



CRIMINAL LAW REFORM ASSESSMENT REPORT



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September 2016

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INTRODUCTION

The Assessment Report presented in this publication was produced as a result of the **Criminal Law Reform Project (CLRP)**, implemented from July 2015 to September 2016, by the Bar Association of Serbia in partnership with the National Chamber of Advocacy of Albania, Bar Association of Federation of Bosnia and Herzegovina (FBiH)¹, Kosovo Bar Association and Macedonia Bar Association, as well as the civil society organization Partners for Democratic Change Serbia.

The Project was supported by a three-year long Balkans Regional Rule of Law Network (BRRLN) Program implemented by the American Bar Association Rule of Law Initiative with the support of the United States Agency for International Development (USAID). In its inception phase, BRRLN conducted a comprehensive analysis of the strengths, independence, and effectiveness of the defense bars in the Western Balkans (the “Region”). The results of this analysis were presented at the initiating conference for the Network, where members determined areas where the Network could focus its efforts to strengthen defense advocacy in the Region. Five priority areas were identified that included: Criminal Law Reform, Legal Aid and Ex Officio Appointment Systems, Training and Education within the Profession, Bar Chamber Capacity and Media Relations and Public Awareness regarding role of lawyers. Within these areas, BRRLN worked towards creating a platform for cooperation of the bars in the Region, that was formalized in March 2015 through the first-ever memorandum of understanding signed by the bar association leaders in Belgrade.

In order to further boost this cooperation and to increase the capacity of its members to carry out reform and advocacy initiatives, BRRLN issued a call for project proposals to address the abovementioned priority areas. Three projects were granted support within this process, one of them being the CLRP, as the first project implemented jointly by the bar associations from the Region. Having in mind the recent reforms of the criminal procedural codes in the Region, and focusing on the rights of the defendant and position of the defense in criminal proceedings, the goal of the CLRP was to identify the most challenging problems common throughout the Region in the criminal law field, and advocate for changes both *de jure* and *de facto*.

The Assessment Report presented in this publication is one of the core results of the CLRP. It addresses the main problems defense advocates and their clients face in criminal proceedings in the Region. It further compares legal frameworks and practices in these systems and refers to international standards in that regard. The Report recommends changes to the respective provisions and practices that would enable

1 There is no unified bar at the state level in Bosnia Herzegovina; instead there are bar chambers for each entity. The Bar Chamber for the Federation participated in this project, but the Bar Chamber for the Republic of Srpska did not. References to the procedure codes of the Republic of Srpska have been included in the international standards section as examples of best practices in the region.

better protection of rights of the accused and provide conditions for guaranteeing the right to a fair trial in criminal proceedings. Therefore, this report represents a useful advocacy tool for the bar chambers in the Region in their future advocacy efforts for reform of criminal proceedings. Ultimately, findings and recommendations provided by this Report should further support the rule of law in the Region.

We believe that the most important results of this Project have exceeded its initial goals and objectives. Through this joint initiative, the bar chambers in the region have both strengthened their mutual cooperation and established cross-regional and multi-professional cooperation and networks with other judicial professions, civil society organizations, media, and other legal and rule of law professionals. Today, these ties seem to be stronger than ever and they have significantly improved the visibility of the bar among various stakeholders and the general public, but also enhanced their capacity to lead and participate in future reform processes in the Region.



II

**RESEARCH
ON THE POSITION
OF DEFENSE IN THE REGION**

From October 2015 to June 2016, within the CLRP an assessment on the position and procedural right of the defense in the Region was conducted, with the following aims:

- to analyze the existing legal framework in the Region relevant for procedural rights of the accused and position of the defense;
- to explore practical problems in implementation of the legal provisions, and the way they influence the rights of the accused;
- to identify the common problems of defense in the Region;
- to discuss examples of good practices in the detected fields, both in the Region and other comparative legal systems;
- to refer to the existing practice of the European Court of Human Rights and its applicability in the national jurisdictions; and
- to propose and initiate changes to the problematic provisions, in line with the best international practices.

The ultimate goal of the Assessment was to provide a platform for joint advocacy efforts of the bar in the Region for enhancement of the legal framework and practices relevant for the position of defense in criminal proceedings. The Assessment was implemented based on the following principles and approaches:

- participatory approach - including target groups and beneficiaries in all stages of the Assessment, from its design to implementation;
- comprehensiveness - covering legal systems of the Region, but also focusing on both national and international legislation and practices;
- methodological pluralism - using various methods of qualitative and quantitative collection and analysis of data;
- multi-stakeholder and multi-professional approach - taking into consideration opinions and experiences of different professional groups, including attorneys, judges and prosecutors;
- promoting good practices - recognizing existing obstacles and problems, and championing good examples and practices with multiplying potential;

- proposing concrete solutions - recommending specific changes to the detected problematic regulations and practices.

Methodology

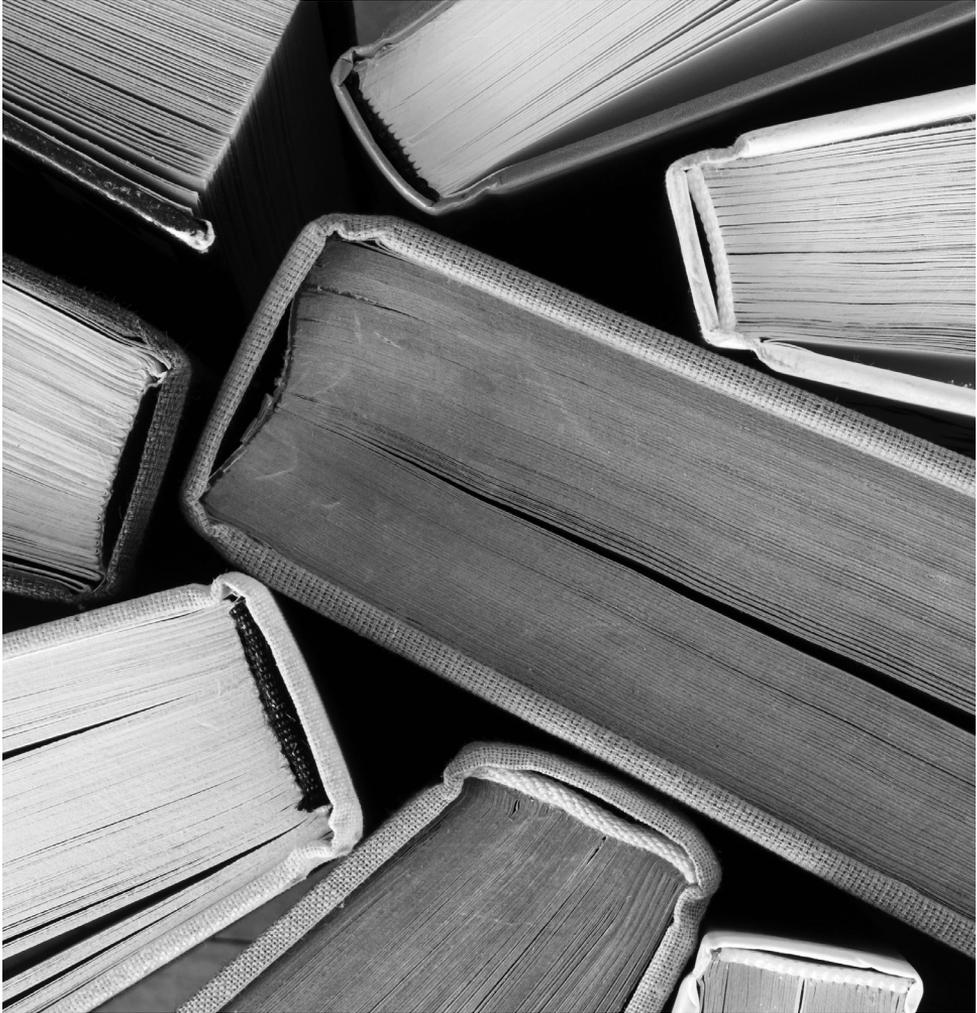
The Assessment methodology consisted of the following:

- Analysis of the normative frameworks for criminal proceedings in the Region, with the focus on procedural rights of the accused, as well as the assessment of the practical problems in implementation of the legal provisions.
- An on-line survey conducted through a questionnaire aimed at assessing whether and to what extent the analyzed provisions are implemented in practice, as well as determining the priority problems and issues for the position of defense in criminal proceedings. 177 defense attorneys from the Region participated in the survey, and their responses are presented in the Annex I to this Report.
- A series of interactive workshops for attorneys, aimed at obtaining input from local practitioners about the legislation and practices in all five systems, recognizing adequate and inadequate normative solutions, highlighting and analyzing examples of good practice that can be replicated and discussing major obstacles for upholding the rights of defense. The workshops were organized in Belgrade, Pristina, Sarajevo, Skopje and Tirana, with 265 attorneys participating.
- Developing the Draft Assessment Report, based on the legal frameworks analysis, results of the survey, experiences and comments shared at the workshops. The Draft Assessment Report was produced by the Research team at a two-day retreat in Pristina, who detected and explained the issues of joint interest and common problems of defense in the Region. The Draft Assessment Report was further used as a baseline for regional and multi-professional discussion on the position of the defense in criminal proceedings.
- Research of comparative practice and international standards, relevant for the detected problematic issues. This research focused on the jurisprudence of the European Court of Human Rights (hereafter: ECtHR) and the U.S. courts, with examples from the selected national jurisdictions.
- Three regional roundtables, organized in Nis (Serbia), Sarajevo (BiH) and Korca (Albania) gathering a total of 88 attorneys, judges and prosecutors. Findings of

the Draft Assessment were presented and discussed at the roundtables, aiming to reach a consensus on the minimum standards relating to the rights of the defendant and the position of the defense in adversarial criminal proceedings. Conclusions and comments expressed at the roundtables are presented in the Annex II of this Report.

The Assessment team

The Assessment was conducted by a group of coordinators and researchers, all representatives of their bar associations. Members of the research team were attorneys Arben Lena, Jordan Daci (National Chamber of Advocacy of Albania), Senad Kreho, Vlado Adamovic, Amila Mujcinovic (Bar Association of Federation of Bosnia and Herzegovina), Dastid Pallaska, Artan Qerkini, Tahir Rrecaj (Kosovo Bar Association), Nikola Dodevski, Deljo Kadiev, Sanja Aleksic (Macedonia Bar Association), Jugoslav Tintor, Aleksandar Popovic and Vladimir Beljanski (Bar Association of Serbia). The Final Report was compiled by Jugoslav Tintor, supported by the ABA ROLI and Partners Serbia staff, including: Elisabeth Givens, Marry Adele Greer, Denisa Fekollari, Sarah Freuden, Jelena Golubovic, Nastasija Stojanovic and Ana Toskic.



III

OVERVIEW OF THE CRIMINAL PROCEDURE REFORMS IN THE REGION

The need for a joint initiative of five bar associations to further reform criminal procedure codes in the Region lies in several facts: the Region shares a similar social background and civil law tradition; they are going through (more or less efficient) social transitions that include comprehensive regulatory reforms; and, new forms of crimes, including organized and cross-border crimes, demand constant cooperation and harmonization of norms and practices among different legal systems.

Most of the justice systems in this region have been transitioning from civil law inquisitorial systems to common law adversarial systems that fundamentally alter the role of the players in the systems. Prosecutors now lead investigations, while judges play a more passive role, and defense lawyers are expected to be the primary protectors of defendants' fundamental rights. Despite all the efforts invested into judicial reform and rule of law programs, the systems still don't function smoothly. Public prosecutor's offices still lack technical capacities and human resources to fully practice their authorities and fulfill their "new" roles, which results in high number of unsolved cases;² coordination of different bodies in implementing the laws is still mostly informal; new notions are not fully, and sometimes not adequately, implemented, while the communication between prosecutors and the police, especially when it comes to exchange of information and operational planning within the investigations, is not fully functional.³ These transitions have resulted in hybrid models that contain both adversarial and inquisitorial elements – which often work against each other and result in a failure to protect fundamental rights to a fair procedure and trial. Citizens are the ones suffering the most from these shortcomings, and problems in fulfilling the rights of defense in criminal proceedings seem to be common throughout the region. Therefore, raising capacities and exchanging information among defense attorneys from the Region is essential to ensure that they are able to uphold their professional responsibilities, adequately represent their clients and jointly advocate for enhanced protection of their human rights. These were all aims of the CLRP, as the first project/initiative implemented jointly by the bars from the Western Balkans.

2 For example, in BiH, in 2013, 46% of criminal complaints and 57% of investigations remained uncompleted at the cantonal level, while at the county level this proportion was 69% and 55%.

3 See Tuzilačka istraga - regionalna krivičnoprocesna zakonodavstva i iskustva u primeni, Misija OEBS u Srbiji, 2014, page 15.



IV

**OVERVIEW OF THE
IDENTIFIED COMMON PROBLEMS
OF DEFENSE IN THE REGION**

1. RIGHT TO BE ADVISED OF HIS RIGHTS IMMEDIATELY AT THE MOMENT OF DEPRIVATION OF LIBERTY

The defendant must have the right to be advised immediately upon being deprived of liberty that he has the right to remain silent, that anything he says may be used as evidence and that he has the right to be questioned in the presence of an attorney of his own choice.

Bar Association of Serbia

Unlike the previous Criminal Procedure Code (CPC),⁴ under which the defendant had to be advised about these rights at the moment of the arrest, the new CPC says that the defendant receives this advice right before the first interrogation,⁵ which leaves a time gap in which the defendant may provide different information to the police and assist them at his own detriment, without previously being advised of his rights. Under Article 29 of the Constitution of the Republic of Serbia, a person deprived of liberty without a decision of the court shall be informed immediately about the right to remain silent and about the right to be questioned only in the presence of a defense counsel he chooses or a defense counsel who will provide legal assistance free of charge if he is unable to pay for it. If the Constitution says that an arrested person must be informed of his rights “immediately” - at the moment of deprivation of liberty, then a law cannot say that this advice should be given to the arrested person at a later moment.

Kosovo Bar Association

The Kosovo CPC contains a provision under which criminal suspects should be informed about their rights immediately after the first interrogation by the prosecution or police.⁶ This means that the CPC does not contain a provision under which suspects should be informed about their rights immediately upon arrest. The Kosovo CPC should be amended so as to adopt the so-called “*Miranda* principle,” i.e., to have suspects advised immediately upon arrest that they have the right to remain silent and that anything they say can be used against them later in the criminal proceedings. The introduction of this rule is necessary, because under the current regulations, the accused may voluntarily plead guilty before finding out that he does not have to do so.

4 Hereafter all criminal procedure codes will be referred to as Criminal Procedure Code or CPC.

5 See Art. 5, para.1, item 1 of the applicable CPC; Art. 68, para.2 and Art.69, para. 1. item 1of the CPC (Official Gazette of the RS No. 72/2011).

6 See Article 125, para.3 of the Kosovo CPC.

Bar Association of Federation of BiH

There is a tremendous need for the introduction of *Miranda*-like protections in BiH which will be modified to fit the needs of the BiH criminal justice system, since they are not being adhered to at present. Article 78 Paragraph 1 of the CPC provides that the suspect in custody shall first be examined on his personal life and history during the first interrogation. Paragraph 2 of that Article provides for the duty to inform the suspect on his rights. Both of these actions take place after the suspect was brought into custody and has been processed by the authority to a certain extent. Such an approach puts the suspect at a significant disadvantage, especially concerning the very important initial defensive steps. Therefore, it is necessary to enact the obligation of immediate provision of the *Miranda* rights to the suspect at the moment of the arrest. This is necessary both from the perspective of the protection of human rights, as well as protecting the integrity of the criminal procedure.

National Chamber of Advocacy of Albania

The right to information about rights as well as the information on the accusation and evidence is provided in Article 28 of the Albanian Constitution as well as in the Criminal Procedure Code. Although the CPC relies on the European Convention on Human Rights (hereafter: ECHR), there is still a need to approximate it with the standards of the ECHR and ECtHR case law, as well as the standards provided in the Directive 2012/13/EU of the European Parliament on the right to information in criminal proceedings. A fully approximated version of the letter of rights implementing the Directive is not yet in place, although some samples of it have been adopted.

Arguments and international standards

The United States Supreme Court has crystallized these protections in the seminal case *Miranda v. Arizona*.⁷ *Miranda* requires that a defendant subject to custodial interrogation must be advised of the right to remain silent, that any statements may be used as evidence against him or her, and of the right to counsel including the right to an attorney provided by the government if he or she cannot afford one. Central to the Court's reasoning in requiring prophylactic warnings was the importance of the right against self-incrimination.⁸ For purposes of applying *Miranda*, subsequent U.S. Supreme Court cases have defined custody as "when a reasonable person would have felt he or she was not at liberty to leave"⁹ and interrogation when police offi-

7 *Miranda v. Arizona*, 384 U.S. 436 (1966).

8 *Id.* at 442.

9 *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

cers “knew or should have known that their words or actions were likely to elicit an incriminating response.”¹⁰ When both tests are met, a suspect is entitled to the *Miranda* advisement and any statements taken in violation of that advisement are inadmissible.

The right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards, which lie at the heart of the notion of a fair procedure under Article 6 of the ECHR.¹¹ How those fundamental rights should be guaranteed is to be determined by each member country but the “method they have chosen [must be] consistent with the requirements of a fair trial.” However, the Convention is designed to “guarantee not rights that are theoretical or illusory but rights that are practical and effective.”¹² While the European Court on Human Rights has not announced a clear *Miranda* style rule, several decisions support the obligation of the state to notify persons suspected of a crime and in custody of their rights against self-incrimination and to consult with a lawyer.¹³

2.1. RIGHT TO KNOW THAT AN INVESTIGATION IS BEING CONDUCTED AND TO BE SERVED THE PROSECUTOR’S WRITTEN ORDER

The defendant must have the right to know whether criminal proceedings are being held against him, as well as the right to have the written order on conducting an investigation served on him without delay after the first activity of the prosecutor. Investigation against unknown persons should be excluded as a possibility.

Bar Association of Serbia

The CPC says that the information on whether an investigation is being made against a person is available only to the court, prosecutor and the police.¹⁴ The prosecutor has the right to decide on his own on the order of undertaking of evidentiary actions in the investigation. He only has the obligation to issue an order on conducting

10 *Rhode Island v. Innis*, 446 U.S. 291 (1980).

11 *Murray v. United Kingdom*, App. No. 18731/91, para. 45, 8 February 1996.

12 *Salduzv. Turkey*, App. No. 36391/02, para. 50, 27 November 2008.

13 *Zaichenko v. Russia*, App. No. 39660/02, para. 52, 18 February 2010 (defendant suspected of theft and questioned at the side of the road entitled to advisement against self-incrimination, but no right to counsel because no significant curtailment of freedom to move); *Panovitz v. Cyprus*, App. No. 4268/04, para. 83, 11 December 2008, (defendant, a minor, not properly advised of right to attorney and against self-incrimination before police questioning); *Brusco v. France*, App. No. 1466/07, 14 October 2010 (defendant in custody as a “witness” – statements taken without advisement of right to remain silent or assistance of attorney violated Article 6 as police interviewed defendant as suspect).

14 See Art. 10, para. 2. and Art. 297, para. 1 of the CPC (Official Gazette of the RS No. 72/2011).

an investigation within 30 days of receiving information about the first evidentiary action undertaken by the police, but does not have the obligation to send the order immediately to the defendant and his counsel.

The CPC permits an investigation against an unidentified perpetrator, which makes it possible for the prosecutor to conduct a complete investigation without the participation of the defendant and his counsel if the prosecutor makes it appear that he has received the identification data about the perpetrator at the end of the investigation.¹⁵

The defense will learn about the investigation only when the prosecutor decides to have the order on conducting an investigation served on the defendant and his counsel, which the prosecutor will have to do only when he decides to undertake the first action that the defendant and his counsel have the right to attend.¹⁶ The prosecutor, however, will be able to examine witnesses in the absence of the defense if he gets the approval of the judge for preliminary proceedings or if he launches an investigation against an unidentified perpetrator and identifies him subsequently, which makes it possible for the prosecutor to strategize with the order in which evidentiary actions will be undertaken in order to conduct the investigation without any participation of the defense for as long as possible.

Macedonia Bar Association

In accordance with Article 292 of the CPC, the public prosecutor enacts an order to conduct an investigation. The suspect does not get a copy of the decision. In order to harmonize the CPC with the jurisprudence of the European Court of Human Rights with regards to the right of defense, it appears necessary for the investigation order to be delivered to the suspect immediately after its enactment. The suspect will then have 8 days in which to file a motion with the criminal trial chamber for review of the grounds and legality of the order.

Kosovo Bar Association

Article 104 of CPC, among others, determines that “[a] stamped copy of the ruling on the investigation shall be sent without delay to the pre-trial judge.” That provision should be altered to require that a stamped copy of the ruling on the investigation is also sent to the defendant. Such a completing amendment would allow the defendant to actively participate in the criminal procedure and to propose the taking of evidence that may go in his favor.

 15 See Art. 6, para.1 and Art. 297, para.2 of the CPC (Official Gazette of the RS No. 72/2011).

16 See Art. 296, para. 2 and Art. 297, para.1 of the CPC (Official Gazette of the RS No. 72/2011).

Bar Association of Federation of BiH

In accordance with Article 35 of the CPC, the prosecutor is authorized to commence investigative activities as soon as he becomes aware of facts that indicate that a certain criminal offense was committed. These activities include the gathering of evidence and communicating with various involved subjects related to a certain suspect. This means that the prosecutor can conduct an extensive investigation regarding an individual without them being aware of their status as a suspect at all. Therefore, it is necessary to amend the CPC to the effect that the target of the investigation is notified of the order as soon as the investigation of a certain criminal offense is steered toward one or more specific persons, in order to adhere to the requirements of the ECtHR and EU directives.

Bar Association of Albania

The Criminal Procedure Code of Albania does not provide the defendant the right to be informed when an investigation is being conducted. Article 279 of CPC allows the investigation to be conducted in secret until the defendant is informed. The prosecutor may also order the maintenance of the secrecy until the end of the investigation. In addition, Article 287 paragraph 2 of the CPC provides that the publication of the registrations shall be prohibited until the suspect is held as a defendant. This rule in relation to Article 34 means that the registration of the name of the person in the register of criminal offence notification has been kept secret until the end of the pre-investigation stage. Indeed, these provisions contradict Article 31 of the Constitution which provides that “[i]n a criminal proceeding, everyone has the right ...to be notified immediately and in detail of the charges against him, of his rights, and to have the possibility created to notify his family or relatives.” It should be understood that a person cannot become a subject of criminal proceedings if no charges against him exist. Moreover, how would the right to defense be fully respected without being notified about the conduct of an investigations and related acts.

Arguments and international standards

The ECtHR has addressed the issue of when Article 6 rights, including the right to be advised of the charges, apply. The Court has held that a person’s status should not depend upon the prosecution’s formal designation, but on whether the person has effectively become a suspect. As stated in *Bandeltov v. Ukraine*, the Court considers a person to acquire the status of a suspect calling for the application of the Article 6 safeguards not when it is formally assigned to him or her, but when the domestic authorities have plausible reasons for suspecting that person’s involvement in a crim-

inal offence.”¹⁷ The opening of an investigative order triggers this standard and the Article 6 requirements to notify regarding the charges should attach at this point.

The EU Directive on the Right to Information is in accord.¹⁸ The Directive requires that information should be given to “suspects or accused persons” about the charges they are suspected of having committed.¹⁹ The Directive treats suspects and accused the same and makes no distinction between formal charging undertaken by the State. Under the Directive, what is critical is that notification should guarantee the suspect or accused the ability to prepare his or her defense and ensure the overall fairness of the proceedings. Recital 27 of the Directive provides: “Persons accused of having committed a criminal offence should be given all the information on the accusation necessary to enable them to prepare their defense and to safeguard the fairness of the proceedings.”

The order on conducting an investigation, which commences the criminal procedure in inquisitorial criminal procedure systems and has been retained in the region despite the shift to adversarial systems, is functionally equivalent to filing a complaint in common law criminal procedure systems. Intentional delays in filing a complaint in order to gain tactical advantage over the defendant are prohibited by the due process clause of the U.S. Constitution.²⁰

Croatia, which has also undergone a transition from inquisitorial to adversarial proceedings,²¹ has addressed this issue by requiring service of the investigative order on

17 *Bandeltov v. Ukraine*, App. No. 23180/06, para. 56, 31 October 2013.

18 EU Directive on Right to Information (2012/13/EU).

19 Article 6 of the EU directive on Right to Information (2012/13/EU) regarding the accusation provides:

“1. Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defense. 2. Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed. 3. Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person. 4. Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings.”

20 *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971).

21 Croatia enacted a new CPC in late 2008, which entered into force on January 1, 2009. The new CPC shifts the Croatian system from a more inquisitorial to a quasi-adversarial system. It provides that State Attorneys, rather than investigative judges, are in charge of conducting the investigation. Investigative judges are now responsible for monitoring human rights and the legality of the procedure, and regulating the relationship between and balancing the rights of defendants and prosecutors, ruling on appeals against detention, and approving special measures of evidence collection, such as tracking, wiretapping and searches.

the defendant. In Croatia, the decision on conducting an investigation is served on the defendant within eight days after its issuance.²² Only if the service of the decision on conducting an investigation would put into danger the life or limb of a person or large-scale property can the prosecutor delay the service of the decision by thirty days at the most, but only in the case of an investigation into specifically listed criminal offenses – those against the state, against armed forces, terrorism and criminal enterprise.²³

A defendant who does not know that there is an investigation against him cannot realize his right to be informed about the grounds of suspicion, right to inspect the case file, and right to propose the implementation of evidentiary actions. A provision with these contents violates the defendant's right to access the court and right to a reasonable deadline. Because of that, any postponement of service of the written order on conducting an investigation is not acceptable.

2.2. RIGHT TO APPEAL TO THE COURT AGAINST THE PROSECUTOR'S ORDER TO CONDUCT AN INVESTIGATION

Defendants must have the right to appeal to the court against the prosecutor's order on conducting an investigation in order to ensure court protection from unlawful and arbitrary prosecution.

Bar Association of Serbia

Criminal proceedings are initiated when the public prosecutor issues an order on conducting an investigation, against which there is no legal remedy.²⁴ Therefore, only the public prosecutor, who launches an investigation without any court control, decides how grounded the initiation of criminal proceedings is, and the investigation can then last for an indefinite period of time. Article 32 of the Constitution says that everyone shall have the right to a public hearing before an independent and impartial tribunal established by the law within a reasonable time, which shall pronounce judgment on their rights and obligations, the grounds for suspicion resulting in initiated proceedings and the accusations brought against them. If the Constitution says that the court has to decide on the grounds for suspicion resulting in initiated proceedings, then it is impermissible for a law to say that the prosecutor alone is to decide on the grounds for suspicion resulting in proceedings initiated by an order against which no judicial remedy is available.

22 Art. 17, para. 1 of the Croatian CPC.

23 Art. 218a, para. 1 of the Croatian CPC.

24 See Art. 7 and Art. 296 of the CPC (Official Gazette of the RS No. 72/2011).

Since the CPC does not prescribe a deadline within which the prosecutor has to complete the investigation, it is clear that criminal proceedings may last indefinitely, and that the court has never decided on the grounds of suspicion on which the order on conducting an investigation that initiated criminal proceedings is based.

Bar Association of Federation of BiH

Under the BiH CPC the prosecutor has a broad range of authority in commencing and conducting investigative proceedings *ex officio*, which is not subject to judicial review. Furthermore, he has at his disposal the services of other institutions and subjects which he is legally authorized to engage into the investigative proceedings. There is no deadline within which the prosecutor has to finalize the investigation. Therefore, the suspect could be exposed to investigative proceedings for an indefinite period of time, without the opportunity to appeal the grounds upon which the investigation itself was commenced. This goes against generally accepted principles of legal security and constitutional guarantees for the right to be heard and to appeal. The prosecutor's decision to conduct an investigation should be subject to judicial review.

National Chamber of Advocacy of Albania

While the Albanian Criminal Procedure Code is mostly a modified version of the Italian Criminal Procedure Code, it lacks the institution of investigating judge which would give to the defense a set of guarantees to use its procedural weapons against the prosecutor's office as well as to provide an effective court control over the investigation.

The initiation of the investigation as a rule means the initiation of the criminal proceedings.²⁵ Without a possibility for the defense to object to the prosecutor's order to conduct an investigation and for the court to assess the merits of a doubt that was the reason to institute criminal proceedings, judicial protection from unlawful and arbitrary prosecution is endangered. According to Article 323 of the CPC, the prosecutor shall decide within 3 months after the registration of the name of the person in the register of notification of criminal offenses, to send the file for trial, or to dismiss the case. However, Article 324 provides that this 3 months limited duration of the investigation can be extended up to 3 additional months by the prosecutor and other additional 3 months duration in case of complex investigation or objective inability to

25 See *Prosecutorial investigation - regional criminal procedure legislation and experiences in application*, OSCE Mission to Serbia Belgrade, 2014, page 24.

conclude them within the extended period. The total duration of pre-trial investigation cannot be longer than 2 years. Nevertheless, in extraordinary cases, the limited duration shall be extended solely with the approval of the Attorney General for another additional period of 1 year with extension of 3 months durations within the limits of the pre-trial detentions.

