer 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

[76] High Judicial Council has 11 members – seven out of them are judges, while one out of the reaming four members must be an advocate.
[77] The Constitution of the Republic of Serbia, Article 153.
[78] The Law of Advocacy of the Republic of Serbia, Article 2.

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.[79] 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 defendantdoes 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 dutyWhen 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 webpages as well as the notice boards of the relevant Bar Association.

Defense for indigent people: 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 councilis 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[80], which forcesthe indigent defendants to turn tolawyersappointed 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 wiling to be appointed for the

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

[80] 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.

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.

Reimbursement of attorney fees: Lawyers appointedex-officio by the courts aregenerally 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 withthe same quality of defense as the defendant who has financial resources to pay for defense.

c) Issues related to practical implementation[81]

Appointment of the ex officio lawyers: 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.[82]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

[81]These findings are based on the results of analyses 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.

[82]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.

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.

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 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.[83]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.

Competences of the ex office lawyers: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.[84] 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 "continually acquire and improve the knowledge and skills necessary for a professional,

[83] The Serbia Ministry of Finances regulation from 2013
[84]Criminal Procedure Act of Serbia, Article 76, Item 2

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]

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.[86] 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 is 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.

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

An impartial and effective judiciary requires that independence of judges and autonomy of prosecutors is assured to avoid political influence on their work, which will be possible with an adequate legal structure, institutional setting and political commitment. Drawing on the previous experience of accession process, the European Union proposed the *new approach* for the 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*

[85]Advocacy Law in Serbia, Article 17
[86]Criminal Procedure Act of Serbia, Article 76, paragraph 2; Advocacy Law in Serbia, Article 17.
[87] The European Union, Chapter 23 of the Acquis Communautaire

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 –there are high levels of corruption, the different solutions work in particular contexts and it is difficult to identify which models are most suitable for individual country,and the countries are at different stages of accession process regarding judicial reform.

In order to harmonize national legislation with the standards of the EU, all countries under this research have undertaken the major reforms needed to fulfill accession criteria.Improvement of the rule of law became one of the main EU preconditions for the countries in the region, but all of themhave been faced with number of the challenges with respect to their judiciary. In accordance to the EU accession requirements, all counties in the region except Albania have reformed their criminal procedure codes and introduced adversarial or quasi-adversarialsystems based on common law instead ofinquisitorial systems thatwere 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 its efficiency and affect the provision of effective defense to defendants in criminal proceedings.

Althoughpersons deprived from liberty have right to defense counsel in criminal proceedings as required by interest of justice, fair trial and fundamental human rights instruments,when it comes to the representation of the 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. Also, members of marginalized and vulnerable groups are not well represented in the bar associations of all five countries due to social barriers preventing these groups from meeting needed requirements to become a lawyer.

The right of defendant to have an effective defense in all these countries is obviously in conflict with the normative solutions that impose the idea that ex officio counsel in most cases represents one of the *procedural presuppositions*that the trail could take place. In most of cases ex officio appointed defense counsel does not have enough time to prepare a quality defense for their clients. However, defense counsel will rather decide that is better to find the best solution for the current situation than to require postponement of the trial in order to prepare the defense because in that case it is not realistic to expect that will be appointed again by the relevant authority. Therefore, it is obvious that some of normative solutions affecting the quality of ex officio defense.

The existing legislation in all countries does not guarantee a fair distribution of ex officio defenses among the counsels. According to previous experiences, to ensure that the selection of lawyers follows the order of the list is hard to provide, whereas any departure from such practice is often explained by a statement that certain ex officio counsel could not be reached.In practice it is common that ex officio counsels are usually appointed *from the halls* based on the *friend-lines* as well as that only few *favored lawyers*have the greatest benefit from providing ex officio defense. Likewise, there are also respectable and prominent lawyers with many years of professional experiencewho never had a single case

[88] The European Commission 2011b: 5.

where they were engaged as ex officio defense lawyers. Therefore, all five countries have faced with the lack of the transparent procedures of appointment of defense counsels, which includes 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 payments of ex officio defense counsels 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 difficult to obtain and in most cases affects the availability of lawyers as well as their motivation to provide adequate representation to all persons in need. Therefore, delay with the payment of the costs incurred by ex officio lawyers may affect the quality of the defense, and thus to have an effect on respecting the rights of suspects or accused person to a fair trialand equality before the law.At the other hand there is a large number of lawyers who state that in the ex officio cases the fees are significantly lower but their payment is more certain. But, there is general dissatisfaction with the overall functioning of the ex officio defensesystem and with the amount allocated for these purposes by the state. 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 officiodefenseand to provide defendants with the same quality of representation in these cases.

An increased number of detected criminal cases require the further development of continuous legal education and training for the lawyers in all countries in order to be able to provide efficient and adequate representation to all citizens. Although thelawyers are obliged to improve their knowledge and professional skills necessary for effective practice of law service, there is no continues program of professional development that are brought by the Bar Associations. Except the Training Center within the Kosovo Bar Association as well as the Criminal Defense Support Section(OKO) in BH[89], there is no other relevant body in other countries in the region that provides continuous capacity building of lawyers or legal professionals in accordance with international obligations and standards. Therefore, the defendants could be provided with a quality defense only if ex officio lawyers have good professional knowledge and practice experience.

7. CONCLUSIONS AND RECOMMENDATIONS

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