In practice, very often the prosecutor does not register any name in the register of notification of criminal offenses pretending that the subject of criminal offense is not yet identified. In this way, the prosecutor can investigate for years without any limitation. Such situation should be addressed by having the institute of the investigation judge or by empowering the court to examine the legitimacy of the initiation of such criminal proceedings. Certainly, it should be emphasized that, the observation of this right is closely related to the observation of the fundamental principles of criminal proceedings, such as the right to defense, as well as the right to legal aid, equality of arms in the proceedings, free access to the court and the adversarial and legality principles.²⁶

Arguments and international standards

As discussed in section 2.1 *supra*, the investigative order made by the prosecutor operates like the initial charging document in a fully adversarial system – it initiates the criminal procedure and contains the preliminary charges being brought by the State against the accused. However, there is no independent check on the prosecutor's decision to initiate the criminal procedure and ensure that the charges brought are well-founded. For example, the Fifth Amendment to the U.S. Constitution requires a grand jury to review evidence in serious cases before formal charges may be brought by the prosecutor “[T]he grand jury continues to function as a barrier to reckless or unfounded charges ... Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought by the prosecutor only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance.”²⁷ In many U.S. state jurisdictions, the prosecutor must proceed either by grand jury indictment or a probable cause hearing before a magistrate or judge to establish that a crime has been committed and defendant committed it before continuing with the criminal procedure.²⁸ Both the grand jury and preliminary hearing act as a check on the prosecutor's decision to pursue a case against an accused.

26 Regarding the potential unconstitutional character of this solution, see M. Skulic, G. Ilic, M. Matic Boskovic, *Unapredjenje Zakonika o krivicnom postupku*, OSCE, Mission to Serbia, 2015, page 35.

27 *United States v. Mandujano*, 425 U.S. 564, 571 (1976).

28 See, e.g., California State Constitution, Art. 1 § 14.

Croatia, which has transitioned from inquisitorial to adversarial procedural systems provides that check by giving the defendant the right to appeal an investigative order. After the decision on conducting an investigation is served on the defendant within eight days after its issuance, the defendant has the right to appeal against the decision, and the appeal is decided by the investigating judge within eight days.²⁹ The criminal proceedings begin only once the decision on conducting an investigation becomes final.³⁰ The investigating judge renders a decision within eight days from receiving the appeal. If the judge finds that there are no reasonable grounds for suspicion that the defendant has committed the cited criminal offence, he can uphold the appeal and suspend the order on investigation, either in its full or just its certain items. If the investigative judge fails to decide on the appeal, the prosecutor is authorized to proceed with the investigation.

3.1. RIGHT OF DEFENSE TO INSPECT EVIDENCE BEFORE PRETRIAL DETENTION HEARING

When it comes to the pretrial detention hearing, any evidence available to the prosecution should be handed over to the defense at least 12 hours before the defendant appears before a preliminary procedure judge, to review the prosecution's request for pretrial detention. This is required so that the defense may also prepare for the pretrial detention hearing and be able to properly respond to any evidence and argumentation presented by the prosecution.

Macedonia Bar Association

In practice, the detention hearing usually means just hearing the detention request by the public prosecutor and reading the list of available material evidence. The judge does not really get acquainted with the evidence at all, which makes it difficult to effectively establish the existence of a “reasonable suspicion” that the suspect committed the crime that he or she is accused of, which of course is the basic and main precondition for detaining a person. Additional legal provisions should be introduced in the CPC, thus regulating the rights of the defense and the defendant during the detention hearing in the manner of presentation of any evidence by the prosecution and defense, as well as challenging such evidence before the preliminary procedure judge, with a single goal to evaluate the existence of a “reasonable suspicion” as the basic precondition for detention.

This is further justified by the judge's obligation, pursuant to Article 167, paragraph

29 Art. 218 of the Croatian CPC.

30 Art. 17, para.1 of the Croatian CPC.

2, item 1 of the CPC, to explain in the detention order all the facts and evidence that point to the reasonable suspicion that the defendant has committed the specific crime.

National Chamber of Advocacy of Albania

As discussed more fully in Section 3.2 (*infra*), the defense does not receive discovery or evidence from the prosecutor in advance of the pre-trial detention hearing or during the pre-trial investigative phase generally. The CPC does not provide for any obligation of the prosecution office or the court to provide to the defense a copy of the prosecutor request and a copy of the court file submitted by the prosecution. Moreover, defense counsel is often not appointed or retained in advance of the pre-trial detention hearing. Under these circumstances, the only option for the defense is to refuse to defend the accused or the suspected person without being provided the file as a normal requirement of an effective defense and professional ethics. Nevertheless, in practice after the defense orally objects, the court usually offers the file for on site for a few minutes inspection for the defense, which is then required to almost immediately articulate its arguments. At the same time, since no copy of the prosecutor's request is provided to the defense, the latter will be informed of such request and on specific security measure demanded by the prosecutor just during his oral deliberation. Certainly, such inspection does not ensure an effective defense. In addition, the defense cannot talk in private with the accused or the suspected person before or during the pre-trial detention hearing. Thus, it is necessary that ECtHR's standards set in the case "*Mooren v. Germany*" (as cited in other parts of the report) shall be respected and fully implemented in Albania as a constitutional requirement for the right to due process.

Bar Association of Federation of BiH

Article 47 Paragraph 2 of the BiH CPC provides that "the evidence relevant for the assessment of the legality of detention for the notification of the defense attorney." Instead, it should state "... for the delivery to the defense attorney." The content of the provision currently in force is being abused by the prosecution and the courts by interpreting the term "notification" in a very broad manner. This provision is contrary to Article 6 of the CPC as well as the case law of the ECtHR.

Arguments and international standards

Under the principle of equality of arms, suspects in the early stages of criminal proceedings have the right to access the evidence in the case-file that will allow them to challenge the lawfulness of their detention. The right of an accused or suspected

person to access evidence from the case-file during the pretrial stage of criminal proceedings has been read into the ECHR by the ECtHR, derived from a combination of Articles 5(4) and 6(3)(b) of the Convention, the fundamental principle of equality of arms, and the jurisprudence of the Court.

In *Lamy v. Belgium*,³¹ for example, the Court held that there was a violation of Article 5 where the defense attorney was not able to review the files and gain insight into the documents upon which the decision on the detention was grounded.³² The failure to permit the defense attorney to review the files violated the principle of equality of arms and prevented the procedure from being adversarial in nature. The same position was taken by the Court in *Vermeulen v. Belgium*,³³ among others.

Similarly, in *Shishkov v. Bulgaria*,³⁴ the ECtHR emphasized that criminal proceedings “must always ensure equality of arms between the parties, the prosecutor and the detained person,” and in finding a breach of Article 5(4) explained that “[e]quality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness, in the sense of the Convention, of his client’s detention.”³⁵

In *Garcia Alva v. Germany*,³⁶ the Public Prosecutor’s Office dismissed the lawyer’s request for consultation of the investigation files on the ground that it would endanger the purpose of the investigation.³⁷ The ECtHR explained that the right for suspected or accused persons to access evidence in their case-files is drawn from the right to an adversarial trial as laid down in Article 6. The Court further stated that “both the prosecution and the defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.”³⁸ Therefore, information that is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to a suspect’s lawyer.

The EU Directive of the European Parliament number 2012/13/EU, Article 7 states: “Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the poss-

31 *Lamy v. Belgium*, App. No. 10444/83, 30 March 1989..

32 *Id.* para. 29.

33 *Vermeulen v. Belgium*, App. no. 19075/91, para. 33, 20 February 2006.

34 *Shishkov v. Bulgaria*, App. No. 38822&97, 9 January 2003.

35 *Id.* para. 77.

36 *Garcia Alva v. Germany*, App. no 23541/94, 13 February 2001..

37 *Id.* para. 40.

38 *Id.* para. 39.

ession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers....”

As discussed in more detail below (section 3.2), the practice in U.S. courts, consistent with the need for equality of arms, is to mandate broad and timely disclosure of discovery, both inculpatory and exculpatory to defendants. These rules apply with equal force to the pre-trial detention hearing.

3.2. RIGHT OF THE DEFENSE TO INSPECT THE ENTIRE CASE FILE AND EVIDENCE

The defense attorney must have the right to inspect the entire case file and to inspect all objects serving as evidence.

Bar Association of Serbia

After the first interrogation, the defense attorney has the right to inspect documents and objects serving as evidence. In the realization of this right in practice, the question is whether all documents or just those that may be used as evidence may be inspected. Since this provision does not have a comma after the word “objects,” it is clear that the objects of inspection are all “documents” rather than just “documents serving as evidence.” The prosecutor has been given the possibility to postpone the defense’s right to inspect documents until the time of interrogation of the last suspect,³⁹ which leaves room for manipulation, because the prosecutor decides on the order of evidentiary actions on his own and may bring the defense attorney into a situation in which he will attend the interview of a witness although he had no possibility of inspecting documents before hand, because some of the suspects had not been interrogated yet.

It is necessary to exclude the possibility of postponing the right of the defense to inspect files until the interrogation of the last suspect, because this leaves room for manipulation in practice.

At the moment of the first interrogation, the prosecutor has all the information and evidence, and the defense nearly nothing. The rule under which the contents of official notes received from citizens may not be contained in the criminal complaint has been introduced only to limit the knowledge of the defense attorney before the first interrogation and to make the conditions for the creation of a defense strategy

39 See Art. 303 para. 1 of the CPC (Official Gazette of the RS No. 72/2011).

difficult.⁴⁰ Before the first interrogation, the defense attorney has the right to read only the criminal complaint, record on the crime scene inspection and the finding and opinion of the expert. This incompleteness leaves room for a restrictive interpretation – which is present in practice – that the defense attorney has the right to read only the criminal complaint, and not its attachments. This norm was created at the time when the record of the crime scene inspection and the finding and opinion of the expert represented the only legally valid evidence in the attachment to the criminal complaint and when the defendant was interrogated at the very beginning of the investigation. However, this is no longer the case. The prosecutor in charge of the investigation may undertake numerous evidentiary actions on which a court decision may be based before he interrogates the defendant, but the defendant does not have the right to be informed about the evidentiary actions undertaken before the first interrogation.

Before the first interrogation, the defense attorney must have the right to read the criminal complaint with all its attachments and to be informed about the contents of all evidentiary actions that might have been undertaken before the first interrogation of the defendant.

Macedonia Bar Association

Article 79 of the CPC prescribes that during the criminal procedure, the defense counsel has the right to review the case file and any available evidence, in accordance with the provisions of this Law. The defense counsel has the right to access and to get a copy of all reports and other files related to actions at which the defense had a right to be present that are being kept at the public prosecutor's office.

This provision is not precise, so, in order to make it clearer and provide for equal footing of both parties to the proceedings and the equality of arms, as elements of the right to a fair trial as guaranteed in Article 6 of the ECHR, it should be changed. During the trial, as well as during the pre-investigative procedure, the defense counsel should be allowed to review the case file and any available evidence and get a copy of all reports and other files, except any evidence obtained through the use of the ongoing special investigative means. Besides, the practice is very problematic. With reference to review applications, the Special Public Prosecution sometimes allows the review and sometimes refuses the application stating that the defense will have an opportunity to review when the defendant makes a statement, in spite of the provision stipulated in Article 206, paragraph 1, item 5, stating that, before any examination, the defendant shall be informed and instructed that he/she has the right to review the

40 See Art. 288 para.8 of the CPC (Official Gazette of the RS No. 72/2011).

case files and review the confiscated items. Whenever a review is allowed, the defense is allowed, during the review, to manually note the content of the evidence and not to make use of a transcript for this purpose. In this regard, if, during the investigation, the defense asks for a review and a transcript, the prosecution advises that the transcript will be available for review after the completion of the investigation in accordance with Article 302, paragraph 3 of the Criminal Procedure Code.

The defense needs time to manually note down the content of the evidence. The content of the evidence is important with reference to the effective exercise of the right to a defense. Thus, this approach puts the defense at a disadvantage. On the other hand, it is not clear what the difference between manually noting the content of the evidence down and the possibility to obtain a transcript is, when the defense becomes familiar with the evidence in any case, even in the more complex cases that involve thousands of pages of evidence. This is obstruction of the defense, i.e., it renders the defense inefficient.

Kosovo Bar Association

Generally, the right to the inspection of evidence before the filing of an indictment exists in the Kosovo CPC and is regulated under Article 213 of the CPC. According to this legal solution, the suspect and his counsel have the right to inspect the case file during the investigative stage of the proceedings.

Article 213, paragraph 6 of CPC provides that: “The state prosecutor may refuse to allow the defense to inspect, copy or photograph specific records, books, documents, photographs and other tangible objects in his or her possession, custody or control if there is a sound probability that the inspection, copying or photographing may endanger the purpose of the investigation or the lives or health of people. If the prosecutor does not allow the suspect and his counsel to inspect the case file, they have the right to complain to the judge for preliminary proceedings and to grant the inspection, copying or photocopying. The decision of the judge is final.”

The quoted part of Article 213 paragraph 6 should be changed in a way that allows the defense access to the paperwork of the case file during the investigation stage, otherwise the defense is deprived of the opportunity to provide effective judicial defense according to the standards determined by the European Court of Human Rights.

Bar Association of Federation of BiH

In accordance with Article 47 of the BiH CPC, the defense attorney can only access

the evidence in favor of the suspect (subject to limitations in cases where there is danger that the evidence may be compromised through allowing access to it), and only after the indictment is the defense attorney allowed to review all the files and evidence. This obviously puts the prosecution in a disproportionately more favorable position. In order to undertake an action and make a proposal, the defense attorney must have an insight into the case file.

National Chamber of Advocacy of Albania

During the investigation stage in the CPC “Pre-Trial Investigation phase”, the defense and the defendant have little or no access to documents and evidence. Article 105 of the CPC regulates pre-trial discovery and allows the prosecutor to deem an investigation confidential thereby relieving the prosecution of the obligation to disclose evidence to the defense. There is no possibility to appeal this decision. Nor is there a remedy under Article 110 which outlines motions available to the defense. Prosecutors typically invoke Article 105 or simply fail to provide evidence to the defense. Under either scenario, the defense lacks an adequate remedy to challenge the prosecutor’s action. Article 6 of the Law on Legal Profession gives the defense the right to seek documents from public institutions but does not cover the prosecutor’s case file and Article 335 of the CPC provides a right to evidence but only in the trial phase not before.

Arguments and international standards

Without the right to inspect the entire case file, the right to defense represents *nudumius*. Through an effective realization of this right, the defendant will get an active role and will become the subject of criminal proceedings rather than the “object of the investigation.” The fairness of criminal proceedings will largely depend on this right and the way of its realization.

As three ECtHR judgments demonstrate, the Court has taken a clear position that the defense must have timely access to the prosecutor’s case file. In *Dolenc v. Croatia*,⁴¹ the ECtHR stated in paragraph 218 that unrestricted access to the case file and unrestricted use of all types of notes, including, when it is needed, the possibility of photocopying relevant documents, are important guarantees of a fair trial in criminal proceedings. As the applicant did not have such access, he could not adequately prepare a defense and was not ensured equality of arms. In *Rasmusen v. Poland*,⁴² the Court considered it important for the applicant to have unrestricted access to the

41 *Dolenc v. Croatia*, App. No. 25282/06, 26 November 2009.

42 *Rasmusen v. Poland* (citing *Pullicino v. Malta* (dec.)), App. No. 38886/05, 28 April 2009.

court files and unrestricted use of any notes she had made, including, if necessary, the possibility of obtaining copies of relevant documents.⁴³

Article 7, paragraph 2 of the EU Directive on the Right to Information states: “Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defense.”

Likewise, American standards relating to access to state’s evidence generally require that the prosecution disclose evidence the prosecution intends to rely on at trial and evidence that is exculpatory to the defense (*Brady* material⁴⁴). *Brady* material includes evidence that points to innocence, that is mitigating or has an impeaching effect on the state’s case. Failure to disclose evidence from its case in chief or *Brady* material can result in reversing a defendant’s conviction if there is a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different.”⁴⁵ Federal discovery statutes outline mandatory disclosures which must be given at the request of the defendant (obligations are continuing through the case) and provide sanctions for failure to comply including orders to disclose, continuing the case, or prohibiting use of evidence that was not properly disclosed.⁴⁶

In Croatia, the defendants and the defense attorneys have the right to inspect the case file after being served the decision on conducting an investigation, and if the interrogation was conducted before the issuance of the decision on conducting an investigation, right after the interrogation.⁴⁷ If there is a danger that the purpose of the investigation will be undermined through the inspection of a part of or the entire case file by preventing or making it difficult to collect an important piece of evidence or if this will put in jeopardy somebody’s life, limb or large-scale property, the defendant may be denied the right to inspect a part or all of the case file for a maximum of 30 days after the service of the decision on conducting an investigation.⁴⁸

43 *Id.* para. 49; see also *Moiseyev v. Russia*, App. No. 62936/00, paras. 213-218, 9 October 2008; *Matyjek v. Poland*, App. No. 38184/03, para. 59 30 May 2006; *Seleznev v. Russia*, App. No 15591/03, 26 June 2008, paras. 64-69

44 *Brady v. Maryland*, 373 U.S. 83 (1963).

45 *United States v. Bagley*, 473 U.S. 667 (1985).

46 U.S. Federal Rule of Criminal Procedure 16.

47 Art. 184, para.4 of the Croatian CPC.

48 Art. 184a, para.1 of the Croatian CPC.

4.1. RIGHT OF THE DEFENSE TO ATTEND THE IMPLEMENTATION OF EVIDENTIARY ACTIONS DURING THE INVESTIGATION

The prosecutor should have the obligation to invite an interrogated defendant and his defense attorney to attend the examinations of all witnesses and experts, as well as the interrogations of all co-defendants during the investigation.

Bar Association of Serbia

Since the invitation of the defense attorney to attend the interrogation of co-defendants is not regulated anywhere in the law, the prosecutors have taken the stand that the defense attorneys do not have this right. Under the previous CPC, however, defendants had the right to attend the interrogation of co-defendants if their client had been interrogated previously. Article 406 of the CPC prescribes a very wide possibility of admitting statements of codefendant whose proceedings have been severed or have ended with a final judgment as evidence – without any opportunity to ask question and challenge this evidence. The defense counsel are thus prevented from examining the codefendants who incriminate their clients both during the investigation, since they do not have the right to be present, and during the trial, because their statements are read out under Article 406 of the CPC – which represents a violation of the principle of directness and the adversarial principle in criminal proceedings.

The prosecutor may interview a witness or an expert – independently from duly inviting the defense attorney – if he previously obtains the approval of the judge for preliminary proceedings.⁴⁹ This means that it is insignificant for the lawfulness of evidentiary actions in the investigation whether the defense attorney is absent for justified reasons – because the action will certainly take place even in his absence, like it is insignificant whether an invitation has been sent to the defense attorney at all – if the prosecutor previously obtains the approval of the judge for preliminary proceedings. Therefore, with the approval of the judge for preliminary proceedings the prosecutor could interview all witnesses and only then serve the order for conducting an investigation on the suspect, together with the summons for interrogation.

The principle of covertness of the investigation is especially prominent in the case of special prosecutors who are given the authority to interview witnesses without inviting the suspect and his counsel to attend “if they assess that their presence might influence the witness.”⁵⁰ The key issue is – who is bothered by the presence of a de-

49 See Art. 300, para. 6 of the CPC (Official Gazette of the RS No. 72/2011).

50 See Art. 300, para. 2 of the CPC (Official Gazette of the RS No. 72/2011). In this case, a court decision may not be based solely or to a decisive extent on this statement of a witness, but the decisive extent is a vague term and the procedural status of the evidence

fense counsel when witnesses are interviewed? A witness might be bothered by the presence of the defendant, but not of the defense attorney, too. If the witness is afraid to testify, he may become a protected witness. Thus, the prosecutor can completely exclude the defense attorney from the investigation based on his discretion.

It is necessary to exclude the possibility of interviewing witnesses without duly inviting the defense attorney on the basis of the approval of the judge for preliminary proceedings, as well as of interviewing witnesses without the presence of a defense attorney.

Macedonia Bar Association

The right of the defense to attend all evidentiary actions arises from Article 296, paragraph 1 of the CPC. However, there are different approaches and practices here, as well. For the procedures conducted before the Special Public Prosecution Office, in spite of the submitted requests to attend every evidentiary activity, the defense attorneys are not invited at all, while, in the Basic Public Prosecution Office, the attorneys are invited and they do attend the evidentiary activities. The Defense counsel should be allowed to be present during any actions taken as part of the proceedings, including any actions taken during the pre-investigative procedure.

Kosovo Bar Association

According to Article 132 of the CPC, the prosecutor may invite the suspect and his counsel to attend the interviewing of witnesses. This means that the prosecutor has the right, but not the obligation, to invite the defense, but if he opts for such a step, he may win later in the proceedings, because a witness' statement obtained in the presence of the defendant and his counsel may serve as evidence at the trial, if the witness cannot testify as a result of objective circumstances (death, illness, etc.). So, if a witness' statement has been taken without the presence of the defense counsel, it may not serve as evidence later in the proceedings if the witness is unable to testify at the trial, as a result of objective circumstances.

Bar Association of Federation of BiH

A significant issue is whether or not the defense attorney should be allowed to be present during the performance of certain evidentiary actions by the prosecution,

obtained indirectly based on the things learned from the statement is not defined. If certain things are found out on the basis of a statement of a witness and other evidence is obtained on the basis of those findings – is the court decision then based on the statement of this witness to a decisive extent. It is to be expected that the courts will interpret this norm restrictively.

and there are diverging opinions among judges and prosecutors on whether or not this would be beneficial to the proceedings. However, there is no doubt this would enhance the transparency of the investigation and improve the chances of quality defense. There have also been cases of prosecutors offering deals to witnesses without any notification to the defense attorneys. All these issues raise questions about the transparency of the investigative proceedings and they can be avoided by the inclusion of the defense attorney in all the aspects and results of investigative actions. In order to undertake an action and make a proposal, the defense attorney must monitor the investigation by being present during the implementation of evidentiary actions.

National Chamber of Advocacy of Albania

Albanian CPC does not provide for a very active defense during the course of investigation. The right of the defense to attend evidentiary action during the investigation is expressly limited in just few procedural actions such as interrogation of the defendant or suspected person, to attend the expertise when is possible (Art. 179), obtaining of data from the persons under investigation (Art.296). Meanwhile, Article 302 provides for the general rule concerning the right of the defendant to be assisted by his defense attorney. Specifically, this Article provides that: “The defense attorney of the person under investigation is entitled to be present in the inspections and immediate verifications on the spot, without necessarily being notified, except in case of immediate opening of the sealed envelope as authorized by the prosecutor.” Therefore, it can be concluded that the principle of equality of weapons and even more the right to a due process, require a more active role of the defense during the investigation *inter alia* by securing the right of the defense to attend every evidentiary action carried out by the prosecutor or the court. Certainly, in order to secure such right as well as other rights as part of the equality between the defense and the prosecutor, several amendments and additions shall be adopted to the CPC.

Arguments and international standards

As outlined above in sections 3.1 and 3.2, U.S. and EU standards mandate disclosure of evidence collected by the prosecution in its investigation of the case. The protocol in the U.S. is to turn over the results of the investigation made by the prosecutor: police reports, witness names and contact information, witness statements, real evidence, expert reports or analysis. Presumably, this requirement could also be satisfied by allowing the defendant through his counsel to be present at investigative actions undertaken by the prosecution. What is critical is that the defense be given access to the evidence relevant to the case against him.

In Croatia, for example, if the public prosecutor did not deliver the information to the defendant and has undertaken the evidentiary action of interviewing of witnesses, the defendant has the right to request these evidentiary actions to be repeated, which is to be decided by the judge for the investigation who may order the public prosecutor to repeat the interviewing of witnesses. If that occurs, the record on the previous interview is excluded from the case file and may not be used as evidence.⁵¹

4.2. RIGHT OF THE DEFENSE TO SUGGEST TO THE PUBLIC PROSECUTOR TO IMPLEMENT EVIDENTIARY ACTIONS DURING INVESTIGATION

At the proposal of the parties and in their presence, the judge for preliminary proceedings should, in certain cases, implement an evidentiary action – if it is likely that the examination of this evidence at the trial will be impossible or if this is an evidentiary action which the defense has proposed and the prosecutor has refused to undertake.

Bar Association of Serbia

The defense attorney has the right to suggest to the prosecutor to undertake an evidentiary action. If the prosecutor refuses to undertake it, or does not make a decision within 8 days, the defense attorney may suggest it to the judge for preliminary proceedings. The judge has a deadline of 8 days to refuse or uphold the proposal and order the prosecutor to undertake the action within a certain time limit. The expectation here is that the evidentiary action in favor of the defense will be properly undertaken by the same prosecutor who previously opposed its undertaking. It remains unclear why the CPC has not envisioned the evidentiary hearing – the implementation of evidentiary actions by the judge for preliminary proceedings in certain cases, if it is likely that the examination of this evidence at the trial will be impossible.

Bar Association of Federation of BiH

The defense attorney does not have the authority to suggest to the public prosecutor to implement evidentiary actions during the investigation. Therefore, there is no control over the investigation procedure in the hands of the defense. However, the absence of such an opportunity is mediated by the fact that the prosecutor should equally assess and take into consideration all the evidence related to a certain criminal offense, which includes the evidence that goes in favor of the suspect as well as that which is detrimental to the suspect. This should enable a comprehensive review of the circumstances and available materials, which should become available to the

51 Art. 213a, paras.1 and 2 of the Croatian CPC.

defense during the pre-trial period and at the main hearings. Regardless, there is a need to include the right of the defense attorney to suggest evidentiary actions into the BiH CPC to enable harmonization with EU legal standards.

National Chamber of Advocacy of Albania

According to CPC, the defendant and his defense have very limited procedural rights to suggest evidentiary issues during the pre-trial investigation stage. As explained in other parts of the report, during this period the prosecutor has exclusive power to control investigation and the court may intervene solely for some specific limited actions. In principle, all the request of the defense should be submitted to the prosecutor of the case mostly under Article 110 of the CPC, which as explained, is completely ineffective remedy, since this article does not provide for a right to appeal the prosecutor decision, nor any effect that may have any prosecutor inaction. These actions would include but not necessarily limited to: questioning of eye witnesses or other persons, performing an expertise, inspection of places, administration of evidences located in third parties, confrontation etc. it should be emphasized again, that no private investigation is allowed under Albanian CPC. On the other hand, phone or other means of communication tapping etc, can be done with court decision, but the defense does not have the right to seek such action before the court, since it is under prosecutor power. The only thing than can be done by the defense through the court is the securing of the evidence, including also testimony.

While during trial the defense has full power to seek for other evidence, and the court shall rule on every single request, this cannot be done, however, if the defense has demanded an accelerated trial (speedy trial or “Gjykim i shkurtuar”). Moreover, as explained in other parts of the report, the court very often decides to give reasoning or even answers to defense motions at the end of trial via its final judgments. Certainly, this de facto situation which is not based on correct meaning of the CPC, but rather a willing misinterpretation of the law, renders these procedural rights of the defense useless.

Arguments and international standards

As discussed below in section 4.3, the defense in U.S. jurisdictions have broad rights to conduct their own investigations, including the ability to interview witnesses and subpoena documents and materials to court. The adversarial system is premised on the idea of two adversaries presenting their cases to a neutral fact-finder and truth emerging. This ideal cannot be realized if the defense is prevented from preparing its defense against the state’s charges either independently or through evidentiary actions requested of the prosecutor.

In Croatia, at the proposal of the public prosecutor, subsidiary prosecutor or the defendant, the judge for the investigation may hold an evidentiary hearing where evidence will be presented if a witness referred to in Articles 292 and 293 of the CPC needs to be examined, or if it will be impossible to examine other evidence later.⁵² The evidentiary hearing is attended by the public prosecutor, defendant, defense attorney and injured party, who may object and request the judge for the investigation to pose certain questions to a witness or an expert for the purpose of clarification, and with his permission, may ask questions directly.⁵³

Likewise, in the Republika Srpska the judge for preliminary proceedings may, at the proposal of the parties or the defense attorney, order that the statement of a witness be taken at a special hearing, when it is in the interest of the justice to interview a witness in order to use his statement at the trial because he might not be available to the court during the trial (Art. 231. paragraph 1. of the CPC of the Republika Srpska).

4.3. RIGHT OF THE DEFENSE TO UNDERTAKE ACTIONS AIMED AT SECURING EVIDENCE IN THE INVESTIGATION

It is necessary to envision the possibility of issuance of a court order, under which a third person would be ordered to surrender an object at the request of the defense, and of a fine and a prison sentence in case of refusal to surrender the object.

Bar Association of Serbia

Unlike the prosecutor, who undertakes evidentiary actions during the investigation, the defense attorney is authorized only to collect evidence, or to undertake preparatory actions aimed at securing evidence with the possibility of proposing to the public prosecutor to undertake some of these evidentiary actions in the investigation. During the investigation, the defendant and the defense attorney have the right to collect evidence and material in favor of the defense on their own and, to that end, also to interview persons who might give them information useful for the defense. They also have the right to obtain the necessary statements and information from this person, on condition that this is not the injured party or persons who have already been examined by the police or the public prosecutor. However, the CPC does not prohibit the police or the prosecutor from taking statements from persons who have already provided their statements to the defense attorney, which means that they may do this. This legal solution gives the possibility to the prosecutor to use the police information and assistance right after the event to identify, locate and take

52 Art. 235, para.1 of the Croatian CPC.

53 Art. 238, paras. 2 and 4 of the Croatian CPC.

statements from all potential witnesses and thus indirectly limit the defense's right to collect evidence. The *ratio legis* of this provision – a widely set exception that significantly narrows the rights of the defense – remains unclear. A key principle of Article 6 of the ECHR is the principle of the “equality of arms,” which means that both sides in the proceedings have the authority to be informed about the facts and arguments of the opposing party and that each party must have an equal possibility of responding to the other.

The defense attorney has the right to interview a person who may offer data in favor of the defense and to obtain written statements and information from this person, the right to enter an apartment and private premises and the right to take objects and documents with the obligation of issuing a receipt, but only with the agreement of the affected person(s).⁵⁴ The possibility has not been envisioned for the defense attorney to realize these rights forcibly, upon obtaining an order from the judge for preliminary proceedings – with police assistance or under the threat of a court-imposed fine or prison sentence.⁵⁵

Finally, immediately after collecting evidence the defense attorney is obliged to notify the prosecutor thereof, and to enable him to inspect the collected evidence before the end of the investigation.⁵⁶ The obligation of the defense attorney to make it possible for the prosecutor to inspect the defense's case file before the end of the investigation is opposed to the presumption of innocence and the rule under which it is the duty of the prosecutor to prove the defendant's guilt, and not of the defense to prove the defendant's innocence.

It is necessary to remove the rule under which the defense is prohibited from contacting any of the persons previously interviewed by the police or the public prosecutor. This limitation may possibly be kept in place only for the victim and the injured party. It is also necessary to remove the obligation of the defense to notify the prosecutor during the investigation about each piece of evidence it has collected as well as the obligation of the defense to inform him about the contents of the collected evidence, because these obligations are in collision with the presumption of innocence and the prosecutor's burden of proof.

54 See Art. 301, para. 2 of the CPC (Official Gazette of the RS No. 72/2011).

55 There are cases in practice where the defense attorneys are not be able to realize certain requests for obtaining objects and taking statements because the relevant persons don't want to interfere in the proceedings that do not directly concern them. Unless the defense can tell these persons that they are actually obstructing justice by avoiding giving their contribution, and are undermining the determination of the truth in criminal proceedings, these norms will only remain dead letter without any realistic possibility of ensuring their effective implementation in practice.

56 See Art. 303, para.3of the CPC (Official Gazette of the RS No. 72/2011).

MacedoniaBar Association

It is necessary to prescribe an extension of the time period available to the defense to collect evidence. The defendant, according to Article 302, paragraph 4 of the CPC, shall have the right, within 15 days after having been notified by the public prosecutor that the investigation procedure has concluded, to submit documents or other evidence or writs related to the activities of the defense, or to ask the public prosecutor to collect certain evidence. The deadline of 15 days, wherein the defense should submit evidence, is insufficient. This deadline should be at least 120 days, particularly if one compares the deadlines of the defense to submit evidence and the available time of the public prosecutor to conduct the investigation, specified in article 301 of the CPC. Namely, Article 301 of the Criminal Procedure Code prescribes the deadlines for the completion of the investigation. According to this Article, if the investigation is not completed within 6 months from the day of enactment of the order to initiate an investigation, the public prosecutor shall be obliged to inform the higher public prosecutor thereof, who, in the event of complex cases, may extend this deadline for another 6 months. In exceptional cases, this deadline may be extended for additional 3 months by the Chief Public Prosecutor of the Republic of Macedonia. In addition, for criminal offenses in the area of organized crime, the deadline may be extended for another 6 months by the Chief Public Prosecutor of the Republic of Macedonia. If one conducts an analysis of the deadlines to be observed by the prosecutor and all mechanisms available to him or her in relation to the deadlines applicable to the defense and its limited capabilities of collecting evidence, it is clear that the deadline of 15 days is far too short.

Furthermore, such a deadline does not correspond to the deadlines prescribed in Article 311 of the CPC, which provides that for the purpose of the defense, in accordance with the law, the defense counsel may ask for information – including documents, files and reports – from state entities, local self-government units, legal and natural persons with public authority and other legal entities. Those entities are obliged to act upon the request by the defense counsel within a period of 30 days from the day of receipt of the request, and if the procedure involves a detention measure, within 7 days from the day of receipt of the request, unless prescribed otherwise by another law.

Bar Association of Albania

Article 316 of CPC provides the authority of the court during the pre-investigation stage to decide upon the motion submitted by parties, for securing the evidence. However, this authority is limited in obtaining the testimony of a person under certain circumstances, the questioning of the defendant for facts related with the responsibility of other persons, the confrontation amid persons who have made contradictory

statements before the prosecutor, to conduct an expertise or a judicial experiment and appearance for recognition. The same authority for the court is provided during trial preparatory actions. Article 336 provides the same authority for the court before the trial begins. These rules do not constitute any specific ground for the defense or defendant to submit motion aiming to obtain any material evidence from third persons. The right of defense to submit motion under Article 110 is not limited in scope, and it might include motions aiming to obtain material evidences from third person. However, this motion is not effective as explained in other part of this report. Therefore, it is strongly recommended to provide for a new rule that secures the right of defendant and defense to submit motions aimed at obtaining material evidences from third persons to the prosecution, which shall be obliged to respond within 5 days, and its decision shall be subject of the review by the court within 5 days.

Kosovo Bar Association

Chapter V of the CPC– Defense Counsel (Articles 53 - 61) does not provide for the right of the defense counsel to conduct investigative activities, despite the fact that this is necessary for the preparation of the defense strategy. Chapter V of the CPC should be amended to incorporate legal provisions that will enable the defense counsel to undertake some investigative actions, and to mandatorily oblige the state bodies to respond to the defense counsel's requests just like they respond to the requests of the state prosecutor. Based on the current legislation, the courts are not obliged to respond to the defense counsel's requests for access to the defendant's file even though the defense counsel might have interest in such access because the prosecution's witness may be a person with a criminal record.

Bar Association of Federation of BiH

The suspect and his defense attorney have the right to commence actions with the aim of securing evidence. They can also file an appeal to the judge for preliminary hearings in cases where such a request is rejected. If a special hearing is scheduled to that effect, the suspect and his defense attorney have the right to attend such a hearing for the judicial securing of the evidence.

Arguments and international standards

According to ECtHR case law, the appellant must have access to the relevant documents in the possession of the administrative authorities, if necessary via a procedure for the disclosure of documents.⁵⁷ If the respondent State, without good cause,

57 *McGinley and Egan v. the United Kingdom*, App. Nos. 10/1997/794/995-996), paras. 86 and 90, 19 October 2005.

prevents appellants from gaining access to documents in its possession that would have assisted them in defending their case, or falsely denies the existence of such documents, this would have the effect of denying them a fair hearing, in violation of Article 6 para. 1.

In the United States, defendants in criminal cases have the right to compel witnesses and documents for trial through a subpoena.⁵⁸ The defendant does not need prior court approval to issue subpoenas, though overly broad or otherwise defective subpoenas may be challenged. Persons failing to respond to a properly served subpoena may be subject to civil penalties or criminal charges. Absent special circumstances, defendants are generally free to contact and interview witnesses including the victim regarding the case.⁵⁹

In Croatia, the defense may contact any witness and is only prohibited from contacting the victim and injured party.⁶⁰ In the Republika Srpska anyone in possession of an object has the duty of surrendering it under a court order on seizure, and those who refuse to do so may be fined up to 50,000 KM and if they continue to refuse – may be imprisoned and remain in prison until they surrender the object or until the end of criminal proceedings, in any case 90 days at the latest. This rule refers also to an official or responsible person at a state authority or legal person, and the only exception are the suspect and persons who are freed of the duty to testify.⁶¹

5.1. THE PROSECUTOR'S OBLIGATION OF DISCOVERY

It is necessary to enable the defendant's and the defense attorney's access to the evidence supporting the indictment and to envision the obligation of the prosecutor to make a list of all evidentiary actions undertaken during the investigation, as well as to make a list of all documents he has collected – both those he proposes as evidence, and those he has collected but does not plan to present as evidence.

Bar Association of Serbia

Since the CPC makes it an obligation of both the prosecution and the police to clarify suspicions of a crime without bias and to examine with equal attention the facts that are detrimental and those that are favorable for the defendant, they are also obliged

58 U.S. Federal Rule of Criminal Procedure 17; *see also* Art.1, section 15 of the California State Constitution [example of state constitutional authority for subpoena power].

59 *See id.*

60 Art. 67, para.2 of the Croatian CPC.

61 Art. 129, paragraph 5. and 9. of the CPC of the Republika Srpska.

to collect with equal attention the information about the guilt and innocence of the defendants. This provision may be the best reflection of the two hats worn by the public prosecutor – that of an investigator and that of the opposing party. In the role of investigator he is obliged to clarify suspicions in the sense of Article 6, paragraph 4 of the CPC without bias. However, this role does not make it an obligation for him to present evidence which is in favor of the charged person and which he does not believe during the proceedings in which he presents his indictment to the court. This is an incredibly sensitive legal area in which the legislator must find a fair balance between the prosecutor who collects all evidence, but, by his nature, presents to the court only the evidence on which the indictment is based, and the defense which must have at its disposal all evidence which the prosecutor has collected and a procedural position that will enable it to use effectively the evidence obtained in favor of the defendant. It seems, however, that a fair balance between the prosecutor and the defense cannot be achieved without a legal obligation of the prosecutor to attach to the indictment all the evidence obtained in his capacity of an investigator, so that the defense can be informed about all of the evidence in order to be able to assess their importance.

Kosovo Bar Association

Chapter XV of the CPC - Indictment and Plea stage (Articles 240 - 256) does not obligate the state prosecutor to propose all the facts and evidence from the very first review. The CPC should be amended to include a legal provision that obliges the prosecutor to propose all evidence since the second review hearing and following this hearing to have the opportunity to propose new evidence, only when they justify the fact that it is not due to their fault that they were not presented during the initial review.

Bar Association of Federation of BiH

Article 228, paragraph 4 of the BiH CPC currently provides: “The judge for the preliminary hearing delivers the indictment to the defendant and his defense attorney.” This provision should be amended to read: “...the judge for the preliminary hearing delivers the indictment with the evidence upon which the claims of the indictment are grounded to the defendant and his defense attorney.” This amendment is necessary because in practice it was shown that the prosecutor and the judge for the preliminary hearing do not consider themselves obliged to deliver the evidence supporting the claims of the indictment. This leads to severe difficulties for the defense in obtaining such evidence although that is one of the basic rights of the defendant during the criminal proceedings.

Finally, at the end of the investigation, the prosecutor should send the court a list of all documents he proposes as evidence as well as a list of evidence that he has, but

does not plan to present. Considering the obligation to consider both the evidence that is favorable and the evidence that is detrimental to the defendant, the prosecution should provide the court and the defense attorney a fair insight into the full scope of evidence assessed before reaching the decision on ordering detention. The evidence should not be arbitrarily selected, but should be assessed in an objective manner. The law should leave no room for manipulation or broad interpretations in this area.

National Chamber of Advocacy of Albania

The prosecutor is obliged to provide to the defendant a list of the evidence collected during the investigation stage when he provides him with the indictment act under the Article 34 of the CPC. The prosecutor has unlimited discretionary power to compose the trial file. Favorable evidence submitted by the defense is very often excluded by the prosecutor and in Albania there is no legal obligation to include such evidence.⁶² Indeed, as a rule, the prosecutor does not accept the evidence brought by the defense at this stage. This results in the necessity of the defense to submit this evidence during the course of the trial.

Tactically this approach is a result of the aim of the prosecutor's office to prevent the defense to use this moment to submit evidence in favor of the defendants and consequently to be very comfortable to submit a motion to proceed with Speedy Trial (*Gjykimi i shkurtuar*) which requires that no new evidence shall be submitted. This is a very serious issue of the criminal proceedings that forces the defendants to choose the speedy or accelerated trial as a tool to obtain the reduction of 1/3 of the final punishment in case he is found guilty even though he cannot submit that evidence. This situation becomes more serious taking into account the fact that as a rule, the prosecutors in Albania collect mainly evidence that provides ground for guilt rather than acquittal of the defendant.

Arguments and international standards

The prosecutor should have disclosure obligations. In some systems, the defense may be served with a "book of evidence" which is a compilation of relevant materials. The general duty to disclose supports the accused right's to defend himself and is a core aspect of his right to adequate time and facilities to defend himself. Furthermore, because the defense is at disadvantage, since it does not have the state authority behind it (including a police force and prosecutorial service to investigate the offense), the provision of evidence to the accused is vital to ensure "equality of arms" between the

62 Art. 332 of the Albanian CPC.

prosecution and the defense, which is an element of the right to fair trial.

As outlined in sections 3.1 and 3.2, the ECtHR and the EU Directive on the Right to Information are in accord with broad and timely disclosure requirements for the prosecution. Detailed in the same section are the discovery obligations imposed on prosecutors in the United States that mandate timely disclosure of all inculpatory and exculpatory evidence as well as any evidence that may be relevant to the case. Moreover, failure to disclose relevant information can result in reversal of a conviction if the omission is deemed prejudicial.⁶³ In the Republika Srpska, whenever the court and the prosecutor come into possession of any information or fact that may serve as evidence at the trial, they both have the statutory obligation to disclose them to the defense attorney and the defendant.⁶⁴

5.2. PREPARATORY HEARING – BURDEN OF PROOF AND ORDER OF PROOF RULES

The defense attorney must be given the possibility freely to decide which evidence will be confronted with the evidence of the prosecution, but only after he sees the results of the examination of the prosecution's evidence at the trial. Moreover, the trial court should only have the indictment in advance of the trial not the prosecutor's case file to ensure the prosecutor must prove its case through testimony and evidence during the trial.

Bar Association of Serbia

At the preparatory hearing, the parties state their position on the charges, explain the existing evidence and propose new evidence, and the factual and legal issues that will be the subject of review at the trial are determined.⁶⁵ The main issue is the defense attorney's obligation to propose all evidence of which he has learned until the preparatory hearing and the preclusion concerning all evidence of which the defense attorney was aware and did not propose at the preparatory hearing. Such a legal solution practically makes it an obligation for the defense attorney to prove innocence, because he is expected to anticipate the effects of the proposed evidence of the prosecution, and decide on the evidence for the defense according to what he expects the prosecutor to show.

It is necessary to envision the rule according to which, once the prosecution has fin-

63 *United States v. Bagley*, 473 U.S. 667 (1985).

64 Art. 55, paragraph 4. of the CPC of the Republika Srpska.

65 See Arts. 345-352 of the CPC (Official Gazette of the RS No. 72/2011).

ished presenting all its evidence, the defense will have the obligation to propose all evidence it has learned about until that moment and will have the possibility not to propose anything at all.

Macedonia Bar Association

In the Republic of Macedonia, together with the submission of the indictment to the court, in accordance with Article 321, paragraph 2 of the CPC, the public prosecutor also submits the material evidence, the minutes and records from the examination of the relevant persons, as well as a list of evidence that he/she proposes to be disclosed during the main hearing. According to Article 344 of the CPC, after the implementation of the indictment appraisal procedure, i.e., after the indictment enters into legal force: the indictment, the indictment approval decisions, the submitted material evidence and the list of evidence that the parties propose to be disclosed, shall be submitted to the competent court, and the minutes and the records from the examinations of the relevant persons shall be returned to the public prosecutor. Similar procedural rules have been prescribed in Bosnia and Herzegovina. This legislative solution is beneficial because it prevents the court from becoming familiar with the evidence before the main hearing and therefore from forming its decision in advance of the main hearing. This solution could further be improved by permitting only the indictment to be submitted to the competent judge, without the material evidence of the public prosecutor and the proposed evidence lists.

Article 347, paragraph 3 of the CPC gives the presiding judge the opportunity, during the preparation of the main trial, to reject certain evidence if he or she believes it not to be relevant (unimportant motion). At that time, before the commencement of the main trial, the presiding judge has not yet heard the opening statements of the attorneys and is not familiar with their theory of the case, and he or she is not familiar with the evidence because at that time only an evidence list would have been provided and therefore cannot assess whether any evidence is relevant or not. Therefore, this right of the presiding judge should be removed from the CPC.

Kosovo Bar Association

The Kosovo CPC does not contain classical provisions on preparatory proceedings. In our case, the stage of preliminary proceedings preceding the trial deals with unlawful evidence, existence of grounded suspicion that a crime has or has not been committed, and procedural obstacles to the holding of proceedings.⁶⁶ CPC does not contain a single provision under which the parties should state their positions on

66 Articles 240 through 256 of the CPC.

the relevance of evidence, on whether evidence is disputable, on facts that are to be considered already proven, on evidence that is to be examined at the trial, etc. Still, according to Article 256 of the CPC, the defense has the duty to inform the prosecutor at the second hearing of the preliminary proceedings which evidence it plans to present during the trial, which does not preclude its right to propose evidence at a later date. The only sanction for the defense in case of violation of the above-mentioned provision is a fine of 250 euros.

National Chamber of Advocacy of Albania

CPC does not provide for a preparatory hearing. Although, parties have the right to submit oral or written motions issues, before the opening of trial examination. However, this procedural stage shall not and cannot be considered as equal to classical preparatory hearing. During this state, usually motions seeking access to case material, the nullity of acts, a speedy trial etc, are submitted orally during the procedure or previously in writing. The defense, cannot ask for the administration of any evidence or seek the exclusion of any evidence etc. Thus, in order to secure an effective defense as well as to preserve the equality of weapons and the burden of proof, a preparatory hearing should be introduced allowing the defense to propose new evidences, to exclude any evidence etc. In addition, the it should be also provided that evidence provided by the prosecutor during the course of the proceedings must be contained within the list of the evidence he has submitted in the beginning of the process. This would prevent the prosecution from introducing “surprise evidence” by presenting the evidence as new when it is not.

Arguments and international standards

In connection with the right to a fair trial referred to in Article 6, paragraph 1 of the ECHR, the ECtHR has taken the position that in the case of assessment of fairness of criminal proceedings, the harmonization of procedures of domestic competent bodies with formal rules of domestic proceedings in the collection and treatment of evidence is not as important as the absence of indicators that the use of this evidence for conviction has violated the autonomous principles of “fairness” in terms of Article 6 of the Convention – specifically, adversarial proceedings, equality of arms and absence of incitement to the commission of a crime and unwarranted pressure to give up the right to remain silent.

In the United States federal system, the defense has no obligation to inform the court or prosecutor if the defendant intends to take the stand or to provide any prior statements of witnesses or other evidence that may be used to impeach the government’s case. The prosecution is obligated, upon request however, to turn over any state-

ments made by the defendant.⁶⁷

In Croatia, at the preparatory hearing the defense attorney may even state that he will hold his statement after the presentation of evidence of the prosecution, while the defendant is examined at the end of the evidentiary proceedings, unless he himself requests otherwise. That means that the formulation of the defense strategy is preceded by the observation of the results of the prosecution's case.⁶⁸

In the Republika Srpska, the court will instruct the defendant that he may provide his statement during the evidentiary procedure in the capacity of a witness, and if he decides to give such a statement, that he will be subjected to the direct and cross-examination (Art. 274 paragraph 2 of the CPC of the Republika Srpska). This is just a possibility, not an obligation. At the beginning of the trial, the prosecutor will briefly present evidence on which the indictment is based and the defendant or his defense attorney may, but do not have to, present the defense case afterwards. Instead, they can wait for the results of the prosecution's case to decide what they will prove and whether there is any need to prove anything at all (Art. 275 of the CPC of the Republika Srpska).

6.1. USING UNLAWFUL EVIDENCE MUST BE AN ABSOLUTE SUBSTANTIVE VIOLATION

The fruit of the poisonous tree principle should be consistently developed throughout the CPC by explicitly prohibiting the use of unlawful evidence during the examination of other evidence and clearly regulating the procedural fate of evidence that was examined with the use of the unlawful evidence, as well as the evidence that would never have been found had they not been preceded by the use of unlawful evidence.

Bar Association of Serbia

Court decisions may not be based on evidence which is directly or indirectly, on its own or according to the manner in which it was obtained "contrary to the law", and not just the evidence that is "expressly prohibited under the law."⁶⁹ Such a legal formulation provides a basis for claims that court decisions may not be based on evidence that is "indirectly obtained" from unlawful evidence and which therefore must share the same procedural fate. This legal solution is in accordance with the

67 U.S. Federal Rule of Criminal Procedure 16.

68 Art. 417, paras.1 and 5 of the Croatian CPC.

69 See Art. 18, para.2 of the applicable CPC and Art. 16, para.1 of the CPC (Official Gazette of the RS No. 72/2011).

so-called “fruit of the poisonous tree the principle”, according to which the lawfulness of evidence is compromised if unlawful evidence was used while it was obtained or examined or if this evidence would never have been obtained but for other illegally obtained evidence.

The use of unlawful evidence, however, is no longer defined as an absolute substantive violation of the criminal proceeding.⁷⁰ This is now a relative substantive violation of criminal proceedings, because the judgment will not be annulled if a second instance court believes it is evident that the same judgment would have been adopted even without the unlawful evidence. Such a legal solution completely undermines the fruit of the poisonous tree principle, proclaimed in Art. 16 of the CPC.

The key problems are that the principle of the fruit of the poisonous tree has not been consistently developed throughout the law and the use of unlawful evidence is no longer defined as an absolute substantive violation of criminal proceeding.

Bar Association of Federation of BiH

The implementation of the fruit of a poisonous tree principle is attainable through the provisions of Article 297 of the BiH CPC which regulates the essential violations of the criminal procedure provisions, as one of the grounds for appeal. Article 297 states that there is an essential violation of the criminal procedure provisions if the verdict is based on evidence which is not acceptable in accordance with this law. There is a need for a more immediate approach specifying unlawfully obtained evidence, which would also be in line with the constitutional guarantee of legality in the criminal justice system. At the entity level, there is a prohibition against using evidence which was obtained through at violation of human rights which are guaranteed by the constitution and international treaties which are applicable in their jurisdiction. The lawfulness of the methods of obtaining the relevant evidence is significant from the perspective of adhering to Article 6 of the European Convention of Human Rights which is of great importance for the path of BiH towards the European Union. The requirement of immediately excluding unlawfully obtained evidence should be universally considered an absolute substantive violation of the criminal proceedings.

Bar Association of Albania

Paragraph 4, of the Article 151 of CPC, provides that evidence taken contrary to the prohibitions provided by law shall not be used. Suppression can be claimed ex-officio in any stage and instance of the proceedings. Although the situation seems to be

70 See Art. 438. paragraph 1. item 11 and Art. 438. paragraph 2. of the CPC (Official Gazette of the RS No. 72/2011)

cleaner than in Serbia, still the reasoning in case of Serbia for a wider meaning of the prohibitions would be useful for the sake of a correct implementation of this rule in practice.

Arguments and international standards

The “fruit of the poisonous tree” doctrine is an evidentiary rule that provides that illegally obtained evidence is tainted and must be excluded from trial including any “fruits” or other evidence that was obtained from that evidence. For example, during an illegal arrest the defendant makes a statement about a witness. The witness subsequently informs the police about an illegal drug trafficking operation and shows them where the drugs are stored. All evidence derived from the illegally obtained statement made by the defendant must be suppressed including the drugs the witness revealed to the police.⁷¹ Like the exclusionary rule itself, the fruit of the poisonous tree doctrine is intended to deter police from using illegal means to obtain evidence.

The admission of unlawfully obtained or objectionable evidence violates Article 6 of the ECHR if the evidence itself or the manner in which the evidence was collected infringes upon the rights of the defendant, thereby rendering the proceedings unfair.⁷² Evidence is particularly suspect if the manner in which it was obtained violates other provisions of the Convention, such as Article 3’s prohibition on torture and inhuman or degrading treatment, the right to privacy under Article 8, or the privilege against self-incrimination guaranteed by Article 6. The Court will examine “the ‘unlawfulness’ in question and, where a violation of another Convention right is concerned, the nature of the violation found.”⁷³

The fruit of the poisonous tree doctrine is robust and well-developed in the United States. Under longstanding U.S. Supreme Court precedent, evidence discovered as a direct or indirect result of a violation of the defendant’s constitutional rights generally may not be admitted into evidence. The doctrine is subject to four main

71 *Wong Sun v. United States*, 371 U.S. 471(1963); see also *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (Supreme Court first uses doctrine); *Nardone v. United States*, 308 U.S. 338 (1939) (Justice Frankfurter first coins term “fruit of the poisonous tree”).

72 *Popov v. Russia*, no. 26853/04, para. 166, July 13, 2006 (finding no violation of Article 6(1) where “the evidence the applicant sought to exclude was subject to adversarial proceedings and the applicant was able to challenge it before the courts at two levels of jurisdiction, which found no breaches of domestic procedure in the way the evidence had been obtained.”).

73 *Mulosmaniv. Albania*, App. No. 29864/03, para. 124; see also, e.g., *Kashlev v. Estonia*, App. No. 22574/08, para. 40, 26 Apr. 2016 (While Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national legislation and the domestic courts. . . .The Court’s only concern is to examine whether the proceedings have been conducted fairly.” (internal citations omitted)); *Heglas v. the Czech Republic*, App. No. 5935/02, paras. 89-92, 1 March 2007.

exceptions, which are permitted largely because they do not implicate the primary rationale for the rule – to deter police misconduct – and/or the connection between the illegal conduct and the discovery of the evidence is remote. Tainted evidence will be admitted if: it was discovered in part as a result of an independent, untainted source (“independent source doctrine”);⁷⁴ it would have been discovered anyway despite the tainted source (“inevitable discovery rule”);⁷⁵ the chain of causation between the illegal action and the tainted evidence is too attenuated;⁷⁶ or the search warrant lacked probable cause, but was executed by the government in good faith (good-faith exception).⁷⁷

Croatia’s CPC contains a rule similar to U.S. law whereby court decisions cannot be based on illegal evidence, and evidence learned about as a result of illegal evidence is considered illegal evidence.⁷⁸

In the Republika Srpska the court may not base its decision on evidence obtained through the violation of human rights and freedoms regulated by the Constitution and international treaties, nor evidence obtained through substantive violations of this law. The court may not base its decision on evidence obtained on the basis of unlawful evidence.⁷⁹

6.2. TIMELY AND EFFECTIVE EXCLUSION OF UNLAWFUL EVIDENCE

It is necessary to envision an appeal against a ruling rejecting the motion for excluding unlawful evidence, which would ensure the existence of two instances in deciding on the lawfulness of evidence before the beginning of the trial.

Bar Association of Serbia

Since the CPC allows only an appeal of a ruling granting the motion to exclude

74 *Murray v. United States*, 487 U.S. 533 (1988) (evidence initially discovered during police officers’ illegal entry of private premises but then later discovered during a subsequent search pursuant to a valid warrant that was obtained without reference to the illegal search admissible at trial).

75 *Nix v. Williams*, 467 U.S. 431 (1984) (defendant’s illegally obtained confession leading to the body of the victim properly suppressed, but body would have been discovered anyway so it was properly admitted into evidence).

76 *United States v. Ceccolini*, 435 U.S. 268(1978) (witness identified through illegal search, but interviewed months later with no reference to search, his statements deemed admissible).

77 *United States v. Leon*, 468 U.S. 897(1984); *Massachusetts v. Sheppard*, 468 U.S. 981(1984). Both, cases allow the court to assess officer’s subjective good faith intent.

78 Art. 10, para. 2, item 4 of the Croatian CPC.

79 Art. 10 paragraph 2 and 3 of the CPC of the Republika Srpska.

unlawful evidence, but not against the denial of such a motion, a procedural mechanism for the timely exclusion of unlawful evidence should be introduced in order to prevent the entire proceeding from being subsequently invalidated by the improper introduction of unlawful evidence.

Kosovo Bar Association

The Kosovo CPC contains good provisions on the timely exclusion of unlawful evidence. Once the indictment is filed, the defense has the right to request that the president of the panel declare certain evidence unlawful. So, this happens during the stage of examination of the indictment. The party dissatisfied with the decision of the panel president has the right to appeal to the Appellate Court of Kosovo. This means that unlawful evidence is reviewed by two instances before the trial.

Bar Association of Federation of BiH

The legality of the evidence upon which the court makes its decision is one of the key indicators of the fairness of the overall court proceedings. Allowing for an appeal of the denial of a request to exclude unlawfully obtained evidence would allow for a more objective review and it would provide legal security and adherence to EU legal standards. As there are currently no such mechanisms provided in the BiH CPC, it is a strongly recommended to make it one of the first priorities when amending the evidentiary provisions of the CPC.

Articles 227 and 228 of the CPC in BiH regulate the decision on the indictment while Article 233 of the BiH CPC regulates the grounds for objections and decisions on objections. In relation to those provisions, there should be an addition between Articles 227 and 228 of this law providing that the indictment should be delivered to the judge for the preliminary hearing and the defense attorney and the defendant at the same time, in order to enable preliminary objections. The preliminary objections described in Article 233 of the BiH CPC should follow the added Article and precede the Article regulating the decision on the indictment, which should be followed by the content of Article 233 (the grounds for objections and the decision on the objections).

The addition of these provisions would make the criminal proceedings more efficient, since the formal deficiencies of the indictment would be eliminated during that phase and the unlawful evidence would be excluded. Upon confirming the indictment, judicial councils usually reject preliminary objections, even though they are mostly well grounded. The failure to allow well-grounded objections at the indictment stage and the resulting additional time in detention of innocent people is a violation of due process rights.

Bar Association of Albania

The CPC does not provide for any right of appeal against any motion seeking the suppression of evidence. In practice, this claim can be raised in the appeal against the final judgment of the court. Certainly, this lack of the right to appeal before the court rules against such motions renders this provision useless as long as “poisoned” evidence are not promptly and effectively excluded resulting in prejudice to the defendant.

Arguments and international standards

The ECtHR considers the influence of unlawful evidence on the criminal procedure and its outcome to be crucial in its assessment of whether there has been a breach of Article 6 of the ECHR. In *Jalloh v Germany*,⁸⁰ the Court emphasised that: “[T]he question that must be answered is whether the proceedings, including the way in which the evidence was obtained, were fair.⁸¹ In *Vanjak v. Croatia*,⁸² it pointed out that “In deciding whether the proceedings were fair, it must be examined whether the Applicant was given the opportunity to challenge the credibility of the evidence and to oppose its presentation. In addition, one must take into account the quality of the evidence, including whether the circumstances in which the evidence was obtained cast doubt on its reliability and accuracy.”⁸³

The Croatian CPC has a rule whereby the investigating judge, upon motion of the parties or *sua sponte*, must decide on the exclusion of unlawful evidence before conclusion of the investigation or before giving consent for the indictment. A special appeal to be decided by a higher court is allowed against the decision on the exclusion of evidence.⁸⁴

After submission of the indictment to the trial panel, the panel must hold a session in which the public prosecutor, injured party, defendant and defense attorney are summoned. At this session, the parties present and explain their conclusions, using the data contained in the case file. The public prosecutor briefly presents the results of the investigation and the evidence on which he bases the indictment, while the defendant and the defense attorney may warn about the evidence in favor of the defendant, about possible omissions made in the investigation and about unlawful

80 *Jalloh v Germany*, App. no. 54810/00, 11 July 2006.

81 *Id.* para. 95

82 *Vanjak v. Croatia*, App. no. 29889/04, 14 January 2010.

83 *Id.* para. 57

84 Art. 86, para. 1 of the Croatian CPC; see also Art. 344, para. 4 of the Croatian CPC.

evidence that should be excluded.⁸⁵

If the panel establishes that evidence exists in the file that must be excluded under Article 86 paragraph 1, but was not excluded by the investigating judge, then it must render a ruling excluding that evidence from the file and the excluded evidence cannot be used in the criminal proceedings.⁸⁶ An appeal against the ruling is permitted.⁸⁷ If the panel doubts the lawfulness of a piece of evidence, but cannot make a decision without examining additional evidence, it will postpone the hearing and immediately schedule a new hearing where information necessary to determine the lawfulness of the evidence will be examined (preliminary trial on legality of evidence). The panel will first decide on the lawfulness of evidence, and then make a decision on the indictment.⁸⁸ If the panel finds that there is insufficient evidence of the grounded suspicion that the defendant has committed the crime referred to in the indictment, or that the collected evidence is obviously so contradictory that a conviction would be impossible – it will issue a ruling discontinuing proceedings.⁸⁹

A number of US jurisdictions, including in Massachusetts, Georgia, and California also support the defense’s right to appeal to a pre-trial decision on a motion to suppress evidence.⁹⁰ For example, California permits the defense to appeal denials of suppression motions pre-trial to the appropriate court of appeal for interlocutory review.

7. EXCEPTIONAL INITIATIVE OF THE COURT IN THE EVIDENTIARY PROCEDURE ONLY IN FAVOR OF THE DEFENSE

It is necessary to envision the right of the court to intervene in the evidentiary procedure only in favor of the defendant if it deems it necessary for ensuring the real observation of the defendant’s right to a fair trial.

Bar Association of Serbia

Article 15 paragraph 4 of the CPC, according to which the court may intervene in the evidentiary proceedings, has its advantages – because it says that this may be done only “exceptionally”, but also its flaws – because it says that this can be done

85 Arts. 349-50 of the Croatian CPC.

86 Art. 351, paras. 1 and 3 of the Croatian CPC.

87 *Id.*

88 Art. 351, para. 2 of the Croatian CPC.

89 Art. 355, para. 1, item 4 of the Croatian CPC.

90 See, e.g., Mass. R. Crim. P. 15(a)(2); Iowa R. App. P. 6.301; OCGA § 5-6-34 (b).

whenever “it finds the examined evidence to be unclear, contradictory or contrary to other evidence, and when this is necessary in order to thoroughly discuss the subject-matter of the evidentiary procedure” – which also means that this can be done in favor of the prosecution.⁹¹ The court must not help the public prosecutor to prove the charges. Such a role of the court would undermine citizens’ trust in the court. The legal profession would never agree to a concept under which charges in the investigation stage would be proven by the public prosecutor and in the trial stage by the public prosecutor with the assistance of the court, where the latter would remove the consequences of the prosecution’s omissions in its search for the material truth.

However, there is the issue of procedural consequences in the case when the court’s interventions in the evidentiary proceedings help the public prosecutor to prove the indictment by alleviating the consequences of his omissions. Bearing in mind the existing case law, it is not realistic to expect that the courts will recognize this fine line between the need to clarify and impermissible help, nor will they exercise restrictiveness in the use of their authority to examine evidence.⁹² That is why the defense attorney is the one who must insist on a difference between the corrective and creative roles of the court, as well as on the implementation of Article 15 paragraph 4 of the CPC in the spirit of observation of the right to a fair trial guaranteed in Article 32 paragraph 1 of the Serbian Constitution and Article 6 of the ECHR.

The right to a fair trial has been established to protect citizens, because the opposing party is the public prosecutor with the entire state apparatus behind him, which is why the parties in adversarial criminal proceedings are actually unequal. One of the goals of the CPC must be the reduction of this inequality, and the goal of the right to a fair trial is to protect the citizen from the bias of the court that would be at his detriment, and insistence should be made on the court’s right to examine on its own “only the evidence in favor of the defendant” which would contribute to the equality of the parties and result in fairer trials.

Kosovo Bar Association

Article 329(4) of CPC foresees that “In addition to the evidence proposed by the parties or the injured party, the trial panel shall have the authority to collect evidence that it considers necessary for the fair and complete determination of the case.” Article 329(4) of the CPC should be changed in that regard so that it provides the

91 See Art. 15. paragraph 4. CPC (Official Gazette of the RS No. 72/2011)

92 In the case law so far, the wrong interpretation of the presumption of innocence and the rule „in dubio pro reo” resulted in the proving of innocence, rather than guilt, in the proceedings, as if it were necessary to remove any possible suspicion in order to prove innocence, rather than to make real only one premise of the non-existence of evidence of guilt.

court with verification of facts and proposal of evidence that might be in favor of the defendant. Giving the court the opportunity to propose facts and evidence that can harm the defendant, results in the court losing its role as neutral arbiter and moving the burden of proof from the prosecution to the court.

Bar Association of Federation of BiH

In accordance with Article 216 CPC, the court can initiate the presentation of the evidence it finds relevant (there is no indication of the preferable treatment of the defendant). Such a wide range of influences the court is granted during the course of the evidentiary process goes against the adversarial principles of the procedure. In order for them not to be abused, there should be amendments to the CPC to provide specific standards under which the court can intervene. Broad constructions such as “whenever the court find suitable” are not adequate for the purpose of obtaining efficient justice. The exceptional nature of the provisions allowing for the courts to intervene in the evidentiary procedure in favor of the defendant is important as it provides just the right amount of judicial involvement as to ensure the defendant’s full reliance on due process rights.

National Chamber of Advocacy of Albania

While the prosecutor is obliged to prove the indictment and the defendant can be defended even in silence, in practice the prosecutor does not collect evidence that goes in favor of the defendant’s innocence. Indeed, all the features of the current Albanian criminal procedure are primarily those of a typical inquisitorial system. Thus, the court has great authority to act and decide during the procedure. This sometimes leads to situation when the court loses its impartiality which is an essential requirement of the right to a fair trial. Judges should not intervene in the proceedings in a manner hostile to the defendant.⁹³ However, in determining whether a judge’s apparently partiality, bias, or hostility violates the Convention, the ECtHR will determine whether the judge’s behavior was so egregious as to render the proceedings as a whole unfair.⁹⁴

Arguments and international standards

Under the case law of the European Court of Human Right, courts have an obligation to ensure the real and effective observation of the defendant’s right to a fair

93 *C.G. v. the United Kingdom*, no. 43373/98, paras. 35-43, 12 December 2001.

94 *See id.* paras. 35-36, 42 (finding no violation of Article 6, because “the judicial interventions in the present case, although excessive and undesirable, [did not render] the trial proceedings as a whole unfair”).

trial, guaranteed by Article 6 of the ECHR. Courts must respect the presumption of innocence afforded to the defendant under Article 6(2) and may not conduct the proceedings in a manner that shifts the burden from the prosecution to the defendant.⁹⁵ Judges likewise must not behave in a manner that evidences preconceived notions of the innocence or guilt of the accused, or demonstrates personal bias against the accused or in support of the government or another party.⁹⁶

In *Olujić v. Croatia*,⁹⁷ the ECtHR stated: “It is not the Court’s function to express an opinion on the relevance of the evidence or, more generally, on whether the allegations against the applicant were well-founded.”⁹⁸ Instead, “[t]he Court’s task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken and submitted, were fair within the meaning of Article 6 para. 1.”⁹⁹

Judges should not intervene in the proceedings in a manner hostile to the defendant.¹⁰⁰ They should, however, intervene in favor of the defendant where necessary to uphold “the positive obligation to ensure practical and effective respect for the applicant’s right to due process.”¹⁰¹ For example, the ECtHR has held repeatedly that domestic authorities have an obligation to intervene to rectify “manifest failures” of court-appointed counsel.¹⁰² A court’s failure to do so compromises the defendant’s right to a fair trial and therefore violates Article 6 of the ECHR.

In Croatia, the court may intervene in the evidentiary procedure only in favor of the defendant’s innocence. Given the recent shift from inquisitorial to quasi-adversarial systems across the region – and the corresponding shift in the role of judges in the proceedings – it is helpful to have rules such as Croatia’s that strongly limit court’s ability to intervene on behalf of prosecution.

A proactive attitude of the court during the trial is justified only in the cases when the defense is insufficiently effective or when the defendant does not have an attorney that can properly protect his procedural rights. In such cases, the court is ex-

95 *E.g., Capeau v. Belgium*, App. No. 42914/98, para.25, 13 January 2005. Judges may, however, draw reasonable inferences against the defendant without shifting the burden of proof. *See, e.g., Murray v. the United Kingdom*, App. No. 18731/91, para.54, 8 February 1996.

96 *See, e.g., Kyprianou v. Cyprus* [GC], App. No. 73797/01, paras.130-32, 15 December 2005; *Lindon, Otchakovsky-Laurens and July v. France* [GC], App. Nos. 21279/02 and 36448/02, para.76, 22 October 2007.

97 *Olujić v. Croatia*, App. No. 22330/05, 5 May 2009.

98 *Id.* para. 85.

99 *Id.* para. 77.

100 *Sannino v. Italy*, App. No. 30961/0327 April 2006.

101 *Bogumil v Portugal*, App. No. 35228/03, 6 April 2009.

102 *Czekalla v Portugal*, App. No. 38830/97, 10 October 2002.

pected to intervene in order to ensure the realization of the right to a fair trial, which implies the effectiveness of the defense. Such a solution under which the court may intervene in the evidentiary procedure only in favor of the defendant or if the defense does not oppose this, and would be in the service of realization of the right to a fair trial. Therefore, the court might intervene in favor of the defendant, but not in favor of the public prosecution – because the right to a fair trial in criminal proceedings represents an individual right of the defendant as a citizen, rather than of the public prosecutor as a state authority.

8.1. SPECIFIC RULES OF DIRECT AND CROSS-EXAMINATION NEED TO BE PRESCRIBED

It is necessary to envision specific rules of direct and cross-examination and clearly define the object of cross-examination and the object of redirect questioning.

It is necessary to envision the right to object to an inadmissible question asked by the opposing party or the court, providing a clear description of the way in which the objection is to be presented and what its type and contents must be. This objection would represent a procedural instrument in the service of observation of the rights of examination, so that the way of examination might be evaluated within the assessment of presented evidence.

It is necessary to introduce a rule under which the court may ask questions only after the parties have completed the examination.

Bar Association of Serbia

The CPC introduces the possibility of asking leading questions that are allowed only during the cross-examination of witnesses and experts at the trial. Leading questions are not allowed during the investigation, or during the interrogation of the defendant, so that there is no possibility of asking leading questions when a defendant is incriminating another. The CPC does not provide any specific rules of cross-examination or the rule under which redirect questioning might refer only to the circumstances that became problematic in the cross-examination. It would not be good to let a party use redirect questioning to supplement the direct examination by the things he forgot to ask, because the other party would no longer have the right to follow by cross-examination, but only by redirect questioning – which is a significant handicap because it cannot bring into question the credibility of these claims. Without such a rule, part of the strategy will be to leave the most important questions for the redirect questioning in order to avoid the dangers of cross-examination, but the whole point of cross-examination will be undermined.

The new CPC does not envision anywhere in the text the tool of objection that would give the possibility to the defense attorney to react in the courtroom in a timely manner and prevent the violation of the defendant's right through the posing of a particular question.

It is not sufficient for the defense attorney to be able only to enter his objection at the end of the record. The whole point of the defense attorney's activity is to prevent the violation of the rules of proceedings to the detriment of the defendant and to ensure that the proceedings are held in a lawful and fair manner. If he does not have at his disposal the appropriate procedural tools that may be used whenever he observes a violation, but may instead present all violations only afterwards, in the appeal to the judgment, and on top of that, only as relative substantive violations of the proceedings, then this legal solution does not provide appropriate protection to the proclaimed rights of the defense. The question is what kind of procedural sanction exists for an inadmissible question, whether this makes the entire evidentiary action unlawful or whether it is only the answer to that question that may not be used as evidence, what is the way in which the segment of evidence could be drawn from the assessment of the evidence and how many violations it takes to draw the conclusion that a procedure was not fair.¹⁰³

The president of the panel may at any time ask a question that will help provide a more complete and clear answer to a question already asked by other participants in the proceedings.¹⁰⁴ This rule makes the strategy of cross-examination pointless, because its whole purpose is in the order of questions that result from each other. The judge should not interfere in this order through his or her clarifications; in fact, it is enough that he or she already has the right to reject any question which has been asked in an inadmissible way. The president of the panel should be given the opportunity to ask questions after the parties with the aim of clarifying matters, because it is contrary to the spirit of the adversarial proceedings to ask clarifying questions at any time.

Macedonia Bar Association

Under the regulation of Article 385, paragraph 7 of the CPC in Macedonia the president of the panel shall ensure the admissibility of the questions, the validity of the answers, the fair examination and the justification of the objections. However, the basic rules for direct and cross-examination are not prescribed. The consequences of not

103 In the Feldbruge case, the European Court took the stand that the applicant was not given the opportunity to give his comment on the court expert's statement, which had the decisive influence on the outcome of the proceedings (judgment of 29.05.1996, A.99 pp.17 and 18)

104 See Art. 398. paragraph 6. of the CPC (Official Gazette of the RS No. 72/2011)

having such rules prescribed give rise to mistakes when asking questions, especially during cross-examination. Because trials are not audio-recorded, in practice, judges often engage in reformulating questions, contrary to the letter, and the spirit of the new criminal procedure. The judges are therefore applying the law poorly, because the rules are not clearly or fully prescribed.

Kosovo Bar Association

The Kosovo CPC does not contain a single provision on parties' objections during the examination of witnesses. CPC contains the rules of direct and cross examinations, which means that it only provides the definitions of direct and cross examinations, but no rules on objections during these two types of examination. This very important element of the procedure should be regulated as clearly as possible.

Bar Association of Federation of BiH

The BiH CPC regulates direct and cross-examinations in detail, outlining the basic rules and limits to the approach of all participants of the criminal proceedings. Article 262 provides that direct, cross and redirect examinations shall always be permitted. During cross-examination, the choice of questions is limited to the questions raised during the direct examination, while the questions in redirect examinations must be related to the ones raised during cross-examination. The judge and the panel can ask questions after the parties have completed direct, cross and redirect examinations. Leading questions are only allowed in cross-examinations for the sole purpose of clarifying a statement of a witness. The judge or presiding judge may allow leading questions to uncooperative or hostile witnesses. If a witness was summoned by the court, then the parties and the defense attorney may ask questions after the court.

These provisions provide sufficient guidance and clarity to the process of witness examination in its various forms which contributes to the legality of evidence and legal security. These limitations are very significant for the due process guarantee of fairness of the proceedings.¹⁰⁵

Bar Association of Albania

The right to cross examination is provided in the Article 31 of the Constitution as well as in the ECHR that is directly applicable in Albania. Articles 359 – 367 of the CPC provide a solid base for specific rules on cross-examination. Nevertheless, as explained in section 9 of this report, because of the application of Article 362 of the CPC

¹⁰⁵ The CPC of Republika Srpska is in accord with these rules. See RS CPC Article 277, pars. 1 and 2.

that provides for the parties the right to oppose partially or totally the testimony of a witness based on statements made before the prosecution or judicial officer and which are part of the trial file, the whole cross examination specifically related to witness and testimonies might be rendered useless. Certainly, this significantly weakens the main weapon of the defense deriving from cross-examination of witnesses. This article also violates the Articles 31, 32 and 42 of the Constitution.

In the CPC, the position of the court is not well specified and just as proposed by the Bar Association of Serbia, the court authority to pose question shall be limited to the end of cross-examination. Moreover, the defense should be armed with the right to seek from the court in real time the reformulation of the question posed by the prosecution to avoid leading or irrelevant questions.

Arguments and international standards

U.S. federal and state courts have complex, detailed rules of evidence, which help to ensure that the jury decides the case only on the basis of material, relevant evidence. Rules circumscribing the scope of direct and cross-examination serve that purpose, and also promote efficiency in the proceedings. Under the Federal Rules of Evidence, cross-examination must be limited to the scope of the direct examination and matters affecting the witness's credibility. Leading questions are permitted on cross-examination. The U.S. Federal Rules of Criminal Procedure state that a party may object to questions that are argumentative, harassing, unduly complex, repetitive, call for narration or speculation, or are otherwise inappropriate. A party may object to nonresponsive or inappropriate answers as well. The court may also exclude such questions on its own initiative.

8.2. INFLUENCE OF PROFESSIONAL CONSULTANT OF DEFENSE NEEDS TO BE IMPROVED

Professional consultant should be examined during the investigation and send his or her expert opinion in writing. Professional consultant should pose questions to the experts during the examination.

Bar Association of Serbia

Article 125 and Article 126 of the CPC for the first time envision the possibility under which parties in criminal proceedings may use the assistance of a person who is an expert in the field in which the expert examination is ordered. The law envisions two possibilities: the engagement of a professional consultant under the power of attorney or filing of a request for appointing a professional consultant.

In practice, there are often court decisions in which the defendant's request to be appointed a professional consultant is rejected even though the subject of the examination is very complex. The rejection in such cases is generally explained by the fact that the defendant has an attorney, that he pays the costs of his defense on his own and that there is no reason why he could not pay the fee of a professional consultant, even in the cases when the defendant has provided evidence of not having income or property. A solution for this situation would be that, if a defendant is requesting the appointment of a professional consultant and if he provides evidence of not being able to cover his costs on his own, the court should not be able to reject such a request.

In practice, courts frequently reject requests for the appointment with the explanation that the defendant does not need the assistance of a professional consultant, although the expert examination has been ordered and the outcome of criminal proceedings largely depends on the findings of the expert. The law would have to find a solution under which the court would not have to assess whether a defendant needs a professional consultant or not; instead, the mere fact that the expert examination has been ordered and that the defendant is indigent should represent sufficient reasons for the appointment of a professional consultant.

In connection with the rights of the professional consultant, under the CPC the defendant has the right to be informed and to attend the expert examination, to inspect the files and the object of the expert examination, to propose to the expert to undertake certain actions, to object to the finding and opinion of the expert, to pose questions to the expert at the trial and to be examined about the subject matter of the expert examination. On this basis, one may conclude that a professional consultant may not be examined during the investigation, that he may not pose questions to the experts during the examination, and that he may not send his expert opinion in writing at any stages of the proceedings. It is unclear why these rights have been denied, especially in view of the fact that the expert examination is ordered and the expert is appointed by the prosecution during the investigation and that the indictment largely depends on the expert's findings.

By giving a professional consultant greater authority in the investigation, the expert's findings might be checked more thoroughly and accusations may be avoided if there are arguments for a different expert opinion. If a professional consultant may be examined at the trial, i.e. he may present his expert opinion orally; it is unclear why he may not do this in writing. A written expert finding and opinion would make it possible for the participants in the proceedings to get to know both the professional consultant and the expert and to prepare for the examination of both, and it would enable the experts to learn the arguments of the professional consultant in a timely manner and to give their opinion on them.

Kosovo Bar Association

Article 141.2 of the CPC determines that “[t]he Defendant may obtain and pay for expert analysis on their own. The expert must comply with Article 138 of this Code and the state prosecutor shall receive a copy of the defense expert’s report within fourteen (14) days of its completion.” Attorneys agree with the existence of this provision, as it clearly improves the procedural position of the defendant in relation to the state prosecutor, but it needs further specification with regard to which phase of the procedure the defendant may engage an expert with their own expenditures.

Bar Association of Federation of BiH

The mere fact that there is a need for expert opinions or evaluations during criminal proceedings should be sufficient grounds for court-ordered appointments of experts. Complex and sensitive issues can only be fairly and justly settled if the necessary insight and data is provided by an expert in the respective field. Otherwise, there would be a high risk of the court reaching a decision without the appropriate assessment of the facts that could be grounds for an appeal or annulment.

The reasoning behind the rejection of such requests by certain courts (the presence of a paid legal representative which should suffice for the protection of the rights of the defendant) is insufficiently grounded in practice and it should be revisited and lead to a change of attitudes and approaches. It is obvious that the average defense attorney cannot be expected to possess sufficient knowledge in all matters of relevance to a particular case.

According to Article 269 of the CPC, an expert consultant can be hired by the parties, the defense attorney and the court with the costs falling on the appointing person. However, there should be an understanding that the expertise provided by the expert consultant serves primarily to the purpose of allowing a correct and fair judgment in the criminal proceeding. Therefore, an expert consultant should be appointed by the court at any moment when such a need arises in the interest of justice and the adequate assessment of relevant facts.

National Chamber of Advocacy of Albania

In Albania, during the pre-trial investigation phase, the prosecutor appoints the expert (Arts. 79 and 314 of the CPC) and there is no available legal remedy to challenge such decision. Meantime, during the trial the defense can propose and the court will rule on this motion. The defense has also the right to propose expert tasks as well as to ask for his disqualification. The role of experts must be reviewed and private

experts retained by the defense need to be accepted in the process as necessary to ensure the proper equality of arms as well as for the sake of an effective cross-examination. This requires the introduction of new rules dealing with this situation.

Arguments and international standards

Subject to the requirements of the ECHR, courts must adhere to the principle of equality of arms and the right to a fair trial in determining whether to permit expert testimony at the trial or pre-trial stages.¹⁰⁶

In the United States, parties have the right to call expert witnesses under the Rules.¹⁰⁷ Expert testimony is admissible if the subject matter is one where scientific, technical or other specialized knowledge would assist trier of fact.¹⁰⁸ Experts must be qualified as possessing sufficient knowledge, skill, experience, training and/or education with respect to the issue on which their expert testimony is sought. Their testimony must be based on sufficient facts and data, and must be product of reliable principles/methods reliably applied to facts.¹⁰⁹ Upon motion of a party or its own initiative, the court may also appoint expert witnesses that the parties agree on and/or the court chooses to appoint.¹¹⁰ Court appointed experts may be deposed by any party, may be called to testify by any party, may be cross-examined by any party, and must advise all parties of their findings.¹¹¹

Moreover, the U.S. Constitution guarantees defendants the right to counsel and right to due process of law, and these rights have been interpreted to include the right to necessary ancillary defense services – such as expert assistance – under both federal and state law.¹¹² U.S. federal law, for example, provides that counsel for an individual who is “financially unable to obtain investigative, expert, or other services necessary for adequate representation” may file an *ex parte* application for such services with the court.¹¹³ If the court or magistrate judge deems the requested services necessary

106 *E.g., G.B. v. France*, App. No.44069/98, paras. 68-70, 2 October 2001.

107 U.S. Federal Rule of Evidence 706(e).

108 U.S. Federal Rule of Evidence 702.

109 *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

110 U.S. Federal Rule of Evidence 706(a).

111 U.S. Federal Rule of Evidence 706(b).

112 *See, e.g., Corenevsky v Superior Court*, 36 Cal.3d 207 (1984) (collecting cases); *Mason v. Arizona*, 504 F.2d 1345, 1351(9th Cir. 1974) (“The effective assistance of counsel guarantee of the Due Process Clause requires, when necessary, the allowance of investigative expenses or appointment of investigative assistance for indigent defendants”). Expert testimony is admissible if the subject matter is one where scientific, technical or other specialized knowledge would assist trier of fact. *See, e.g., Fed R. Evid. 702.*

113 18 U.S.C. § 3006A(e)(1). Counsel may obtain expert services without prior request if the cost of such services is less than \$800 or if

and concludes that the person is financially unable to obtain them, then counsel may obtain such services on behalf of defendant at the expense of the state.

8.3. AUDIO RECORDING OF ALL MAIN HEARINGS IN CRIMINAL PROCEDURE

It is necessary to envision mandatory audio recording of all trials and transcribing of all audio records. If it is temporary impossible to ensure transcribing of audio records for all criminal trials, it is possible to envision mandatory audio recording in order to solidify the course of the trial – this would serve as a tool of control, where the recording is transcribed only in certain procedural situations at the request of the parties and at their expense, or when this is necessary to assess the validity of the trial record, or when a request for recusal of the court is filed or when a disciplinary complaint against other participants in the proceedings is filed – in order to check the validity of the complaint.

Bar Association of Serbia

Cross examination can achieve its purpose only when the trial is recorded or when stenographic notes of the trial are taken, because any rephrasing of a question or an answer will make the entire instrument completely pointless. The number of the criminal offenses for which audio recording is mandatory should be increased, depending on the statutory sentence or the complexity of the case. This is necessary for at least the criminal offenses referred to in Article 162 paragraph 1 – i.e., those cases where special investigative techniques may be ordered.¹¹⁴

counsel could not feasibly await prior approval services and the judge or magistrate approves the expert's services after the fact. 18 U.S.C. § 3006A(e)(2). The amount of compensation is limited by statute. See 18 U.S.C. § 3006A(e)(3). Courts in California have also recognized that even where counsel is privately retained, defendants may still qualify for court-appointed or paid experts or other ancillary services. For example, where an indigent defendant's retained counsel is paid for by third parties such as family members, the defendant may still qualify for court appointed experts for his defense. The key question is whether the defendant is indigent and not whether his attorney is privately retained. See *Tran v. Superior Court*, 92 Cal. App. 4th 1151 (2001) and *Anderson v. Justice Court*, 99 Cal.App.3d 398 (1979).

¹¹⁴ See Art. 236, paragraph 1. of the CPC (Official Gazette of the RS No. 72/2011). If, due to the gravity of a criminal offense, the suspension of some constitutional rights is allowed with the aim of detecting and proving it, audio recording must be secured in order to ensure conditions for a fair trial. Otherwise, there will be situations in which, in proceedings for an aggravated murder where the sentence might be 40 years of prison, during the cross-examination of witnesses there will be debates on what the witness said exactly and what exactly will be included in the record.

Macedonia Bar Association

In practice, there is no visual or audio recording of court hearings although such a record is required by the Code. Instead, a written record of the proceedings is maintained by a court typist. This undermines the effectiveness of cross-examination, because its essence is completely lost, because the typist is incapable of recording every single asked question in its entirety and cannot make a full record of the answers provided. It is essential to the right to a fair trial to provide for the necessary capability and means for visual-audio recording of the main hearing and only in exceptional cases, to allow only for a written record of the proceedings.

Kosovo Bar Association

While provisions on audio or video recording of trial hearings and the investigation stage – e.g. audio or video recording of a witness' statement exists, this is not applied in practice because a hearing does not have to be recorded if technical conditions for this do not exist.

Bar Association of Federation of BiH

Article 155 Paragraph 1 of the CPC (audio or audio-visual recording) should not contain the word “as a rule”, and the Article should say “all the performed activities during the course of the criminal proceedings are to be recorded” instead. The main reason is that witnesses change their statements very often with various explanations. The prosecution also abuses its procedural competences by influencing the witnesses or suspects in an inappropriate way. The testimony of witnesses and suspects being recorded is the exception not the rule. All advanced legal systems insist on recording all the activities undertaken during the criminal proceedings.

Bar Association Albania

In the Republic of Albania, since 2013, audio recording of all hearing have been introduced in all courts. The procedures for audio recording are set in Article 115 of the CPC, as well in the Instruction of the Minister of Justice no. 353, dated 3 September 2013, and stating: “On the determination of detailed rules for the store, saving and the archiving of the minutes of hearing with audio tools.” Parties have the right to receive the copy of the recording as well as its transcript. This has significantly improved the ethic between the parties as well as the respect of the rights of parties by the court.

Arguments and international standards

The U.S. Federal Rules of Criminal Procedure require key proceedings, including grand

jury sessions, preliminary hearings, plea hearings, and motion hearings, to be recorded in their entirety.¹¹⁵ Proceedings may be recorded by a court reporter (stenographer) or other “suitable recording device.”¹¹⁶ The purpose of the rule is to ensure the creation of a complete, objective and accurate record that may be relied upon in the event of an appeal.

9. MINIMAL DEPARTURE FROM THE ADVERSARIAL AND DIRECTNESS PRINCIPLES

It is necessary to prescribe that the records of statements provided during the investigation may be read out and used as evidence at the trial only when the examined persons are dead or have developed a lasting mental illness or cannot be found or their arrival to the court is impossible or significantly impeded for important reasons.

It is necessary to prescribe that statements provided during the investigation may be used at the trial only during the direct and cross-examination if the witness contradicts his previous statement and only in order to verify the truthfulness of the witness or the statement, and to that end, they are presented as exhibits.

Bar Association of Serbia

In the case of severance of proceedings against a co-defendant or final conviction of an accomplice in another criminal procedure, the co-defendant or accomplice is not examined as a witness, but the court is informed about the contents of the record on his statement from the other proceedings.¹¹⁷ Therefore, it is impossible to directly examine this person, which means that judgments will be based on the statements of defendants in other proceedings, without the possibility of the court to examine him directly and without giving the possibility to the defense attorney to ask questions to clarify all the disputable circumstances of importance for his client.

The question is whether it is acceptable under the Constitution to read statements of witnesses for the prosecution at the trial, who were interrogated by the prosecutor during the investigation, without providing the possibility of direct and cross-examination, and whether it is acceptable under the Constitution to read statements of witnesses for the prosecution at the trial in cases when no attempt was made to make the presence of the defense possible, since, according to the prosecutor’s dis-

115 See U.S. Federal Rule of Criminal Procedure 5(g) (preliminary hearings); 6(e) (grand jury proceedings); 11(g) (plea hearings); and 12(f) (motion hearings).

116 *Id.*

117 See Art. 406. paragraph 1. item 5 of the CPC (Official Gazette of the RS, No. 72/2011)

cretion, the presence of the defendant or his counsel might have influenced the witness (Art. 300 paragraph 2) or the witness was examined under a previous approval of the judge for preliminary proceedings (Art. 300 paragraph 6) or the witness was examined in an investigation against an unidentified perpetrator who was identified later in the proceedings. Therefore, these are procedural situations where during the investigation no attempt was made to make it possible for the defense to take part in the examination of the witness, and where, under Article 406 of the CPC, there are conditions for the reading of these statements at the trial.

These are departures from the principle of directness and the adversarial principle, which must be both regulated and understood restrictively, because Article 32 of the Serbian Constitution says that any person charged with a criminal offense shall have the right to present evidence in his favor by himself or through his legal counsel, to examine witnesses against him and demand that witnesses on his behalf be examined under the same conditions as the witnesses against him and in his presence. It is an elementary principle that defendants in criminal proceedings must have effective means of contesting evidence against them.

Under this principle, the defendant must be able to examine the truthfulness and reliability of presented claims by having the witnesses be examined in his presence. So, in all situations when the witness is examined in the investigation, it will not be possible to read his statement at the trial without summoning the defendant or his counsel because the defendant was not given the possibility to realize his constitutional right in the criminal proceedings referred to in Article 32 of the Serbian Constitution, which is stronger than the legal possibility of reading these statements formally. If this becomes case law, it would be too risky for the prosecutor to apply Article 300 paragraph 2 of the CPC and Article 300 paragraph 6 of the CPC extensively, because he will thus expose himself to the risk of not being able to read the statement of this witness at the trial if the legally prescribed conditions are met.

Macedonia Bar Association

Article 391, paragraph 3 of the CPC provides that if the defendant does not give a statement during the main hearing, the public prosecutor may ask for the statement given by the defendant to the public prosecutor during the investigation to be read out loud and put on the record. This possibility does not coincide with the spirit of the new CPC, which states that only the defense that can put the defendant on the stand or ask him or her to give a statement during the main hearing, and not the public prosecutor. This provision would make it possible, whenever the defendant is not willing to give a statement - i.e. to testify - for the public prosecutor to ask to present and put on record the earlier statement given by the defendant to the public prosecutor.

The testimony of a codefendant and the verdict convicting him or her should not be allowed as evidence in the procedures for the other codefendants. A codefendant, who has been convicted by a legally effective verdict, should not be heard as a witness nor should a verdict against the co-defendant be disclosed as evidence.

Bar Association of Federation of BiH

The principle of directness is universally accepted and any deviation from its application in the criminal proceedings puts into question the quality and reliability of statements and testimonies derived from the proceedings leading up to the main hearing itself. Whenever there is any chance for a witness to be present and provide a direct oral testimony, there should be no room for referring to records and written statements obtained previously under various circumstances. One must always take into consideration the possibility of coercion, pressure, threat, manipulation, etc. There can be no surrogate for relevant statements being given directly before the court in the presence of all parties.

The BiH CPC provides in Article 219 that the prosecutor can examine and take statements informally during the investigation and that the recordings of such informal examinations do not have probative value before the court. The examined person also has the right to file a complaint to the prosecutor within three days in cases of misconduct during the examination.

If the authorized person conducts an informal examination of a person while treating them like a suspect or witness (i.e. the person in question is introduced to their rights arising out of Article 78 of the CPC: the criminal offense being brought against them, the probable cause, the right not to answer questions or present defense, the right to hire legal representation which can be present during the examination, the right to present all the facts which go in their favor and which they plan to use as defense, that this defense can be used at the main hearing even without their consent if such defense was revealed in the presence of their attorney, their right to an interpreter, etc.), then the written record of this examination can be used as evidence at the main hearing. This brings forth a series of unfavorable factors for the suspect/defendant as they are exposed to an informal examination which can have genuine repercussions for the potential trial, before a person even knows their exact status (whether they are a suspect or witness). This provision should only be applied when the person in question is objectively unable to come forth and provide a statement at the main hearing. Otherwise it will further improve the prosecutor's position in comparison to the suspect/defendant.

National Chamber of Advocacy of Albania

The application of 362 of the Criminal Procedure Code which provides the parties the right to oppose partially or totally the testimony of a witness based on his statements made before the prosecution or judicial officer that are part of the trial file, is a serious issue. This Article violates the Articles 31, 32 and 42 of the Constitution. In practice, there have been cases when all the testimonies have been opposed by the prosecution office and these motions have been accepted by the court. This means that this article undoes the value of evidence and facts that are proven through the examination of witnesses before the court by the defendant and his defense.

This allows the statements given under the impact of violence, torture, intimidation, etc., to be taken as evidence while undoing the value of the true evidence examined by the court. It also constitutes a violation of the principle of equality of arms, as it neutralizes the only “weapon” that is available to the defendant which is the examination of witnesses during the trial and allowing the prosecutor to submit evidence collected during the investigation stage in which the defense and the defendant do not participate. This violates defendant’ constitutional guarantees to a fair trial.

Arguments and international standards

The European Court of Human Rights has emphasized that Articles 6(1) and 6(3)(d) of the ECHR generally require that witness testimony “be produced at a public hearing, in the presence of the accused.”¹¹⁸ Exceptions to the rule are permitted only with good reason, and only if they do not infringe on the rights of the defense to challenge the evidence and confront witnesses.¹¹⁹

In regards to exceptions of the principle of directness, the ECtHR made the clear its position in two judgments:

In *Al Khawaya and Tachery v. United Kingdom*,¹²⁰ the ECtHR held that the right to a fair trial guaranteed by Article 6, paragraphs 1 and 3(d) was breached because the

118 *Poletan and Azirovik v. The Former Yugoslav Republic of Macedonia*, nos. 26711/07, 32786/10 and 34278/10, ¶ 81, 12 May, 2016 (citing *Khodorkovskiy and Lebedev*, nos. 11082/06 & 13772/05, ¶ 707). Cf. *Sibgatullin v. Russia*, no. 32165/02, ¶ 36, 23 April 2009 (“In appeal proceedings reviewing the case both as to facts and as to law, Article 6 does not always require a right to a public hearing, still less a right to appear in person In order to decide this question, regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant’s interests were actually presented and protected before the appeal court, particularly in the light of the nature of the issues to be decided by it and of their importance to the appellant.”).

119 *See id.*

120 *Al Khawaya and Tachery v. United Kingdom*, App. Nos. 26766/06 and 22228/06, 15 December 2011.

domestic court's judgment was rendered exclusively or in a greater part based on the statement of a person to whom the accused has not had a chance to question. The Court emphasized: "The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. This principle requires not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that he should be able to test the truthfulness and reliability of their evidence, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings."¹²¹

In *DeLuca v Italy*,¹²² the ECtHR held that it is equally important for the defendant to have the possibility to question credibility of a statement made by a witness or a co-defendant. The Court stated in this regard that the fact that the statements in question were given by co-defendants and not witnesses was not relevant: when a statement might be crucial for conviction, regardless of whether it was given by a witness or a co-defendant, it represents the evidence of the defense subject of the guarantees of Article 6, paragraphs 1 and 3(d).

In the U.S, the Sixth Amendment's Confrontation Clause guarantees criminal defendants the right to confront the witnesses against them. The admission of testimonial evidence violates the confrontation clause if the declarant is not present for cross-examination at trial, unless the declarant is unavailable and was subject to cross-examination at the time the statement was made.¹²³ Thus, in a multi-defendant case, for example, the confession of a defendant who does not take the stand may not be admitted, even if it was legally obtained, because his co-defendants will not have an opportunity to cross-examine him.¹²⁴ A defendant forfeits his confrontation rights only if he intends to make the declarant unavailable – e.g., by murdering the declarant.¹²⁵

The U.S. Federal Rules of Evidence favor live witness testimony and mandate the exclusion of hearsay evidence.¹²⁶ Hearsay is any out of court statement offered to prove the truth of the matter asserted.¹²⁷ It is excluded because it cannot easily be subjected to cross-examination, given that it involves statements made prior to a witness's tes-

121 *Id.* para. 127.

122 *De Luca v. Italy*, App. No 43870, 24 September 2013.

123 *Crawford v. Washington*, 541 U.S. 36 (2004).

124 *Bruton v. United States*, 391 U.S. 123 (1968).

125 *Giles v. California*, 554 U.S. 353 (2008).

126 U.S. Federal Rule of Evidence 802.

127 See U.S. Federal Rule of Evidence 801(c).

timony at trial. Although the Rules generally bar the admission of hearsay, there are numerous exceptions. All exceptions, however, are subject to the Sixth Amendment; a testimonial statement may not be admitted if it violates the confrontation clause, even if it meets an exception to the hearsay rule.¹²⁸

The U.S. Federal Rules of Evidence state that the witnesses may be presented with their prior statements to refresh their recollection, whether or not those statements would be admissible under the hearsay rules.¹²⁹ Such statements are also shown to the opposing party and the judge, but they are not admitted into evidence.¹³⁰ If viewing the statement does not refresh the party's recollection, the relevant portions of the witness's statement may be read into evidence.¹³¹ The statement will not be admitted into evidence unless the adverse party wishes for it to be admitted.¹³²

The principle of directness, the adversarial principle and the principle of equality of arms are regulated very well in the Republika Srpska, where the court has the obligation to treat the parties and the defense attorney in the same way and to give each of the parties the same opportunities in terms of access to evidence and its examination at the trial.¹³³ The statement a witness provided during the investigation may not be used if the witness is present at the trial, and the party which requests that the statement provided during the investigation be taken into account as evidence at the trial must prove that, despite all efforts invested with the aim of ensuring the presence of the witness at the trial, the witness remained inaccessible.¹³⁴ Statements provided during the investigation may be used at the trial only during the direct and cross-examination if the witness contradicts the previously provided statement and only in order to verify the truthfulness of the witness or his statement and, in that sense, it is presented as an exhibit. Exceptionally, records of statements provided during the investigation may be read out and used as evidence at the trial under a decision of the judge or the panel only when the examined persons are dead or have developed a permanent mental illness or cannot be found or their arrival to the court is impossible or significantly impeded for important reasons.¹³⁵

128 See, e.g., *Bourjaily v. United States*, 483 U.S. 171 (1987).

129 U.S. Federal Rule of Evidence 612.

130 See *id.*

131 U.S. Federal Rule of Evidence 803(5).

132 See *id.*

133 Art. 14 paragraph 1 of the CPC of the Republika Srpska.

134 Art. 231 paragraph 2 of the CPC of the Republika Srpska.

135 Art. 288 paragraph 1 and 2 of the CPC of the Republika Srpska.

10. THE COURT SHOULD BE BOUND BY THE LEGAL QUALIFICATION OF THE CRIME.

After the defendant entered his/her plea, the prosecutor should not have the possibility to change the legal qualification.

No one can be tried for criminal event for which he/she had been tried before.

Macedonia Bar Association

In Macedonian criminal practice of the courts it is recognized that for the same criminal event, one can be tried and punished for the other legal qualification of the criminal offence. This means double jeopardy for the same event, and that is the reason why, in the criminal law, it has to be strictly defined that no one can be tried and punished for the same criminal event. Just for clarification, in Article 7 CPC in Macedonian wording it is stated that "No one can be tried again and sentenced for a *criminal offence...*", but it should be changed and the article should read "*event*".

According to Article 398, paragraph 2 of the CPC, the court is not obliged to accept the legal qualification of the criminal offense made by the authorized plaintiff. It is recommended that the courts are actually bound to it, because this would provide for more just and fair trial and increased responsibility of the public prosecutor and his or her actions and filed indictments.

This would especially have repercussions when it comes to the guilty plea and the implementation of the new Sentencing Law and the mitigation circumstances for a lesser sentence. Thus, in accordance with the Sentencing Law, any defendant who pleads guilty before the beginning of the main hearing may receive a lesser sentence, even below the legally prescribed minimum, but after the commencement of the trial, this is no longer possible. Having this in mind, hypothetically, any defendant who would plead not guilty for a first degree or premeditated murder – especially cruel or out of self interest or greed - but would be willing to plead guilty for manslaughter or negligent homicide, if charged with a first degree murder, he or she would not admit the crime and thus lose the possibility to get a mitigated sentence. However, if one assumes, again hypothetically, that during the evidentiary procedure the court comes to the conclusion that the crime committed was manslaughter after all and decides to change the charge, the defendant should be given the opportunity to give a plea and maybe admit the guilt for the new specific crime that he or she has been charged with, because if not, that would mean that the defendant received injustice and was prevented from enjoying his or her rights to the fullest extent.

For these reasons, the courts should be bound by the legal qualification of the crime and the above discussed hypothetical case should end with an acquittal, thus increasing the responsibility of the prosecutorial work and protecting the rights of the citizens and defendants in the proceedings of a fair trial.

If the public prosecutor fails to enact an order to conclude the investigation, or an order to stop the investigation, then the investigation shall be considered to have been concluded by the force of law. If the investigation has been concluded, then an order to conduct an investigation for the same criminal event cannot be issued against the defendant.

Kosovo Bar Association

Article 360.2 of CPC determines that “[t]he court shall not be bound by the motions of the state prosecutor regarding the legal classification of the act.” This provision should be changed due to the fact that the lawmakers have given the state prosecutor the opportunity to re-qualify the criminal offence based on the results of the evidence issued during the legal review. If the state prosecutor does not make use of this opportunity, the court should not have the right to rule the defendant as guilty for an offence they were not even impeached for.

Bar Association of Federation of BiH

In accordance with the CPC of BiH, the court is bound by the indictment and the legal qualification contained within it during the main hearing, not only in relation to the subject matter, but also in relation to its scope. However, as the main hearing is not just a mechanical reproduction of the material obtained during the investigation, in cases where new relevant facts arise, the prosecutor is authorized to change the indictment accordingly. This possibility is provided by Article 275 of the CPC and it is available to the prosecutor from the beginning of the main hearing until the moment the judge closes the evidentiary stage. The indictment can be changed both in favor or to the detriment of the defendant. In such cases the defense would be given additional time to prepare for the continuation of the main hearing under the new circumstances. Such a change in the qualification of the criminal offense does not require a new confirmation of the indictment. However, if the qualification is changed to the extent that there are barely any traces of the initial criminal offense, there should be a confirmation of the new indictment. If the facts of the case have not changed, but only the prosecutor’s legal understanding then there is no need to change the indictment, but the prosecutor can voice his newfound understanding during the closing arguments, and he can also leave it unchanged due to the fact that the court is not bound by the legal assessment of the prosecutor.

Bar Association Albania

Articles 372 – 374 of the CPC, provide the rule on the right of the prosecution to modify the accusation, adding an accusation for another offence and the accusation for a new fact.

When during the trial, the facts turn out different from what is described in the request for trial, and the trial of these facts is under the authority of the same court, the prosecutor modifies the accusation and proceeds with the relevant one. When during the court examination another criminal offence connected with the offence subject to trial is evident, according to the Article 79, letter b, or when an aggravating circumstance which was not presented in the request for trial comes about, the prosecutor communicates to the defendant the criminal offence or the circumstance, provided that the examination is not in the competency of another superior court. In addition, when during the court examination a new fact, in the charge of the defendant, which is not mentioned in the request for trial and for which must be proceeded ex-officio comes about, the prosecutor proceeds in usual way, withdrawing the file to continue the preliminary investigation. However, if the prosecutor demands, the court may allow the examination during the same hearing when the defendant agrees and the speed of proceedings is not damaged.

The court at any case with its final judgment may qualify the act differently from the qualification made by the prosecution or injured accuser, less severe or more severe, provided that the criminal offence is under its competency.

While the Constitutional Court of Albania, has already ruled that the court shall not have the right to re-qualify the accusation in case when is proceeded with a speedy trial. Thus, if the court wants to modify the qualification made by the prosecutor, it should revoke the decision to proceed with a speedy trial and open an normal trial process. This goes also for the situation of other special proceedings such as plea bargaining (which does not exist yet in Albania) etc, as in case of Macedonia where this issue is raised in the above paragraphs.

As can be seen, the situation in Albania provides for strong position of the prosecutor and the court to modify the accusation, which leads to situation when the prosecution knowing from the beginning that there are ground for additional accusation or a different one from the one stated in the request for trial; uses some undiscovered evidences to the defense and the court as surprise when evaluates that his position is weak.

Also the final conclusion made by the Bar of Macedonia, would be an excellent tool

to secure the rights of defense. The court should not have the right to modify the qualification made by the prosecution into a more aggravating situation for the defendant, but can exercise this right solely for the purpose of providing a more favorable situation for the defendant. This fits perfectly with the nature of an adversary system and the position of an impartial and independent court as required by the ECHR.

Arguments and international standards

The EU Directive on the Right to Information in Criminal Proceedings requires that detailed information be provided to the accused person on the nature and legal classification of the criminal offence and the nature of the accused's participation in that offence no later than the submission of the merits of the accusation to a court.¹³⁶ Article 6, paragraph 4 of the directive adds that the accused must be informed promptly of any changes in the information given where necessary to safeguard the fairness of the proceedings.

Article 6, paragraph 3(d) of the ECHR likewise mandates that the accused be informed “promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.” The ECtHR has held repeatedly that the right to be informed of the “cause” of the accusation includes not only the right to learn of the facts underlying the charges, but also the right to be informed of “the legal characterisation given to those acts.”¹³⁷ The provision of “full, detailed information” concerning the charges, including their legal characterization, is an “essential prerequisite for ensuring that the proceedings are fair.”¹³⁸

In U.S. federal court, offenses punishable by more than one year imprisonment must be prosecuted by indictment, issued by a grand jury, unless the defendant agrees to waive his constitutional right to indictment and be prosecuted by information. Offenses punishable by less than one year of imprisonment may be prosecuted by information, filed by the prosecutor. These rules do not apply to states, which may prosecute by indictment or information, as the state rules provide. The indictment or information must be a “plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government.”¹³⁹ “For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the

136 Art. 6, para.3 of the EU Directive on Right to Information (2012/13/EU).

137 E.g., *Mulosmani v. Albania*, App. No. 29864/03, para. 123, 8 October 2013 (citing *Pélissier and Sassi v. France* [GC], App. No. 25444/94, para. 51, ECHR 1999-II); *Penev v. Bulgaria*, App. No. 20494/04, para. 42, 7 January 2010.

138 *Zhupnik v. Ukraine*, App. No. 20792/05, para. 37, 9 December 2010 (citing *Pélissier and Sassi*, paras. 52-54).

139 U.S. Federal Rule of Criminal Procedure 7(c)(1).

defendant is alleged to have violated.”¹⁴⁰

Indictments may not be actually or constructively amended by the prosecutor or the court, except, upon motion of the defendant, surplusage may be removed that has the effect of narrowing the defendant’s liability without changing the nature of the charge.¹⁴¹ That is because the U.S. Constitution requires that federal indictments be issued by the grand jury.¹⁴² The grand jury may return a superseding indictment, adding or altering charges, but the defendant should be given additional time to prepare his defense on those charges, if necessary.¹⁴³ With permission of the court, the prosecutor may amend an information at any time before the verdict or finding, “[u]nless an additional or different offense is charged or a substantial right of the defendant is prejudiced.”¹⁴⁴

SPECIFIC PROBLEMS OF DEFENSE DEFINED BY EACH OF THE BAR

Bar Association of Serbia

After the introduction of the prosecutor-led investigation and the adversarial concept of the trial, discussion can be heard regarding restoration of the principle of material truth at the trial, with the explanation that the trial is insufficiently efficient. The introduction of the material truth at the trial would essentially disrupt the balance between the efficiency and fairness of the proceedings, which is maintained in relation to the criminal proceedings as a whole, rather than to each of its individual stages. Likewise, the right to a trial within a reasonable time should be perceived in relation to the proceedings as a whole, rather than just in relation to the trial. Prosecutor-led investigations, which are covert and may last indefinitely, have largely compromised the right to trial in a reasonable time due to the normative solutions that regulate the investigation, rather than the normative solutions that regulate the trial. Under the conditions of prosecutor-led investigation – the introduction of the principle of material truth to the trial would bring into question the realization of the defendant’s right to a fair trial.

140 *Id.*

141 U.S. Federal Rule of Criminal Procedure 7(d); see also, e.g., *United States v. Whitman*, 665 F.2d 313 (10th Cir. 1981)

142 See, e.g., *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Wacker*, 72 F.3d 1453, 1474 (10th Cir. 1995).

143 See *United States v. Rojas-Contreras*, 474 U.S. 231, 236 (1985) (holding that the filing of a superseding indictment does not reset the Speedy Trial Act’s 30-day trial preparation period, but noting that the defendant is not prejudiced, because the Act “places broad discretion in the District Court to grant a continuance when necessary to allow further preparation. Section 3161(h)(8) authorizes the trial judge to grant a continuance if ‘the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.’”).

144 U.S. Federal Rule of Criminal Procedure 7(e).

The CPC introduces the principle of covertness of the investigation and fails to regulate its length anywhere in the text. The question is what are the rights of the defense from the moment of issuance of the order on conducting an investigation to the moment when it is served on the defendant. The problem is that this covert part of criminal proceedings can last for an indefinite period of time, without and recognition of the rights of the defense. The CPC should prescribe the service of the order without any delay as well as an effective mechanism of court protection from unlawful, arbitrary, criminal prosecution.

The prosecutor-led investigation has also changed the role of the defense, which, according to the law, may now only undertake measures aimed at securing evidence and propose to the prosecutor to undertake these evidentiary actions, rather than collecting evidence itself. In order to undertake an action and make a proposal, the defense attorney must have insight into the case file and monitor the investigation by being present during the implementation of evidentiary actions. Only then can he or she make a proper assessment of and decision on the particular direction to focus activities within the collection of evidence which would help the prosecution clarify suspicions. The statutory limitation on the defense's rights to inspect the case file and to be present during the undertaking of evidentiary actions essentially violates the principle of fairness of the proceedings. Finally, at the end of the investigation, the prosecutor should send the court a list of all documents he proposes to use as evidence as well as a list of evidence that he or she has, but does not plan to present. The central issue of effective defense is the rule under which the defense has the duty to propose all evidence as early as at the preparatory hearing. This rule undermines the defendant's right to prepare a defense in the way that he or she regards as most favorable, because he or she is practically forced to present evidence and disclose the defense strategy at the very beginning of the proceedings. Such a legal limitation of the right to defense may not be justified by interests of the time-effectiveness of the proceedings. The defendant's rights to remain silent throughout the proceedings, not to incriminate him or herself and to defend in the most favorable way and at the most favorable time represents the very core of the right to a fair trial.¹⁴⁵

The second important issue of effective defense is the issue of exclusion of unlawful evidence, which is only nominally resolved in Article 16 of the CPC, while a meaningful elaboration of the "the principle of the fruit of the poisonous tree" is lacking in other legal provisions. Therefore, a procedural mechanism should be envisioned for a timely exclusion of unlawful evidence ahead of the trial and the use of unlawful evidence should be defined as an absolute substantive violation of proceedings.

145 See *Jalloh vs. Germany* 2006, *J.B. vs. Switzerland* 2001, *Allan vs. United Kingdom* 2003

The prosecutor-led investigation has been introduced for the sake of efficiency of criminal proceedings. However, greater competences of the prosecutor in the investigation stage call for a need for the adversarial concept of the trial where the defense is given the possibility to contest the collected evidence through an equal and adversarial public debate. Only in this way is it possible to strike the necessary balance between the two opposing principles of criminal proceedings – efficiency and fairness.

There are also certain problems that are not essentially connected to the text of the CPC, but whose resolution represents a necessary precondition for a full realization of rights provided for in the CPC. Prosecutors' offices are faced with a huge number of cases that lead to bottlenecks in work and demonstrates a lack of systemic solutions that would facilitate the work of the prosecution. Moreover, higher courts of review are not in their appellate decisions requiring lower courts to implement the CPC, which indicates that there is a need for a stronger corrective role of higher courts in the implementation of new principles and standards prescribed by the CPC.

The beginning of implementation of the new CPC also implies that opposition to change must be faced, because the implementation of new solutions means not only a reform of the norms, but also a reform of the legal perception and understanding of some principles and instruments. The way of interpretation and implementation of norms in each specific case that might be reasonably foreseen is of crucial importance for the rule of law. The key shortcomings of the CPC are reflected in the incomplete and vague norms regulating the position of the defense in the prosecutor-led investigation and exclusion of unlawful evidence. Departures from the principle of directness and the adversarial principle would have to be minimal and the principles of the equality of arms and fruit of the poisonous tree would have to be consistently elaborated through specific procedural solutions – which has not happened. Finally, the defense has to be freed of the obligation to disclose all evidence it has before it sees the results of the prosecution's evidence.

Macedonia Bar Association

There should be the possibility for settlement until the conclusion of the main hearing (alternatively, until the conclusion of the appeals procedure). The Criminal Procedure Code of the Republic of Macedonia envisions the possibility whereby, until the filing of the charges, the public prosecutor and the defendant can file a settlement proposal asking the judge of the preliminary procedure to apply a criminal sanction determined according to the type and level, within the legislative framework for the particular criminal offence, but not under the sanction mitigation limits stipulated in the Criminal Code, which is a positive novelty in the criminal legislation of the Republic of Macedonia. Such a solution can, on the other hand, also be restrictive

since the possibility whereby the suspect/defendant and the public prosecutor can settle the level of the sanction, exists only until the filing of the criminal charges. Therefore, this solution can be improved by envisioning the possibility for a proposed settlement regarding the criminal sanction between the suspect/defendant and the public prosecutor during the course of the main hearing, as well. Such a solution has been accepted in Bosnia FBiH and Serbia and functions very well.

A new paragraph 4 should be added to Article 301 which shall read: If the deadlines stipulated in paragraphs 1, 2 and 3 of this Article expire and if the public prosecutor fails to enact an order to conclude the investigation, in accordance with paragraph 1 of this Article, or an order to stop the investigation, in accordance with Article 304, then the investigation shall be considered to have been concluded by the force of law. Moreover, anew article should be added that provides: "If the investigation has been stopped in accordance with Article 304 of this law, then an order to conduct an investigation for the same criminal event cannot be issued against the defendant.

It is necessary to prescribe an extension of the time period available to the defense to collect evidence. The defendant, according to Article 302, paragraph 4, shall have the right, within 15 days after having been notified, by the public prosecutor, that the investigation procedure has concluded, to submit documents or other evidence, writs related to the activities of the defense or to ask the public prosecutor to collect certain evidence.

The deadline of 15 days, wherein the defense should submit evidence, is insufficient and, therefore, it should be at least 120 days. Article 301 of the Law on Criminal Procedure prescribes the deadlines for completing the investigative procedure. Thus, according to this article, if the investigative procedure is not completed within six months after the day of enactment of the order to conduct an investigative procedure, then the public prosecutor shall be obligated to inform the superior public prosecutor, who, for complex cases may extend this deadline for an additional six months. Notwithstanding, this deadline can be extended by the public prosecutor of the Republic of Macedonia, for an additional three months. In addition, for organized crime offences, the public prosecutor of the Republic of Macedonia may extend the deadline for an additional six months. An analysis of the deadlines available to the public prosecutor with all of the mechanisms available to him/her and the deadlines for the defense with its limited possibilities to collect evidence, leads to the conclusion that the time period of 15 days is too short. In addition, this deadline does not correspond to the deadlines prescribed in Article 311 of the Criminal Procedure Code, which specifies that the defense attorney, for the purposes of the defense may, in accordance with the law, request data and notifications from state administrative authorities, the authorities of local self-government units, from legal entities and nat-

ural persons that perform public authorizations and request from them documents, files and notifications. The entities shall be obligated to act on the request of the defense attorney within 30 days after they have received the request and, if the procedure involves detention, within seven days after the day they received the request, unless otherwise specified by another law.

There is no possibility of plea-bargaining within the summary proceedings. This is because in summary proceedings, the public prosecutor does not notify the defendant about the investigation. Therefore, the defendant basically finds out for the first time that he or she was a target of an investigation at the proceedings, although not of the classical type like in the regular proceedings, at the moment of receipt of the penal warrant. This eliminates the possibility of plea-bargaining, which is otherwise an option up to the filing of the indictment. The CPC should provide a possibility for the public prosecutor, before actually issuing a penal warrant as part of the summary proceedings, to notify the defendant of his or her intention to issue a penal warrant and introduce the defendant to the available evidence and offer the option of possible sanction bargaining, with the defendant making the final decision whether to accept the plea agreement or go to trial. If the defendant opts for a trial, he or she should be given additional 120 days to prepare his or her defense.

As a measure that would provide for the presence of the defendant, bail is rarely used in the Republic of Macedonia. The procedure for setting bail should be reregulated. Whenever the prosecution is asking for pretrial detention, the preliminary procedure judge, *ex lege*, should be obliged to consider the possibility of setting bail. In addition, a scale should be established with the specific amount of bail for each criminal offense, thus providing for uniformity of the decisions made by the preliminary procedure judges.

Pursuant to Article 256 of the CPC, some of the special investigative means as referred to in Article 252, paragraph 1, items 1- 5 are to be ordered by a preliminary procedure judge upon an elaborated motion by the public prosecutor, whereas the other investigative means referred to in Article 252, paragraph 1, items 6 - 12 are to be ordered by the public prosecutor by means of a written order. All special investigative means should be ordered by a preliminary procedure judge upon an elaborated motion by the public prosecutor, thus promoting the judicial control over the invasion of several rights while implementing such measures.

The provision stipulated in Article 410 of the CPC, referring to the deadline for appeals (against a first instance verdict, authorized persons can lodge an appeal within 15 days after the day the verdict was submitted) should change in a way that, for criminal offences where the imposed sentence can be up to ten and more than ten

years of imprisonment, the deadline for appeals should be 30 days, while for more complex cases, upon a request from the parties, the court can also specify a longer deadline.

National Chamber of Advocacy of Albania

Article 17 of the Constitution provides for a complete integration into the Constitution of the ECHR. This means that all the standards under the ECHR and the case law of the ECtHR are directly applicable in the Republic of Albania. However, there is a slight difference between the meaning of “charge” under the Article 28 of the Constitution and Article 34 of the CPC. While the Constitution provides for a general and broad meaning of the “charge”, Article 34 of CPC provides for a more narrow meaning of “charge” by linking it with the document through which the defendant is informed about the charge or the indictment act. In practice, very often this turns out to be considered as a lack of a formal charge for a detained or arrested person. However, logically there is always a charge against somebody when he is detained or arrested.

The law fails to provide many guarantees for the defense attorney in performing his duty. For example, the Criminal Procedure Code protects the communications of defense advocates, prohibiting interception of defense advocate conversations or inspecting the mail between a defense advocate and his client. See Ch. V, art. 52 (4, 5) of the CPC. In Albania, however, these conversations and other types of communications have been used against defense attorneys for corruption charges. This undermines the crucial importance of confidentiality in the attorney-client relationship.

Other issues are related to the right of a defense attorney to meet with his client without any restriction. In Albania, detention facilities do not allow advocates to visit on weekends at all, and on weekdays only between the hours of 9:00 a.m. and 2:00 p.m.

Moreover, in courts there are no private spaces available to defense attorneys to discuss the case with the defendant during crucial stages of the proceedings. Against this lack of equality and guarantees for an effective defense, *ex parte* communications and other ethical issues must be better observed by both judges and prosecutors.

According to the case law in Albania, the prosecutor when deliberating his final conclusion under the Article 378 of the Criminal Procedure, provides also a specific request for the specific conviction including the amount of fine, or the number of years to be served in prison. Indeed, Article 378 does not provide for such specifica-

tions to be made by the prosecutor and the court is the only charged by the law with the duty to determine the final sentence. Thus, such practice should be considered unconstitutional and prohibited in practice.

One of the ways to increase court and prosecution office responsibility and thus the equality of parties is by securing public access in pre-trial detention hearings and increased access in other hearings. These hearings must be open to the public and must comply with the requirements of the right to a fair trial. The latter requires also a better and strict definition of media role and limitation of media broadcasting of criminal proceedings as a legal requirement to comply with the principle of the presumption of innocence. Mass broadcasting of hearings and detentions and arrests of suspected or accused persons by the police constitutes an improper influence to judges and harms the delivery of justice. There is a lack of normative framework that would deal with these issues.

Criminal proceedings in Albania include a severe misuse of pre-trial detention by all courts, especially by the first instance courts, which order pre-trial detention in 95% of cases. It is obvious that this legal framework and practice do not provide effective legal remedies that comply with the requirements of Article 5 of the ECHR. The misuse of pre-trial detention, infrequent use of other alternative security measures along with an extensive pre-trial detention period, are crucial issues to be addressed in the future in order to comply with Article 5 of the ECHR. It is important to emphasize that in Albania the pre-trial detention period can be up to three years for crimes punishable at a minimum of 10 years imprisonment. This period can be extended for three additional months by the court if requested by the prosecution. This means no possible *restitutio integrum*.

Preliminary hearing must be introduced also in the criminal process. Evidences and facts from the defense shall be administered during this hearing.

Electronic evidence - there is no rule concerning the way of administration and its value in the process for this type of evidence. Electronic signature must be used.

The role of the victim must be limited to the civil lawsuit and should not have powers within the criminal proceedings related with the fate of the process and guiltiness of the defendant etc. Such role would significantly harm the rights of the defendants and misbalance the equality of arms.

The following terms must be clarified: accused, defendant, person who is attributed a criminal offense, person under investigation, registration of the criminal offense and registration of the perpetrator.

The court must provide a well reasoned decision when it refers to motion to suspend the trial and send the case for an incidental constitutional review under the Article 145/2 of the Constitution.

Trial in absentia affects the presumption of innocence. Thus, this proceeding should be strike out form the CPC.

Ex officio lawyers must be on a rotation basis and should secure an effective defense.

Court should facilitate the defense lawyer access in court services by designated a special post of work and other facilities as necessary including access in courts files.

Motions claiming the absolute nullity of criminal procedure acts lodged by the defense are unjustly disregarded by court. One of the ways is to postpone the court decision at the end of the trial investigation stage. Although it is not precisely clear, the time limit provided in Article 110 of 15 days shall be applicable also for all motions lodged under the Article 128 of the CPC.

The defense must be provided not only with the list of evidence but the entire files.

The defense lawyer must be present when evidence is taken. The distinction between evidence and act must be clarified, as well as uselessness of evidence and invalidity of the act.

Kosovo Bar Association

Articles 245 – 256 determine that the single trial judge or presiding trial judge shall decide on filing the indictment. The single trial judge or the presiding trial judge should not participate in the court hearings, as they have already formed an initial conviction on the guilt of the defendant.

Article 367(2) determines that “If a single trial judge or trial panel imposes a sentence with imprisonment of five (5) or more years, and imposes detention on remand, for the accused if he or she is not in detention, or extends it when the accused is already in detention.” The given provision should be changed in a way that even when a sentence with imprisonment of five (5) or more years is imposed, the court can decide on a case by case basis whether the conditions for imposing detention on remand are met.

The CPC does not specify when the official duties of the defense end. It should be clarified that according the duties of defense counsel officially end with the ex-

haustion of all judicial means, including extraordinary means. Provision of defense according to official duty, even in the procedure according to extraordinary judicial means would improve the procedural position of the defendant, because it is exactly during this phase that the defendant is in great need of professional representation.

Bar Association of Federation of BiH

Article 84, paragraphs 2-5 of the BiH CPC regulates the status of witnesses with immunity. The provisions of this article should be amended in a way that the existing Article 84 would be expanded with points marked 84a, 84b, 84c (...). The additional provisions should provide for the mandatory notification of the defense attorney of the suspect/defendant on the assignment of immunity to a witness. This is important because in practice, defense attorneys do not receive any type of notice on the assigned immunity, and the decision on immunity is presented to them just before the hearing of the witness with immunity.

The manner in which the Republic of Croatia has dealt with the issue of witnesses with immunity (the key witness) could be an example: Articles 42 and 41 of the Law on the Office for Combating Corruption and Organized Crime regulate the decision of the Council for the assignment of immunities and the preconditions which they assess when reaching their decisions. Such provisions do not exist in the law of BiH, and should be integrated into the existing CPC. Articles 42 to 46 of the Croatian law go on to regulate the proceedings upon the assignment of immunities. Such a way of dealing with the issue of witnesses with immunities would be useful in BiH law as well.

Detailed provisions on the treatment and status of the key witnesses means a clear procedure and legal security for all parties involved, which will lead to the higher level of assistance from persons involved in criminal activities in exchange for lenient treatment in the criminal proceedings and possible release. In BiH it would be a very significant addition to the CPC, considering the high presence of organized crime and the importance of its reduction for the path of the country towards EU membership. In any case, consistent with the obligation to provide all parties involved in the criminal proceedings with the equal opportunity to prepare their case and defense, the defense attorneys must be “on the same page” as the judge and the prosecution when it comes to the immunity of certain witnesses as well. Whether this goal will be achieved through integrating solutions from comparative law, which is applied successfully in other countries, or through new provisions tailored to the specific circumstances in BiH, such provisions are necessary in the CPC of BiH.



V

RECOMMENDATIONS

1. GENERAL RECOMMENDATIONS

Joint recommendations of the Criminal Law Reform Project for changes of legislation and practices in criminal procedures in the Region

1. RIGHT TO BE ADVISED OF HIS RIGHTS IMMEDIATELY AT THE MOMENT OF DEPRIVATION OF LIBERTY

The defendant must have the right to be advised immediately upon being deprived of liberty, that he has the right to remain silent, that anything he says may be used as evidence and that he has the right to be questioned in the presence of an attorney of his own choice.

2.1. RIGHTS TO KNOW THAT AN INVESTIGATION IS BEING CONDUCTED AND TO BE SERVED THE PROSECUTOR'S WRITTEN ORDER

The defendant must have the right to know whether criminal proceedings are being held against him, as well as the right to have the written order on conducting an investigation served on him without delay after first activity of prosecutor. Investigation against unknown person should be excluded as possibility.

2.2. RIGHT TO APPEAL TO THE COURT AGAINST THE PROSECUTOR'S ORDER TO CONDUCT AN INVESTIGATION

Defendants must have the right to appeal to the court against the prosecutor's order on conducting an investigation in order to ensure court protection from unlawful and arbitrary prosecution.

3.1. RIGHT OF DEFENSE TO INSPECT EVIDENCE BEFORE PRETRIAL DETENTION HEARING

When it comes to pretrial detention hearing, any evidence available to the prosecution should be handed over to the defense at least 12 hours before the defendant appears before a preliminary procedure judge, to review the prosecution's request for pretrial detention.

This is required so that the defense may also prepare for the pretrial detention hearing and be able to properly respond to any evidence and argumentation presented by the prosecution.

3.2. RIGHT OF THE DEFENSE TO INSPECT THE ENTIRE CASE FILE AND EVIDENCE

The defense attorney must have the right to inspect the entire case file and to inspect all objects serving as evidence. Without the right to inspect the entire case file, the right to defense represents *nudumius*. Through an effective realization of this right, the defendant will take an active role and will become the subject of criminal proceedings rather than the “object of the investigation.” The fairness of criminal proceedings will largely depend on this right and the way of its realization.

4.1. RIGHT OF THE DEFENSE TO ATTEND THE IMPLEMENTATION OF EVIDENTIARY ACTIONS DURING THE INVESTIGATION

The prosecutor should have the obligation to invite an interrogated defendant and his defense attorney to attend the examinations of all witnesses and experts, as well as the interrogations of all co-defendants during the investigation.

4.2. RIGHT OF THE DEFENSE TO SUGGEST TO THE PUBLIC PROSECUTOR TO IMPLEMENT EVIDENTIARY ACTIONS DURING INVESTIGATION

At the proposal of the parties and in their presence, the judge for preliminary proceedings should, in certain cases, implement an evidentiary action – if it is likely that the examination of this evidence at the trial will be impossible or if this is an evidentiary action which the defense has proposed and the prosecutor has refused to undertake.

4.3. RIGHT OF THE DEFENSE TO UNDERTAKE ACTIONS AIMED AT SECURING EVIDENCE IN THE INVESTIGATION

It is necessary to envision the possibility of issuance of a court order, under which a third person would be ordered to surrender an object at the request of the defense, and of a fine and a prison sentence in case of refusal to surrender the object.

5.1. THE PROSECUTOR’S OBLIGATION OF DISCOVERY

It is necessary to enable the defendant and the defense attorney access to the evidence supporting the indictment and to envision the obligation of the prosecutor to make a list of all evidentiary actions undertaken during the investigation, as well as to make a list of all documents he has collected – both those he proposes as evidence, and those he has collected but does not plan to present as evidence.

5.2. PREPARATORY HEARING – BURDEN OF PROOF AND ORDER OF PROOF RULES

It is necessary to provide the defense attorney the opportunity for objections to the indictment at the preliminary hearing stage. The defense attorney must be given the possibility freely to decide which evidence will be confronted with the evidence of the prosecution, but only after he sees the results of the examination of the prosecution's evidence at the trial.

6.1. USING UNLAWFUL EVIDENCE MUST BE AN ABSOLUTE SUBSTANTIVE VIOLATION

The fruit of the poisonous tree principle should be consistently developed throughout the CPC by expressly prohibiting the use of unlawful evidence during the examination of other evidence in the proceedings and by clearly regulating the procedural fate of the evidence in the examination of which unlawful evidence and evidence that would never have been found had they not been preceded by the use of unlawful evidence was used.

6.2. TIMELY AND EFFECTIVE EXCLUSION OF UNLAWFUL EVIDENCE

It is necessary to envision an appeal against a ruling rejecting the motion for excluding evidence, which would ensure the existence of two instances in deciding on the lawfulness of evidence before the beginning of the trial.

7. EXCEPTIONAL INITIATIVE OF THE COURT IN THE EVIDENTIARY PROCEDURE ONLY IN FAVOR OF THE DEFENSE

It is necessary to envision the right of the court to intervene in the evidentiary procedure only in favor of the defendant if it deems it necessary for ensuring the real observation of the defendant's right to a fair trial.

8.1. SPECIFIC RULES OF DIRECT AND CROSS-EXAMINATION NEED TO BE PRESCRIBED

It is necessary to envision specific rules of direct and cross-examination and clearly define the object of cross-examination and the object of redirect questioning.

8.2. INFLUENCE OF PROFESSIONAL CONSULTANT OF DEFENSE NEEDS TO BE IMPROVED

By giving a professional consultant greater authority in the investigation, expert's findings might be checked more thoroughly and accusations may be avoided if there are arguments for a different expert opinion.

8.3. ALL MAIN HEARINGS IN CRIMINAL PROCEDURE SHOULD BE AUDIO RECORDED

It is necessary to envision mandatory audio recording of all trials and transcribing of all audio records. If it is temporarily impossible to ensure transcribing of audio records for all criminal trials, it is possible to envision mandatory audio recording in order to solidify the course of the trial – as a tool of control, where the recording is transcribed only in certain procedural situations at the request of the parties and at their expense, or when this is necessary to assess the validity of the trial record, or when a request for recusal of the court is filed or when a disciplinary complaint against other participants in the proceedings is filed – in order to check the validity of the complaint.

9. DEPARTURE FROM THE ADVERSARIAL AND DIRECTNESS PRINCIPLES SHOULD BE MINIMAL

It is necessary to prescribe that the records of statements provided during the investigation may be read out and used as evidence at the trial only when the examined persons are dead or have developed a lasting mental illness or cannot be found or their arrival to the court is impossible or significantly impeded for important reasons. It is necessary to prescribe that statements provided during the investigation may be used at the trial only during the direct and cross-examination if the witness contradicts his previous statement and only in order to verify the truthfulness of the witness or the statement, and to that end, they are presented as exhibits.

10. THE COURT SHOULD BE BOUND BY THE LEGAL QUALIFICATION OF THE CRIME.

After the defendant entered his/her plea, the prosecutor should not have the possibility to change the legal qualification. No one can be tried for criminal event for which he/she had been tried before.

2. SPECIFIC SUGGESTIONS FOR AMENDMENTS TO THE CRIMINAL PROCEDURE LEGISLATIONS

Bar Association of Serbia - proposals for Amendments to the Serbian Criminal Procedure Code

ITEM 1.

Art. 69 paragraph 1 item 1. An arrested person has the right to be informed immediately after his arrest in a language he understands about the reason for his arrest, that he has the right not to say anything, that everything he says may be used as evidence in the proceedings, and that he has the right to be questioned in the presence of a defense counsel of his choice or, if he cannot afford one, a defense counsel who will give him legal assistance free of charge.

Art. 68 paragraph 1 item 1. The defendant is entitled to be informed in the shortest possible time, and always before the first interrogation, in detail and in a language he understands, about the charges against him, the nature and grounds of the accusation, about the collected evidence against him, as well as that everything he says may be used as evidence in the proceedings.

ITEM 2.1.

Art. 296 paragraph 2. An order to conduct an investigation is issued before or immediately after the first investigative action undertaken by the public prosecutor or police in the pre-investigative proceedings, ~~and at the latest within 30 days from the date when the public prosecutor was notified about the first investigative action undertaken by the police.~~

Art. 297 paragraph 1. The order to conduct an investigation is served on the suspect within 8 days after its issuance. ~~together with the summons or information about the first evidentiary action they may attend (Article 300).~~

Art. 10 paragraph 2. ~~If requested, the public prosecutor will present the information on whether an investigation is conducted against a person only to the court, another public prosecutor or police, and to the defendant, his counsel or injured party when conditions referred to in Article 297 of this Code are fulfilled.~~

Art. 295 paragraph 1. An investigation is initiated against a specific person where there are grounds for suspicion that he has committed a criminal offence ~~or against~~

~~an unidentified perpetrator where there are grounds for suspicion that a criminal offense has been committed.~~

ITEM 2.2.

~~Art. 297 paragraph 2. If the identity of an unidentified perpetrator is established during the investigation against him, the public prosecutor will amend the order to conduct an investigation within the meaning of Article 296 paragraph 3 of this Code and act in accordance with paragraph 1 of this Article. The suspect or his counsel may complain against an order to conduct an investigation within 8 days. The judge for preliminary proceedings decides on the complaint within 8 days. If he finds that the grounds for the issuance of the order to conduct an investigation are insufficient, the judge for preliminary proceedings will revoke the order in whole or in part.~~

ITEM 3.1.

Art. 212 paragraph 2. The court is required to inform in a suitable manner the public prosecutor and the defense counsel on the time and place of the defendant's questioning. **The public prosecutor is required to enable the defense counsel to inspect in detail all collected evidence on which a motion for detention is based at least 12 hours before the defendant is questioned about the reasons for detention.** The questioning may also be performed in the absence of persons duly notified.

ITEM 3.2.

Art. 68 paragraph 1 item 8. The defendant is entitled to examine **and photocopy** all documents contained in the case file **as well as to examine and make copies of all** objects serving as evidence.

Art. 71 paragraph 1 item 3. The defense counsel is entitled to examine **and photocopy all** documents from the case file **as well as to examine and make copies of all** objects serving as evidence, after the issuance of an order on conducting an investigation or after an indictment was filed directly (Article 331 paragraph 5); and also before that time if the defendant had been interrogated in accordance with the provisions of this Code;

Art. 303 paragraph 1. The public prosecutor is required to enable, within a time limit sufficient for the preparation of defense, a suspect who has been questioned and his defense counsel to examine **and photocopy all** documents from the case file, **as well as to view and make copies of all** objects serving as evidence. **In case**

several persons are suspects in connection with the same criminal offense, the examination and viewing of objects serving as evidence may be deferred until the public prosecutor has questioned the last of the accessible suspects.

Art. 68 paragraph 1 item 6. The defendant is entitled to read immediately before his first interrogation the criminal complaint **with attachments**, crime scene report, expert witness' finding and opinion, as well as records of all evidentiary actions undertaken in the investigation until that moment.

Art. 71 paragraph 1 item 2. The defense counsel is entitled to read immediately before the suspect's first interrogation the criminal complaint **with attachments**, crime scene report and expert witness' finding and opinion, as well as records of all evidentiary actions undertaken in the investigation until that moment.

ITEM 4.1.

Art. 300 paragraph 1. The public prosecutor is required to **summon** the defense counsel to attend the interrogation of the suspect, or to **summon** the **interrogated** suspect and his defense counsel and to notify the injured party about the time and place of the questioning of **a co-defendant**, witness or expert witness.

~~Art. 300 paragraph 2. By exception from paragraph 1 of this Article, in proceedings in connection with criminal offences in which a prosecutor's office of special jurisdiction acts in accordance with a special law, the public prosecutor may question a witness even without summoning the suspect and his defense counsel to attend the questioning if he assesses that their presence may influence the witness. In such a case the court's decision may not be based only or to a decisive extent on the statement of the witness.~~

~~Art. 300 paragraph 6. If a summons to a suspect and his defense counsel was not delivered in accordance with the provisions of this Code, or if the investigation is being conducted against an unidentified perpetrator, the public prosecutor may undertake questioning of a witness or expert witness only on the basis of prior authorization by the judge for the preliminary proceedings.~~

ITEM 4.2.

Art. 302 paragraph 3. If the judge for preliminary proceedings grants the motion of the suspect and his defense counsel, he will order the public prosecutor to undertake the evidentiary action and set a deadline for this purpose. **If the public prosecutor fails to undertake the evidentiary action within the set deadline, the judge for**

preliminary proceedings will undertake the evidentiary action himself, in the mandatory presence of the public prosecutor and the defense counsel.

ITEM 4.3.

Art. 301 paragraph 3. For the purpose of exercising competences referred to in paragraph 1 of this Article, the suspect and his defense counsel have the right to request from the judge for preliminary proceedings to issue a decision ordering a person who refuses voluntarily to be interviewed, or to enable the entry into rooms or to hand over objects or documents, to do so under the threat of a fine or a prison sentence of up to 90 days. ~~The authorization referred to paragraph 2 item 1) of this Article does not relate to the injured party and persons already questioned by the police or public prosecutor~~

ITEM 5.1.

Art. 310 paragraph 1. When he finds that the subject matter of the investigation has been clarified sufficiently, the public prosecutor will issue an order on the conclusion of the investigation which he will deliver to the suspect and his defense counsel, if he has one, and will notify the injured party about the conclusion of the investigation. **At the end of the investigation, the public prosecutor is required to make a list of all evidentiary actions he has undertaken and a list of all written documents he has collected during the investigation. These two lists, together with the written documents referred to therein, constitute an integral part of the prosecution's case file.**

ITEM 5.2.

~~**Art. 303 paragraph 3.** A suspect who has been questioned and his defense counsel are required after collecting evidence and materials for the benefit of the defense (Article 301) to notify the public prosecutor thereof and to enable him before the conclusion of the investigation to examine the case-file documents and view objects that will be used as evidence.~~

Art. 350 paragraph 1. The president of the panel will ask the parties, defense counsel and injured party to explain the proposed evidence they intend to present at the trial; and will caution them that evidence known to them, but not proposed at the preparatory hearing without justified reasons, will not be examined.

~~**Art. 396 paragraph 1.** After questioning the defendant,~~ the president of the panel determines a period during which evidence proposed by the prosecutor will be ex-

amined first, followed by evidence proposed by the defense, evidence whose examination was proposed by the panel *ex officio*, evidence proposed by the injured party, and finally by **the examination of the defendant** and evidence on facts on which depends the decision on the type and extent of the criminal sanction. If there are justified reasons, the president of the panel may ~~decide on a different order and~~ extend the period for examining evidence. **The president of the panel will caution each party, before presenting evidence, that the evidence known to them until that moment but not proposed will not be examined.**

ITEM 6.1.

Art. 438 paragraph 1 item 11. A substantive violation of the provisions of criminal procedure exists if the summary of the judgment is incomprehensible, **contradicts itself or reasons for the judgment, or if the judgment has no reason at all, or the reasons for the facts which are the subject matter of proving are not provided in it, or these reasons are completely unclear or largely contradictory, or if in respect of the facts which constitute the subject matter of proving there exists a substantial contradiction between what is stated in the reasons for the judgment about the content of the documents or transcripts of testimonies provided during the proceedings and those documents or transcripts themselves**

Art. 438 paragraph 2 item 1. A substantive violation of the provisions of criminal procedure exists if the judgment is based on evidence on which, under the provisions of this Code, it may not be based, ~~except if, in view of other evidence, it is obvious that the same judgment would have been issued even without that evidence;~~

Art. 438 paragraph 2 item 2. A substantive violation of the provisions of criminal procedure also exists if, during the trial, the court either failed to apply or improperly applied some provision of this Code and this had **or could have had decisive** importance for issuing a lawful and proper judgment.

ITEM 6.2.

Art. 237 paragraph 1. When it is prescribed in this Code that certain evidence may not be used in criminal proceedings or that a court decision may not be based on it, the judge for preliminary proceedings will *ex officio* ~~or on a motion of the parties and the defense counsel~~ issue a ruling on excluding **the evidence the transcript of those actions from the file** immediately, or no later than the conclusion of the investigation. A special appeal against this ruling is allowed.

Art. 237 paragraph 2. A motion for the exclusion of unlawful evidence or evi-

dence obtained through the use of unlawful evidence may be filed by the parties and the defense counsel. The court panel referred to in Art. 21. paragraph 4. decides on whether the motion is founded within 8 days. A special appeal against this ruling is allowed.

Art. 337 paragraph 6. If the panel determines that the files contain transcripts or information referred to in Article 237 paragraphs 1 and 3 of this Code or **unlawful evidence referred to in Art. 237. paragraph 2. of this Code** it will issue a ruling excluding them from the files. A special appeal against this ruling is allowed.

Art. 407 paragraph 1 and 2 The panel will issue a ruling ordering the exclusion from the case file and separate keeping of transcripts of earlier examinations of persons which may not be read out for the reasons specified in Article 406 paragraph 2 of this Code, transcripts or information referred to in Article 237 paragraphs 1 and 3 of this Code or **unlawful evidence referred to in Art. 237. paragraph 2. of this Code.** A special appeal is allowed against the ruling referred to in paragraph 1 of this Article

Art. 407 paragraph 3. ~~If on the basis of examined evidence the panel finds that exclusion of evidence was not appropriate, it may until the conclusion of the evidentiary proceedings revoke the ruling referred to in paragraph 1 of this Article against which no appeal was filed and decide to examine the excluded evidence.~~

ITEM 7.

Art. 15 paragraph 4. The court itself may ~~order a party to propose additional evidence or,~~ exceptionally, order that **additional evidence be examined if it finds that this is necessary for the realization of the defendant's right to a fair trial and only on condition that this is not opposed by the defense.** ~~that the evidence that has been examined is contradictory or unclear, and finds such action necessary in order to comprehensively examine the subject of the evidentiary action.~~

ITEM 8.1

Art. 402 paragraph 6. The direct examination is performed first, followed by cross-examination, and additional questions may be posed with the approval of the president of the panel. **The cross examination may only refer to the examination of the credibility of a witness or an expert witness and validity of facts presented during the direct examination. Additional questions may refer only to the examination of the validity of facts presented during the cross examination.**

Art. 398 paragraph 3. The president of the panel will prohibit a question or a reply

to an already asked question if it is inadmissible (Article 86 paragraph 3), **or repeated** or does not refer to the subject matter, except if the question is aimed at verifying the authenticity of the testimony.

Art. 398 paragraph 4. The parties may object to any question they regard as impermissible within the meaning of paragraph 1 of this Article. The parties object immediately after the question, using only one sentence that expresses the reason for the objection. The president of the panel decides on the validity of the objection and does not need to explain his decision. The objection and the decision thereon must be entered into the record. ~~The parties may request that the panel decide on the prohibition of a question or answer to a question. If the panel upholds the decision of the president of the panel on a prohibition of the question or answer as inadmissible, the question will be entered in the transcript at the request of a party.~~

Art. 398 paragraph 5. Once the prosecutor and the defense counsel have completed the examination, the president of the panel may **always** pose to the defendant a question which contributes to a more comprehensive or clearer reply to a question posed by other participants in the proceedings.

Art. 126 paragraph 1. The professional consultant is entitled to be informed about the date, hour and location of the expert examination and to attend the expert examination which may also be attended by the defendant and his counsel, to examine during the expert examination documents and the object of the expert examination, and to propose to the expert witness the performance of certain actions, to make **written** remarks about the findings and opinion of the expert witness, **to make his finding and opinion, to attend the examination of the expert witness and at the trial** to pose questions to the expert witness, as well as to be examined on the subject-matter of the expert examination.

ITEM 8.3.

Art. 236 paragraph 1. The authority conducting proceedings may order that the undertaking of an evidentiary or other action be recorded by a device for audio or video recording. The audio recording of the interrogation of a defendant and examination of a witness and an expert witness in the proceedings in connection with criminal offenses referred to in Article 162 paragraph 1 item 1) **and item 2)** of this Code is mandatory.

Art. 236 paragraph 3. The audio or video recording may be performed at a trial only when it is authorized for a particular trial by the president of the panel. If recording at a trial has been authorized, the trial panel may for justifiable reasons decide that

certain parts of the trial not be recorded. The audio recording of a trial at which offenses referred to in Article 162 paragraph 1 item 1) **and item 2)** of this Code are being discussed is mandatory.

ITEM 9.

Art. 239 paragraph 3. Statements given by the defendant, witness, expert witness or other person are entered in the record ~~if they contain deviations from or amendment to their earlier statement~~, in such a way that their basic content is presented.

Art. 406. paragraph 1. items 1, 4 and 5 Except in cases stipulated elsewhere in this Code, inspection of the contents of transcripts of the testimonies of witnesses, co-defendants or already convicted accomplices in a criminal offence, as well as transcripts of the findings and opinions of expert witnesses, may, if so decided by the panel, be performed by analogous application of Article 405 of this Code if:

1) The persons examined are deceased, mentally ill, or if their location is unknown ~~or their appearance before the court is impossible or would be substantially hampered by their advanced age, illness or other important reasons;~~ 4) ~~The witness or expert witness refuses to testify at the trial without a legally valid reason;~~ 5) ~~What is concerned is the testimony of a co-defendant prosecuted in severed criminal proceedings or criminal proceedings already concluded by a final conviction.~~

All transcripts of statements witnesses or expert witnesses have provided during the investigation may be used during the direct and cross examination at the trial only in case of deviation from their previous statements, for the purpose of checking the validity of the statements they are providing at the trial. If these transcripts are used during the examination, they may be used only for the purpose of checking the validity of the witness' or expert witness' statement provided at the trial, and not for checking any other facts in the proceedings.

OTHER ISSUES AND SPECIFIC PROPOSALS FOR AMENDMENTS TO THE SERBIAN CPC

Art. 19. All public authorities, legal persons and citizens are required to render necessary assistance to the public prosecutor, court or other authorities conducting proceedings, as well as to the defendant and his defense attorney at their request with the aim of collecting evidence

Limiting the obligation only to public authorities reduces the effectiveness of this provision in practice

Art. 73 paragraph 3 item 4. A defense counsel may not defend the co-defendant charged with the same criminal offense in the same case where the co-defendants' defenses are conflicting, unless the authority conducting proceedings concludes that it would not be detrimental to the interests of the defense.

The rule under which co-defendants can only exceptionally hire the same defense counsel is in contravention with the citizens' constitutional right to a defense counsel of their own choice. An exception could be envisioned only in cases where the co-defendants' defenses are conflicting, which is determinable.

Art. 74 paragraph 1 item 3. The defendant must have a defense counsel if he **has been arrested and brought to the public prosecutor (Art. 293), or** taken into custody, or prohibited from leaving his abode, or is in detention – from the moment of deprivation of liberty until the ruling discontinuing the measure becomes final.

When a defendant is taken to the prosecutor by the police, he is deprived of liberty despite the fact that he has not been ordered to remain in custody, which means that mandatory defense should also be envisioned in this situation.

Art. 78 paragraphs 1 and 2. Several co-defendants in the same case may have a common *ex officio* defense counsel **only if this is not contrary to the interests of their defense** only where that would not hinder the professional, conscientious and timely provision of legal assistance with their defense.

The assessment of the defense's interests by the authority conducting proceedings may be justified only in the case of ex officio defense. This means that the authority conducting proceedings must look after the effectiveness of the defense provided by the ex officio counsel it has appointed. However, the professionalism and conscientiousness of the defense counsel cannot be assessed by the authority conducting proceedings, but by the bar association, where the authority conducting proceedings may initiate the appropriate disciplinary proceedings

Art. 81 paragraph 2. Before issuing its decision, the court is required to invite the defendant and the defense counsel to state their position in relation to the reasons for disqualifying the defense counsel within no more than 24 hours, and to substantiate their assertions with evidence, and to caution them that if they fail to provide the declarations or substantiate them, the decision would be made on the basis of available **evidence data**.

The defense is requested to present evidence and, if it fails to do so, a decision is made on the basis of »data«

Art. 81 paragraph 4. The ruling on disqualification of a defense counsel on the grounds specified in Article 80 paragraph 1 item 1) of this Code is not appealable.

There is no “ratio legis” for not allowing an appeal against the ruling on the disqualification of a defense counsel.

Art. 88 When a defendant confesses to having committed a criminal offence, the authority conducting proceedings is required to continue collecting evidence about the perpetrator and the criminal offence only where there exists grounded suspicion about the veracity of the confession or if the confession is incomplete, contradictory or unclear or if it is **not substantiated by other evidence and contrary to other evidence.**

A confession may not be “regina probationem”. It must also be substantiated by other evidence. The formulation “if it is not contrary to other evidence” makes it possible to have a judgment based on the defendant’s confession for which it would be sufficient to have other evidence of the commission of the crime in addition to the confession, rather than other evidence proving that the defendant was the one who had committed the criminal offense.

Art. 90 paragraph 4. In accordance with the provisions from paragraphs 1 to 3 of this Article, a person may also be identified on the basis of his voice.

The voice-based identification is problematic because there are issues in connection with the description of the characteristics of the voice, taking of voice samples, finding of similar samples and substantiation of the identification, and the provision never defines the way in which voice recognition would be implemented in practice

Art. 93 paragraph 1 item 4. The duty to testify does not apply to an authorized police officer in connection with the content of information received within the meaning of Art. 286 and 288. of the CPC

This provision has existed earlier (Art. 97. item 4) because the veracity of operative findings cannot be reviewed. There is no justified »ratio legis« for deleting this provision, in view of the introduction of the right to cross examine for the purpose of effective examination of the prosecution’s evidence.

Art. 100 paragraph 3. During the pre-investigation proceedings and the investigation, the identification of persons is performed in the presence of the public prosecutor and the defense counsel.

The mandatory presence of the defense counsel during identification is conducive to the appropriate implementation of this evidentiary action. The evidentiary credibility of the identification would thus be ensured.

Art. 103 paragraphs 2 and 4. The ruling granting the status of an especially vulnerable witness is issued by the **judge for preliminary proceedings public prosecutor**, president of the panel or single judge.

~~**No special appeal is allowed against a ruling approving or denying a request.**~~
The prosecutor has been given the right to grant the status of an especially vulnerable witness on his own, without the right to appeal. He has thus been given the privilege to free key witnesses for the prosecution from the cross examination. The justifiability of the status of an especially vulnerable witness must be subjected to judicial control.

Art. 156 paragraphs 3 and 7A. search may be conducted even without the service of the search order, and without an invitation for a person or object to be surrendered and the advice on the right to a defense counsel or lawyer, if armed resistance or other form of violence is expected, or if there is obvious preparation for or commencement of the destruction of traces of a criminal offence or objects of importance for the proceedings, ~~**or if the holder of a dwelling or other premises is inaccessible.**~~ The search is attended by two citizens of adult age as witnesses who will before the commencement of the search be advised to observe the course of the search, and that they are entitled before they sign the record of the search to enter their objections on the veracity of the content of the record. ~~**If the conditions referred to in paragraph 3 of this Article are fulfilled, the search may also be performed without the presence of witnesses.**~~

There is no clear “ratio legis” for introducing the possibility of conducting a search of a dwelling in the absence of its holder and without witnesses. This possibility has not existed earlier, because the lawfulness of such a search cannot be checked. This solution makes it possible for the police to search a place when they expect not to find anybody there, in order to conduct the search more speedily.

Art. 158 paragraph 1 item 3. The public prosecutor or authorized police officers may by exception without a court order enter a dwelling and other premises and without the presence of witnesses undertake a search of the dwelling or other premises or persons found there: ~~**in order to directly arrest the perpetrator of a criminal offence;**~~

Police should not be authorized to enter an apartment without a court order whenever they make it appear they are doing this in order to directly arrest the perpetrator of a criminal offense. This undermines the purpose of a court order and the right to the

inviolability of the dwelling, because the police can always say they have acted on the basis of “operative findings” for the purpose of arrest

Art. 240 paragraphs 1 and 2A. transcript must be concluded by the conclusion of a session. The transcript is signed by the president of the panel, **public prosecutor, defense attorney and** record-keeper. The parties are entitled to examine a completed transcript and its attachments, to voice objections in respect of its content and to request corrections of the transcript. The parties are entitled to receive a copy of the transcript **immediately** after the conclusion of the session, if they so request.

This reaffirms the veracity of the transcript and prevents any additional changes in the formulations therein. This solution already exists in civil proceedings.

Art. 243 paragraphs 2 and 6. If the person referred to in paragraph 1 is not present at the place where the delivery is to be executed, the document may be delivered to an adult member of his household who is required to accept it. ~~If no member of the family household is present, the document will be delivered to a doorman, neighbor or president of the house council if they agree to it, and the delivery is thereby deemed executed. If in the place where a delivery is to be executed the person referred to in paragraph 2 and 3 of this Article who is required to receive a document is not present, the delivery will be effected in the manner specified in paragraph 4 of this Article.~~

The provision of a wider possibility for a proper personal delivery that would include the notice board of the court, and neighbors or the president of the house council with whom the person might not have good relations is highly problematic. The delivery very frequently results in very serious procedural consequences.

Art. 288 paragraph 8. Based on the information collected, the police draft a criminal complaint in which they specify the evidence they learnt about during the collection of information. ~~The content of statements made by individual citizens during the collection of information is not entered in the criminal complaint, except the statement provided by the suspect in accordance with Article 289 of this Code.~~

This has been envisioned only in order to limit the information the defense can get during the stage of first interrogation.

Art. 293 paragraphs 1, 2 and 3. The public prosecutor is required to advise an arrested person brought before him about the rights referred to in Article 69 paragraph 1 of this Code and to make it possible for him to use a telephone or other electronic message communicator, in his presence, to notify a defense counsel directly or

~~through members of the family or a third person whose identity must be revealed to the public prosecutor, and if necessary also to assist him to find a defense counsel. If the arrested person does not secure the presence of a defense counsel within 24 hours of the time when it was made possible to him within the meaning of paragraph 1 of this Article, or declares that he does not wish to obtain a defense counsel, the public prosecutor is required to question him without delay. If in the case of mandatory defense (Article 74) the arrested person does not obtain a defense counsel within 24 hours of the time he was advised of this right or declares that he will not obtain a defense counsel, an *ex officio* defense counsel will be appointed for him.~~

The right to inform a third person of one's own choice is contained in Art. 3. of the European Convention and it cannot be limited because of the prosecutor's assessment. Also, it makes no sense for the prosecutor to "help" the arrested person to "find" a defense attorney, because this leaves room for manipulation. The bringing of an arrested person before the prosecutor must be regarded as equal to him being kept in custody, because the defendant is, de facto, deprived of liberty and mandatory defense during the first interrogation has to be envisioned.

Art. 313 paragraph 5. Provisions relating to examination of the indictment (Articles 337 to 341) are not applicable to the indictment referred to in paragraph 4 of this Article. **If a plea agreement is to be concluded after the confirmation of the indictment, the prosecutor, for the purpose of concluding the agreement, may specify the indictment in terms of the description of facts and legal qualification of the criminal offense.**

For the purpose of creating conditions for the widest possible implementation of plea agreements, it should be explicitly said that the prosecutor is not bound by his own indictment and that he can deviate from it for the purpose of concluding a plea agreement.

Art. 319 paragraph 2. **A ruling dismissing (Article 316) or rejecting (Article 318) the plea agreement is not appealable.**

No "ratio legis" justifies the prohibition of an appeal to a ruling rejecting the plea agreement

Art. 323 paragraph 1 item 4. The court will accept the agreement on testifying by a defendant with a ruling if it determines **that there exists other evidence proving the veracity of his testimony.**

An agreement on testifying by a defendant or a convicted person must be corroborat-

ed by other evidence proving the veracity of facts presented in the testimony. Otherwise, judgments will be adopted merely on the basis of a “word uttered” by the person who will get a personal benefit – without any other evidence.

Art. 344 paragraph 1. The president of the panel begins preparations for the trial immediately after receiving the confirmed indictment ~~and the case file. Together with the indictment, the president of the panel receives only physical evidence and a list of evidence the prosecutor plans to present at the trial. After the confirmation of the indictment, the transcripts of statements provided during the investigation are returned to the prosecutor and may be used during the proceedings in accordance with Art. 406. paragraph 2. of this Code.~~

The court should not inspect the entire case file, because it will thus create preconceptions determining the course of the proceedings and, very frequently, also its final outcome. This will ensure the court’s impartiality in reviewing the results of the direct and adversarial discussion at the trial, and enable it to decide on the facts and legal issues on the basis of these results.

Art. 368 paragraph 5. During the trial, the panel decides on 5) the examination of additional evidence, ~~if it assesses that this is necessary for the realization of the defendant’s right to a fair trial and only on condition that this is not opposed by the defense. for the purpose of eliminating discrepancies or lack of clarity in the evidence examined and that it is necessary in order to discuss the subject-matter of the proving comprehensively;~~

Art. 412 paragraph 4. ~~The president of the panel may, after the parties declare themselves, specify the duration of the closing arguments.–~~

Frequently in practice, time limitations stand in disproportion with the size and complexity of the case. In view of the importance of the closing arguments – where the results of the proceedings are reviewed and the analysis of the examined evidence has a crucial effect on the outcome of the proceedings (See: Handževačkivš Croatia) – the defendant’s right to a fair trial is thus violated. The president of the panel is authorized to prevent the abuse of procedural rights if somebody uses the closing argument for this purpose.

Art. 429 paragraph 1 item 2. A judgment rendered in writing does not need to contain a rationale if a ~~term of imprisonment of up to three years~~, fine, community service penalty, penalty of seizure of a driver’s license, suspended sentence or judicial admonition was imposed on the defendant, and the conviction was based on a confession of the defendant fulfilling the conditions referred to in Article 88 of this Code.

The denial of the right to a reasoned court decision to a defendant who did not have a defense counsel and who received a prison sentence of up to 3 years reduces the defendant's right to a legal remedy, which drastically violates his right to a fair trial.

Art. 447 paragraph 1 and 2 A session of the panel is scheduled upon a proposal of the reporting judge by the president of the panel, who notifies thereof the public prosecutor, defendant, defense counsel, subsidiary prosecutor, private prosecutor and their proxy. ~~That defendant or his defense counsel, subsidiary prosecutor, private prosecutor or their proxy who requested within the time limit specified for filing an appeal or a response to an appeal to be notified about the session or proposed that a hearing be held before the court of second instance will be notified about the session of the panel.~~

This legal provision is not in accordance with the principle of equality of arms because, while the prosecutor must be informed about the session, the defense is informed thereof only optionally, which creates a procedural situation in which one of the parties in the proceedings cannot present its position on the claims of the other party. See Miladinov v. Macedonia, where the European Court clearly stated its position on the issue.

Macedonia Bar Association

1. In accordance with Article 292 of the CPC, the public prosecutor enacts an order to conduct an investigation. The suspect does not get a copy of the decision. It appears necessary, immediately after its enactment, for the investigation order to be immediately delivered to the suspect, who will then have 8 days in which to file a motion with the criminal trial chamber for review of the grounds and legality of the order.
2. Additional legal provisions should be introduced in the CPC, thus regulating the rights of the defense and the defendant during the detention hearing in the manner of presentation of any evidence by the prosecution and defense, as well as challenging such evidence before the preliminary procedure judge, with a single goal to evaluate the existence of a "reasonable suspicion" as the basic precondition for detention.
3. Article 79 of the CPC prescribes that during the criminal procedure, the defense counsel has the right to review the case file and any available evidence, in accordance with the provisions of this Law. This provision is not precise, so, it should be changed. During the trial, as well as during the pre-investigative procedure, the defense counsel should be allowed to review the case file and

any available evidence and get a copy of all reports and other files, except any evidence obtained through the use of the ongoing special investigative means.

4. Whenever a review is allowed, the defense is allowed, during the review, to manually note the content of the evidence and not to make use of a transcript for this purpose. If the defense lawyer asks for a review and a transcript during the investigation, the prosecutor responds that he will be allowed the transcript after the completion of the investigation in accordance with article 302, paragraph 3 of the CPC. This provision should be removed from the CPC.
5. The defendant, according to Article 302, paragraph 4 of the CPC, shall have the right, within 15 days after having been notified, by the public prosecutor, that the investigation procedure has concluded, to submit documents or other evidence, writs related to the activities of the defense or to ask the public prosecutor to collect certain evidence. The deadline of 15 days, wherein the defense should submit evidence, is insufficient and, therefore, should be at least 120 days, particularly if one compares the deadlines of the defense to submit evidence and the available time of the public prosecutor to conduct the investigation, specified on Article 301 of the CPC. Furthermore, such a deadline does not correspond to the deadlines prescribed in Article 311 of the CPC, which provides that for the purpose of the defense, the defense counsel may ask for information and reports from state entities, legal and natural persons
6. Article 347, paragraph 3 of the CPC gives the presiding judge the opportunity, during the preparation of the main trial, to reject certain evidence if he or she believes them not to be relevant (unimportant motion). At that time, the presiding judge has not yet heard the opening statements and is not familiar with their theory of the case. Therefore, this right of the presiding judge should be removed from the CPC.
7. The basic rules for direct and cross-examination are not prescribed. The consequences of not having such rules prescribed give rise to mistakes when asking questions, especially during cross examination. Considering that there is still no audio recording of the trials, in practice, judges often engage in reformulating questions, contrary to the letter, and the spirit of the new criminal procedure code.
8. It is essential to the right to a fair trial to provide for the necessary capability and means for visual-audio recording of the main hearing and only in exceptional cases, to allow only for a written record of the proceedings.

9. Article 391, paragraph 3 of the CPC provides that if the defendant does not give a statement during the main hearing, the public prosecutor may ask for the statement given by the defendant to the public prosecutor during the investigation to be read out loud and put on the record. This possibility does not coincide with the spirit of the new CPC, according to which, it is only the defense that can put the defendant on the stand or ask him or her to give a statement during the main hearing, and not the public prosecutor. This provision should be removed from the CPC.
10. The testimony of a codefendant and the verdict convicting him/her cannot be taken as evidence in the procedures for the other codefendants. It would not be good practice in Macedonia, if a codefendant, who has been convicted by a legally effective verdict, could be heard as a witness or if such a verdict could be disclosed as evidence.
11. According to Article 398, paragraph 2 of the CPC, the court is not obliged to accept the legal qualification of the criminal offense made by the authorized plaintiff. This provision should be amended to require the court to be bound to try the offense as indicted.
12. A new paragraph 4 should be added to Article 301 which shall read: "If the deadlines stipulated in paragraphs 1, 2 and 3 of this Article expire and if the public prosecutor fails to enact an order to conclude the investigation, in accordance with paragraph 1 of this Article, or an order to stop the investigation, in accordance with Article 304, then the investigation shall be considered to have been concluded by the force of law." Moreover, a new article should be added that provides: "If the investigation has been stopped in accordance with Article 304 of this law, then an order to conduct an investigation for the same criminal event cannot be issued against the defendant."
13. There should be the possibility for settlement until the conclusion of the main hearing (alternatively, until the conclusion of the appeals procedure).
14. There is no possibility of plea bargaining within the summary proceedings. The Code should provide a possibility for the public prosecutor, before actually issuing a penal warrant as part of the summary proceedings, to notify the defendant of his or her intention to issue a penal warrant and introduce the defendant to the available evidence and offer the option of possible sanction bargaining, with the defendant making the final decision whether to accept the plea agreement or go to trial.

15. Whenever the prosecution is asking for pretrial detention, the preliminary procedure judge, *ex lege*, should be obliged to consider the possibility of setting bail. In addition, a scale should be established with the specific amount of bail for each and every criminal offense, thus providing for uniformity of the decisions made by the preliminary procedure judges.
16. The investigative means referred to in Article 252, paragraph 1, items 6, 7, 8, 9, 10, 11 and 12 are to be ordered by the public prosecutor by means of a written order. All special investigative means should be ordered by a preliminary procedure judge upon an elaborated motion by the public prosecutor, thus promoting the judicial control over the invasion of several rights while implementing such measures.
17. The provision stipulated in Article 410 of the CPC, referring to the deadline for appeals (against a first instance verdict, authorized persons can lodge an appeal within 15 days after the day the verdict was submitted) should change in a way that, for criminal offences where the imposed sentence can be up to ten and more than ten years of imprisonment, the deadline for appeals should be 30 days, while for more complex cases, upon a request from the parties, the court can also specify a longer deadline.

Kosovo Bar Association - Specific proposal for amendments to the Kosovo CPC

1. The Kosovo CPC contains a provision under which criminal suspects should be informed about their rights immediately after the first interrogation by the prosecution or police¹⁴⁶. This means that our Code does not contain a provision under which suspects should be informed about their rights immediately upon arrest. We believe that our Code should be amended so as to adopt the so-called *Miranda Rights* principle. The introduction of this rule is necessary, because, under the current regulations, the accused may voluntarily plead guilty before finding out that he does not have to do it.
2. Article 104 of CPC, among others, determines that “A stamped copy of the ruling on the investigation shall be sent without delay to the pre-trial judge.” The provision as above should be completed in such a way that it determines that a stamped copy of the ruling on the investigation is also sent to the defendant. Such a completing amendment would allow the defendant to actively participate in the criminal procedure and to propose the taking of evidence that may go in their favor.

 146 See, Article 125 paragraph 3 of the Kosovo CPC.

3. Article 120 of the CPC should be amended to provide for the possibility of having the defendant and his counsel present during the evidentiary action of identification of persons or objects, in view of the importance of this evidentiary action.
4. The Kosovo CPC should be amended to adopt the so-called *Miranda Rights* principle, i.e. to have suspects advised immediately upon arrest that they have the right to remain silent, and that anything they say can be used against them later in the criminal proceedings.
5. Article 213 paragraph 6 should be changed in a way that allows the defense full access to the paperwork of the case file during the investigation stage.
6. Chapter V of the CPC should be amended to incorporate legal provisions that will enable the defense counsel to undertake some investigative actions, and to mandatorily oblige the state bodies to respond to the defense counsel requests just like they respond to the requests of the state prosecutor.
7. The CPC should be amended to include a legal provision that obliges the prosecutor to propose all evidence at the second review hearing and following this hearing to have the opportunity to propose new evidence, only when they can justify that the delay was not their fault.
8. Article 329.4 of the CPC should be changed to provide the court with verification of facts and proposal of evidence that might be in favor of the defendant.
9. The Kosovo CPC does not contain a single provision on parties' objections during the examination of witnesses. CPC contains the rules of direct and cross-examinations, which means that it only provides the definitions of direct and cross-examinations, but no rules on objections during these two types of examination. This very important element of the procedure should be regulated as clearly as possible.
10. Article 141.2 of CPC determines that "[t]he Defendant may obtain and pay for expert analysis on their own. The expert must comply with Article 138 of this Code and the state prosecutor shall receive a copy of the defense expert's report within fourteen (14) days of its completion." This provision needs further specification with regard to which phase of the procedure the defendant may engage an expert with their own expenditures.

11. The CPC has provisions on audio or video recording of trial hearings and the investigation stage – e.g. audio or video recording of a witness' statement. This is not applied in practice, however, because a hearing does not have to be recorded if technical conditions for this do not exist.
12. Article 360.2 of CPC determines that “[t]he court shall not be bound by the motions of the state prosecutor regarding the legal classification of the act.” This provision should be changed due to the fact that the lawmakers have given the state prosecutor the opportunity to re-qualify the criminal offence based on the results of the evidence issued during the legal review. If the state prosecutor does not make use of this opportunity, the court should not have the right to rule the defendant as guilty for an offence they were not even impeached for.
13. Articles 245 – 256 of the CPC determine that the single trial judge or presiding trial judge shall decide on filing the indictment. The single trial judge or the presiding trial judge should not participate in the court hearings, as they have already formed an initial conviction on the guilt of the defendant.
14. Article 367.2 determines that “If a single trial judge or trial panel imposes a sentence with imprisonment of five (5) or more years, and imposes detention on remand, for the accused if he or she is not in detention, or extends it when the accused is already in detention.” The given provision should be changed in a way that even when a sentence with imprisonment of five (5) or more years is imposed, the court can decide on a case-by-case basis whether the conditions for imposing detention on remand are met.
15. The CPC does not specify when the defense, according to official duty, ends. It should be clarified that according to official duty, defense ends with the exhaustion of all judicial means, including extraordinary means.

Bar Association of Federation of BiH - Specific proposals for amendments to the CPC BiH

1. Securing the right to be advised of rights immediately upon arrest.

This addition to the CPC would decrease the chances of manipulations and it would increase the legal security and quality of proceedings, since the protection of due process rights must begin with the first contact with the suspect/defendant.

2. Providing for the right to appeal to the court against the prosecutor's order on conducting an investigation in order to ensure court protection from unlawful and arbitrary prosecution.

It is necessary to amend the CPC to the effect that the investigation order as soon as the investigation of a certain criminal offense is steered toward one or more specific persons. The suspect could be exposed to investigation proceedings for an indefinite period of time, without the opportunity to appeal the grounds upon which the investigation itself was commenced. The prosecutor decision to conduct investigation should be subject to judicial review.

3. The evidence related to the assessment of the legality of pretrial detention should not be presented by means of notification to the defense attorney, but by means of delivery to the defense attorney.

When it comes to Article 47 Paragraph 2 of the CPC BiH, the provision in this Paragraph stating "...and the evidence relevant for the assessment of the legality of detention for the notification of the defense attorney" should say "...for the delivery to the defense attorney".

4. Providing the defense attorney with sufficient possibilities and time to review files and prepare defense

In accordance with Article 47 of the CPC, the defense attorney can only access the evidence in favor of the suspect (subject to limitations in cases where there is danger that the evidence may be compromised through allowing access to it), and only after the indictment is the defense attorney allowed to review all the files and evidence. In order to undertake an action and make a proposal, the defense attorney must have an insight into the case file and monitor the investigation by being present during the implementation of evidentiary actions.

5. Introducing the obligation of the prosecutor to make a list of all investigative actions conducted as well as all the evidence collected during the course of the investigation.
6. Delivering the indictment to the defendant and the defense attorney at the same time when the indictment is delivered to the judge for preliminary hearings in order to enable preliminary objections
- 7.

Articles 227 and 228 of the CPC B&H regulate the Decision on the indictment while Article 233 of the CPCBiH regulates the grounds for objections and de-

cisions on objections. In relation to those provisions, there should be an addition between Articles 227 and 228 of this Law providing that the indictment should be delivered to the judge for the preliminary hearing and the defense attorney and the defendant, at the same time, in order to enable preliminary objections. The preliminary objections described in Article 233 of the CPC BiH should follow the added Article and precede the Article regulating the decision on the indictment, which should be followed by the content of Article 233 (the grounds for objections and the decision on the objections).

8. Delivering the indictment with evidence on which it is grounded to the defendant and the defense attorney by the judge for the preliminary hearings.

With regard to Article 228 Paragraph 4 of the CPC the sentence “The judge for the preliminary hearing delivers the indictment to the defendant and his defense attorney” should be replaced with “... the judge for the preliminary hearing delivers the indictment with the evidence upon which the claims of the indictment are grounded to the defendant and his defense attorney.”

9. Allowing for the possibility of appealing the rejection of the request for the exclusion of unlawfully obtained evidence, more detailed regulation of the effective and immediate exclusion of unlawfully obtained evidence.

The legality of the evidence upon which the court makes its decision is one of the key indicators of the fairness of the overall court proceedings. Allowing for an appeal of the rejection of the request for the exclusion of unlawfully obtained evidence would allow for a more objective review and it would provide legal security. As there are currently no such mechanisms provided in the BiH CPC, it is a strong recommendation to make it one of the first priorities when amending the evidentiary aspect of the CPC.

10. The exceptional nature of the provisions allowing for the courts to intervene in the evidentiary procedure in favor of the defendant is important as it provides just the right amount of judicial involvement as to ensure the defendant’s full reliance on due process rights.

In accordance with Article 216 of the CPC, the court can initiate the presentation of the evidence it finds relevant (there is no indication of the preferable treatment of the defendant). Such a wide range of influences the court is granted during the course of the evidentiary process goes against the adversarial principles of the procedure. In order for them not to be abused, there should be amendments to the CPC to the effect of providing specific standards under which the court can

intervene. Broad constructions such as “whenever the court find suitable” are not adequate for the purpose of obtaining efficient justice.

11. Article 155 Paragraph 1 of the CPC (audio or audio-visual recording) should not contain the word “as a rule”, and the Article should say “all the performed activities during the course of the criminal proceedings are to be recorded” instead.

The main reason is the fact that witnesses change their statements very often with various explanations. Instead of the hearings of witnesses and suspects being recorded as a rule, the rule seems to be the absence of recording. All advanced legal systems insist on recording all the activities undertaken during the criminal proceedings.

12. Setting a framework for very limited deviation from the rule of directness and adversarial principles for the examination of witnesses by the court.

The CPC BiH provides in Article 219 that the prosecutor can examine and take statements informally during the investigation and that the recordings of such informal examinations cannot have probative value before the court as such. If the authorized person conducts an informal examination of a person while treating them like a suspect or witness (i.e. the person in question is introduced to their rights arising out of Article 78 of the CPC), then the written record of this examination can be used as evidence at the main hearing. This brings forth a series of unfavorable consequences for the suspect/defendant as they are exposed to an informal examination which can have genuine repercussions for the potential trial, before a person even knows their exact status (whether they are a suspect or witness). This provision should only be applied when the person in question is objectively unable to come forth and provide a statement at the main hearing.

13. Improvement of terms for appointing professional and expert consultants for the defense.

According to Article 269 of the CPC, an expert consultant can be hired by the parties, the defense attorney and the court with the costs falling on the appointing person. However, there should be an understanding that the expertise provided by the expert consultant serves primarily to the purpose of allowing a correct and fair judgment in the criminal proceeding. Therefore, an expert consultant should be appointed by the court at any moment when such a need arises in the interest of justice and the adequate assessment of relevant facts.

14. The mandatory notification of the defense attorney of the suspect/defendant that immunity has been given to a witness. This must be done since in most cases in practice, the defense attorneys do not get any type of notification on the assigned immunity.

Article 84 of the BiH CPC, in its Paragraphs 2,3,4 and 5 regulates the status of witnesses with immunity. The provisions of this Article should be amended in a way that the existing Article 84 would be expanded with points marked 84a, 84b, 84c (...). The additional provisions should provide for the mandatory notification of the defense attorney of the suspect/defendant on the assignment of immunity to a witness. This is important because in practice, defense attorneys do not get any type of notice on the assigned immunity, and the decision on immunity is presented to them just before the hearing of the witness with immunity.

The manner in which the Republic of Croatia has dealt with the issue of witnesses with immunity (the key witness) could be an example:

Article 36 of the Law on the Office for Combating Corruption and Organized Crime

- (1) *The State Attorney can request from the Court provided in Article 31 Paragraph 1 of this Law the decision on questioning in the role of a witness of a person which has become the member of a criminal organization (criminal association):*
1. *against whom there is a criminal report or against whom there is a criminal proceeding in process for the criminal offense from Article 21 of this Law which was committed in within a criminal organization and if there are circumstances based on which the member of the criminal organization can be released from serving the sentence, or lenient circumstances based on which the sentence can be reduced, in accordance with the provisions of the Criminal Code.*
 2. *If the statement of such a person is proportional to the committed criminal offense and the relevance of the statement of that person for the discovery and proving of the criminal offenses committed within a criminal organization or their perpetrators, or for the discovery and prevention of the criminal activities of the criminal organization.*
- (2) *The State Attorney can file the request from Paragraph 1 of this Article upon the elaborated proposal of the Director until the scheduling of the main hearing in the criminal proceedings against the members of the criminal organization from Paragraph 1 of this Article.*

Paraph 2 of Article 36 contains one of the main preconditions for assigning immunity to a witness, which is not fulfilled most of the time in practice. Furthermore, Articles 42 and 41 of the Law on the Office for Combating Corruption and Organized Crime regulate the decision of the Council for the assignment of immunities and the preconditions which they assess when reaching their decisions. Such provisions do not exist in the law of BiH, and should be integrated into the existing CPC.

Articles 42 to 46 of the Croatian law go on to regulate the proceedings upon the assignment of immunities. This approach to dealing with the issue of witnesses with immunities would be useful in BiH law as well.

Article 42

Through a decision on acceptance of the request of the State Attorney, the Council shall:

1. *allow the person named in the request to be examined as a witness in the criminal proceedings (the key witness),*
2. *order the exclusion of the records and official notes from the file containing information on the previous statements of that person which were given in the capacity of a suspect or defendant, if such statements exist. Such statements and other evidence arising out of them cannot be used as evidence in the criminal proceedings.*

Article 43

- (1) *The council of the court from Article 31 Paragraph 1 of this Law will reject the request of the State Attorney for the examination of as a witness of the person from Article 37 Paragraph 1 of this Law, if the statement of that person is not in the interest of discovering and criminally prosecuting of other members of the criminal organization (criminal group).*
- (2) *The Council can reject the request of the State Attorney for the interrogation as witness of the person from Article 37 Paragraph 1 of this Law for the reasons contained in Article 41 Paragraph 2 of this Law.*
- (3) *The State Attorney can file an appeal against the Decision of the Council from Paragraphs 1 and 2 of this Article within 48 hours. The Supreme Court of The Republic of Croatia shall decide upon the appeal within 3 days.*
- (4) *If it finds the request of the State Attorney for the interrogation as a witness of*

the person from Article 37 Paragraph 1 of this Law grounded, the Council shall allow such a person to be interrogated as a witness.

- (5) Upon the examination of the person from Article 37 Paragraph 1 of this Law, the Council shall, if it finds that the statement can contribute significantly to the discovery and proving of the criminal offenses committed by a criminal organization or the perpetrators of those criminal offenses, or to the discovery and prevention of the perpetration of criminal offenses by the members of a criminal organization, amend the final decision on the sanction to which that person was sentenced, and sentence it to a sanction which will be reduced by a minimum of one third and maximum by two thirds of the previous sanction in accordance with the provisions of Article 498 of the Law on Criminal Proceedings.*

Article 44

By means of the Decision on the acceptance of the request of the State Attorney, the council shall decide to exclude the public from the part of the main hearing against the members of the criminal organization in which the key witness is being examined.

Article 45

- (1) The known witness who has given a statement in accordance with the obligations from Article 38 Paragraphs 1 and 2 of this Law and the witness from Article 37 of this Law cannot be criminally prosecuted for the criminal offense from Article 21 Paragraph 1 Points 3 to 6 and Paragraph 2 of this Law.*
- (2) The key witness and the witness from Article 37 of this Law are liable for giving false statements.*
- (3) If it hadn't previously rejected the criminal report against him, the State Attorney will declare that it is stopping the criminal prosecution against the key witness at the latest until the final conclusion of the criminal proceedings against the members of the criminal organization.*

Article 46

The provisions of Article 45 of this Law shall not apply and the State Attorney shall continue the criminal prosecution or commence criminal proceedings if:

- 1. the crown witness has not revealed all the facts and circumstances from Article 38 Paragraph 2 of this Law or has given a false statement,*

2. *the key witness commits a new criminal offense from Articles 21 and 39 of this Law before the final conclusion of the criminal proceedings,*
3. *the key witness becomes a member of a criminal organization and commits a criminal offense from Article 21 of this Law within 2 years after the decision from Article 42 of this Law.*

Article 47

- (1) *The provisions of the Law on Criminal Proceedings apply to the examination of the key witness, with the exception of Article 286 Paragraph 1 of that Law in relation to the criminal offenses from Article 21 Paragraphs 1 and 2 of this Law.*
- (2) *The security measures for the key witness and his relatives outside the criminal proceedings are performed in accordance with special regulations.¹⁴⁷*

Such detailed provisions on the treatment and status of key witnesses means a clear procedure and legal security for all parties involved which will lead to the higher level of assistance from persons involved in criminal activities in exchange for lenient treatment in the criminal proceedings and possible release. In BiH it would be a very significant addition to the CPC considering the high presence of organized crime and the importance of its reduction for the path of the country towards EU membership.

In any case, consistent with the obligation to provide all parties involved in the criminal proceedings with the equal opportunity to prepare their case and defense, defense attorneys must be “on the same page” as the judge and the prosecution when it comes to the immunity of certain witnesses as well. Whether this goal will be achieved through integrating the solutions from comparative law which is applied successfully in other countries, or through new provisions tailored to the specific circumstances in BiH, such provisions are necessary in the CPC of BiH.

¹⁴⁷ The Law on Office for Combating Corruption and Organized Crime

National Chamber of Advocacy of Albania - Specific proposals for amendments to the Albanian CPC

Paragraph 4 of Article 52 should be amended as follows:

4. There is not permitted the interception of the conversations or communication of the defense attorneys and their assistants neither between each other nor with their clients or their relatives as provided in article 158 of this code.

Article 105 should be amended as follows:

Article 105

The receiving of copies, excerpts and certificates

1. During the proceedings and after its termination any interested person may obtain for free copies, excerpts or certificates of specific acts. This includes also the right to obtain on his copies, excerpts or certificates as well as written information about their content of specific acts related with other proceedings even in case of state secrets, which are related with the proceeding against the defendant or may be used for defense purpose only.
2. The motion is reviewed by the prosecution during the pre-investigation stage and the court who has delivered the judgment for trial's acts within 5 days from its submission.
3. The decision of the prosecutor, the can be appealed before the first instance competent court within 10 days from the date next day of dully notification of such decision or from the next day of the expiry of 5 days time limit.
4. The decision of the first instance court, the can be appealed before the competent appellate court within 10 days from the date next day of dully notification of such decision or from the next day of the expiry of 5 days time limit.
5. Appeals lodged under paragraph 3 and 4 of this Article shall be reviewed by the competent court within 10 days for their submission.
6. The issue of copies, excerpts or certificates does not cease the prohibition to publication.

In Article 110, two additional paragraphs shall be added as follows:

Article 110

Memories and requests of parties

3. The decision of the proceedings authority can be appealed before the first instance competent court by the defendant or his defense or injured accuser within 10 days from the date next day of dully notification of such decision or from the next day of the expiry of 15 days time limit.
4. Appeals lodged under paragraph 3 of this Article shall be reviewed by the competent court within 10 days from their submission.

A paragraph shall be added to Article 128 as follows:

3. The court shall rule within 15 days after the submission of the motion seeking the nullity of acts. The court decision can be appealed within 10 days from the date next day of dully notification of such decision. The lodge of appeal shall suspend the trial and the competent court shall rule about the appeal within 10 days after its submission.

Paragraph 4 of Article 151 shall be amended as follows:

4. There may not be used the evidences taken contrary to the prohibitions provided by law. The uselessness is also brought ex-officio in any stage and instance of the proceedings. The proceeding court shall rule within 15 days for the motion seeking the uselessness of evidences. The court decision can be appealed within 10 days from the date next day of dully notification of such decision. The lodge of appeal shall suspend the trial and the competent court shall rule about the appeal within 10 days after its submission

The first section of the article 222 shall be amended as follows:

Article 222

The decision permitting the interception

1. The court authorizes the interception, upon request of prosecutor or injured accuser, by motivated decision for cases permitted by law and when it is indispensable for the continuation of investigations.

In Article 258, an additional paragraph shall be added as follows:

Article 258

The request for the evaluation of the arrest or detention

3. Notification for the pre-trial detention hearing for the accused, suspected person and his defense by the court at least 24 hours before the scheduled hearing. The notification would include a copy of the prosecution request and all material evidences attached thereto, including and not limited to acts, photographs, audio and video recording. Access to material evidence in possession of the competent authority, whether for or against the suspect or accused person may be refused, when the interest of justice allows, or where such access may lead to a serious threat to the life or fundamental rights of another person or where refusal of such access is strictly necessary to safeguard an important public interest. Any refusal of such access must be weighed against the rights of the defense of the suspect or accused person for an effective defense. Restrictions on such access should be interpreted strictly and in accordance with the principle of the right to a fair trial under the ECHR and as interpreted by the case-law of the European Court of Human Rights.¹⁴⁸

Paragraph 2 of Article 287 should be amended and other 2 paragraphs should be added as follows:

2. A stamped copy of the ruling on the investigation shall be sent without delay and no later than 2 days to the competent court, which shall rule on its legality after allowing the person under investigation being priory informed about the grounds of such decisions and already existing evidence and to present to the court his defense.
3. The decision of the court can be appealed before the competent court within 10 days from the next day after it delivery.
4. In cases when no person has been identified, the prosecutor may conduct investigation strictly limited with the identification of the person identity. The use of evidences collected prior to the notification as provided in paragraph 2 of this article shall be prohibited when court under this article asserts with a reasoned decision that the identification of person was possible prior to their collection.

 148 Fully approximated with the DIRECTIVE 2012/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2012 on the right to information in criminal proceedings

Article 302 should be amended as follows:

Article 302

The assistance of the defense attorney

1. The defense attorney of the person under investigation is entitled to be present in the inspections and immediate verifications on the spot, and other procedural actions being duly notified, except in case of immediate opening of the sealed envelope as authorized by the court.

The first paragraph of Article 312 should be amended and another paragraph should be as follows:

Article 312

The obtaining of data

1. The prosecutor obtains data by the injured person and the ones who can explain circumstances useful to the targets of investigation, observing the rules provided for the obtaining of testimony and in presence of the defense attorney of the persons under investigation.
4. Data collected in absence of the defense attorney as provided in paragraph 1 of this Article, cannot be used as testimony nor to oppose the testimony of this person given before the court.

After the paragraph 2 of Article 314, 2 new paragraphs shall be inserted and renumbering the last paragraph as follows:

Article 314

The appointment of expert

3. The decision of the prosecutor to appoint expert of group of experts shall be notified to the defendant and his defense within 5 days and always prior to any action taken by the expert or group of experts. The latter, shall have the right to seek disqualification of expert as provided in this code and pose questions for them.
4. The defense has the right to seek expertise from private experts and such ex-

pertise shall be administered by the court as evidence.

The first paragraph of Article 378 shall be amended as follows:

Article 378

Final deliberation

1. After the taking of the evidence, the prosecutor, the defense attorney of the defendant and the attorneys of the other parties prepare and expose the relevant conclusions. The prosecutor shall not be entitled to claim a specific conviction nor its amount etc, but shall claim sole the guiltiness of the defendant.

Paragraph 3 of Article 332 shall be amended as follows:

3. The request is notified to the defendant and injured who shall have the right to submit their own evidence within 7 days after the next day of its dully notification. Evidence submitted by the defense shall be part of the request for trial and its respective file.

Article 375 shall be amended as follows:

The modification of qualification of the offence

1. With final judgment, the court should not have the right to modify the qualification made by the prosecution into a more aggravating situation for the defendant, but can exercise this right sole for the purpose of providing a more favorable situation for the defendant, provided that the criminal offence is under its competency.



VI

ANNEXES

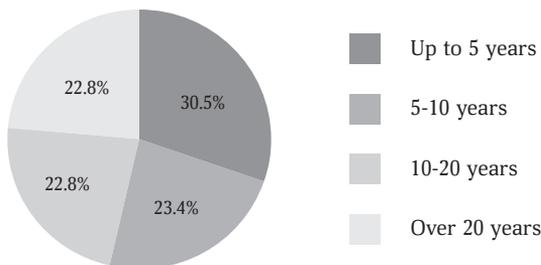
1. PRACTICAL PROBLEMS OF THE DEFENSE IN CRIMINAL PROCEEDINGS - OPINIONS OF THE PRACTITIONERS

During March 2016, a survey was conducted among lawyers and trainees who are members of the Bar Association of Serbia, National Chamber of Advocacy of Albania, Bar Association of Federation of Bosnia and Herzegovina, Kosovo Bar Association and Macedonia Bar Association, aimed at determining practical aspects of the position of defense in criminal proceedings. For these purposes, a questionnaire was developed, made available in Albanian, Macedonian and Bosnian/Serbian/Croatian) and distributed through bar associations, BRRLN and Partners Serbia contact lists. A total of 167 criminal defense attorneys from the region participated in the survey, sharing their experiences and the most common challenges they face in representing their clients in criminal cases. A summary of the survey results is presented below.

I Survey participants

Out of 167 survey participants, 22 were members of the National Chamber of Advocacy of Albania, 28 of the Bar Association of Federation of Bosnia and Herzegovina, 48 of the Macedonia Bar Association, 13 of the Kosovo Bar Association and 56 of the Bar Association of Serbia. 95.2% of the survey participants were attorneys and 4,8% trainees in law offices, while 76,6% of the survey participants were men and 23,4% were women. When it comes to years of practice, the structure of the group was the following:

Years of experience in practicing law



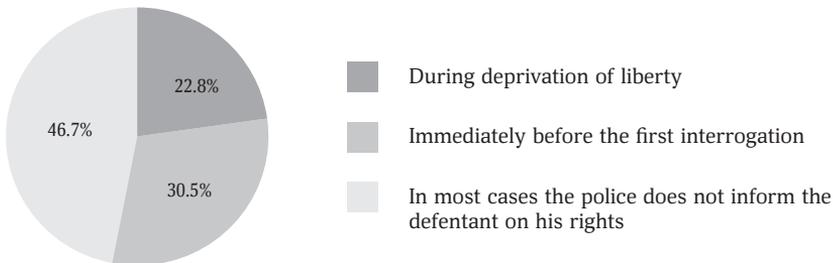
II. Survey Questions and Answers:

Section One: Right of the defense in pre-investigation and investigation proceedings

This section of the questionnaire examined whether the accused is properly informed on his rights, whether he and his counsel are, in practice, allowed access to evidence and case files, and whether and to what extent the adversarial principle is implemented in these stages of proceedings. The overall impression is that the practices vary, even within the same legal system.

Question 1

Based on your experience, at what moment the police informs the defendant that “he has a right to remain silent, that everything he says may be used against him in a court of law, and that he is entitled to choose a defense counsel”?



Question 2

According to your experience, when is the defendant first informed about the evidence on which the accusation is based?

The following are illustrative answers to this question.

An attorney, member of the Bar Association of Serbia stated: *“If the evidence are strong, the defendant is informed immediately, but if the evidence are weak, then there will be attempts to get a statement on the record, or a guilty plea.”*

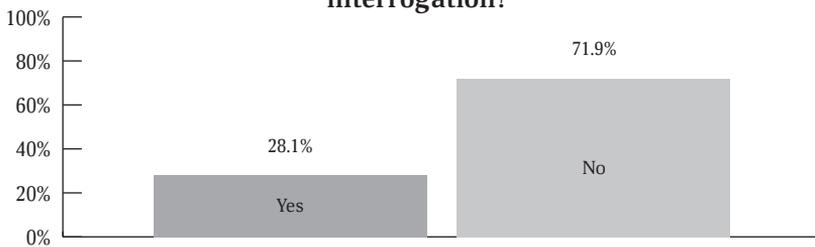
Another respondent from BiH wrote: *“Only after the confirmation of indictment, which I think endangers a fair trial and the possibility of adequate and active partici-*

pation of the accused and his counsel in criminal proceedings. This is a result of inadequate legal solution regarding the investigation that in such a manner as prescribed may not enable the protection of fundamental rights in the investigation.”

A respondent, member of the National Chamber of Advocates of Albania commented: *“The defendant is often not informed on the evidence based on which he has been accused. At the beginning he is provided with some superficial information when he appears before the court for the pre-trial detention session, on a case by case basis. It happens very often that the defendant is not informed about the evidence even when the investigation process has started and the prosecutor’s office has granted to him/her the capacity of the defendant.”*

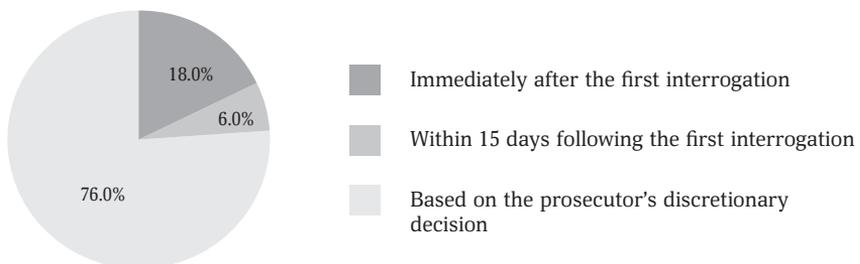
Question 3

According to your experience, does the defense have a possibility to examine attachments to the criminal complaint before the first interrogation?



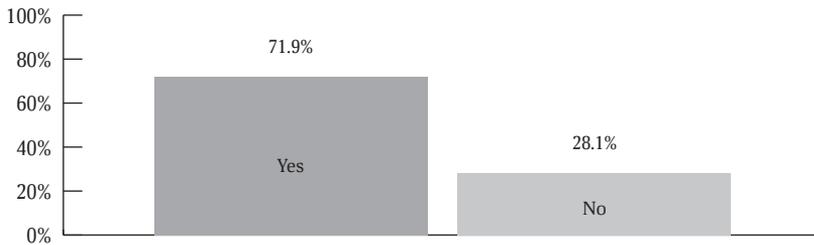
Question 4

According to your experience, when is the defense allowed for the first time to copy the case file in the prosecutorial investigation?



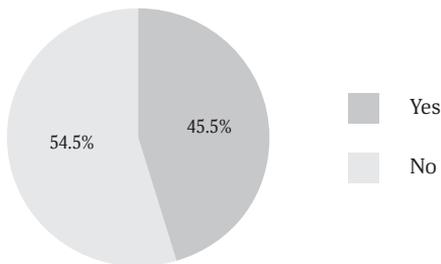
Question 5

Does the prosecutor in practice postpone allowing defense to copy the case file?



Question 6

Is the defense allowed to copy all the documents



Some of the respondents who answered “NO” to the previous questions, explained that the defense is usually not allowed to copy a criminal complaint, statements of witnesses from the police, official reports of the police and prosecutors. Others said that this practice depends on the prosecutor in the case - some allow the defense to copy the complete file, some do not allow copying at all.

An attorney from BiH stated: *“We do not have an insight into the complete prosecutor’s file so we are not aware whether we are allowed to copy just sections or the complete file. Sometimes the prosecutor leaves out the evidence that are in favor of the defense, which we learn in the later stages, or even never.”*

A respondent from Albania said: *“Although the defense requests in writing to be pro-*

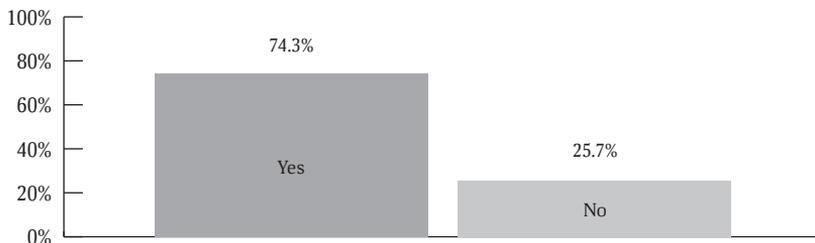
vided with a copy of all the materials of the file, the prosecutor of the case, after he examines the request of the defense, he makes available only a part of the materials of the file with the justification that those are the ones he deems reasonable to share. Most of the time we review the file of the case at the court session.”

Another respondent from Kosovo Bar Association said that [b]efore the indictment has been prepared, it is not allowed to make copies of the materials and as such the principle of equality of parties is heavily violated.

An attorney from Macedonia said that the defense is usually not allowed to copy the order to conduct an investigation, photo documentation, findings and opinions of the experts, and especially the result of special evidentiary measures.

Question 7

Can, in practice, the prosecutor examine the witness during the investigation without the presence of the defense counsel?



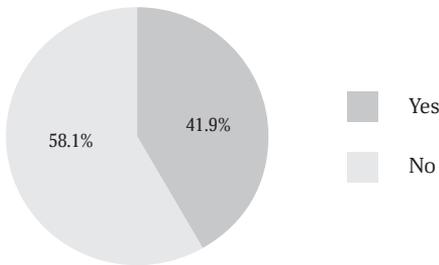
Some of the respondents who answered “YES” to the previous question stated that this practice also depends on the prosecutor. Some respondents from Serbia said that the prosecutor usually examines the witnesses without the presence of defense counsel, if the counsel is properly invited but does not show up, or there is an “emergency situation” that does not allow postponing the examinations. Most of the respondents coming from Bar Association of Federation of Bosnia and Herzegovina (FBiH) and Macedonia Bar Association said that the general practice is that the defense is not even informed about the time of examination of witnesses by the prosecutor and, therefore, is not present during the examination of witnesses.

A respondent from Albania stated that in most of the cases the judicial police and the prosecutor interrogate even the victims of domestic violence as well as the witnesses or other relatives without the presence of the defense lawyers. He further stated:

“There are cases that the questions have been suggestive and from the capacity of witness he has been given the capacity of the defendant because the evidence provided before the judicial police or the prosecutor has been too wide and the explanations did not match the version of the defendant.”

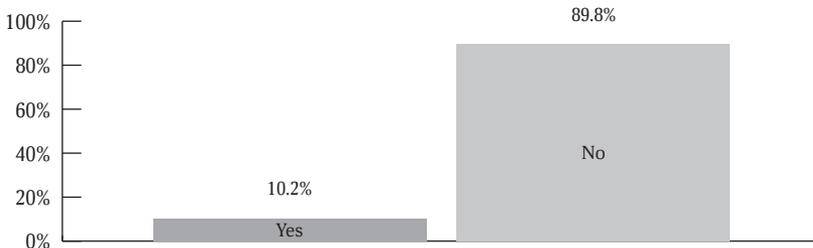
Question 8

Does in practice the prosecutor make a list of all the evidence collected in the investigation?



Question 9

From your experience, does the prosecutor provide exculpatory evidence as he or she is required to by the law?



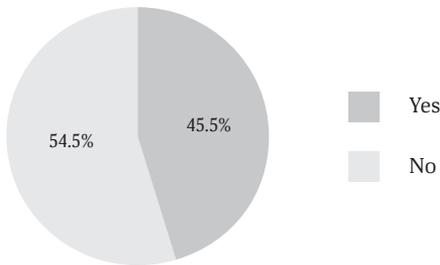
Section II: Investigation and the main hearing

This section of the questionnaire aimed at examining to what extent the rights of the defense are respected in practice during the investigation proceedings, whether the adversarial principles are implemented throughout the procedure, as well as whether and to what extent the new notions (such as plea bargaining and cross-examination) are used in practice. The overall impression is that the participants to the criminal

proceedings are still not fully adapted to their “new” roles, and that implementation of some principles, notions and practices in many cases depends on personal attitudes and experiences.

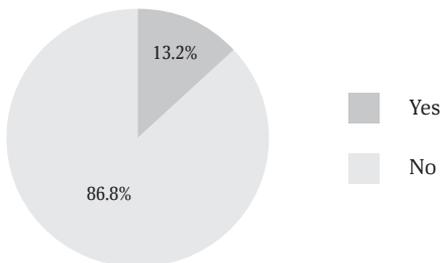
Question 10

Is, in practice, the indictment delivered to the accused and his lawyer without a delay?

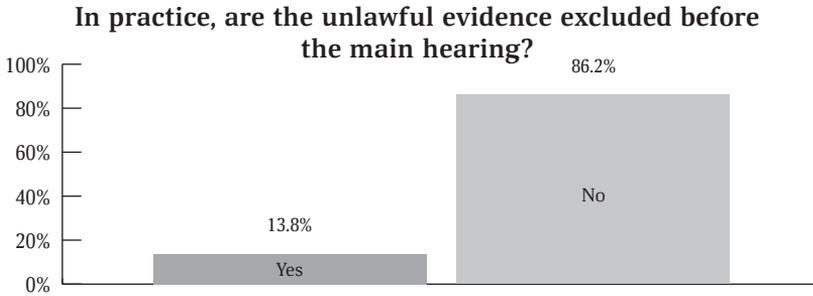


Question 11

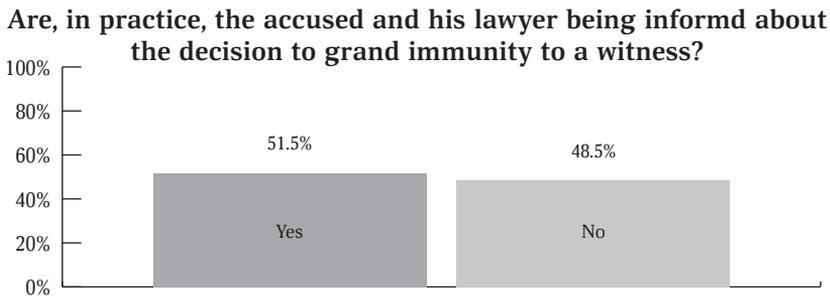
Is, in practice, the indictment delivered with all the supporting evidence?



Question 12

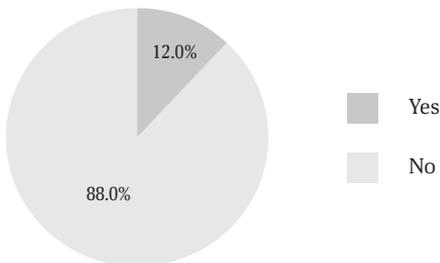


Question 13



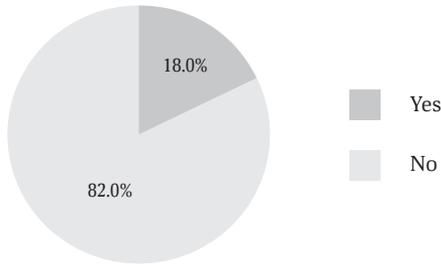
Question 14

From your experience, does the court properly rule and explain its decisions when imposing pre trial detention?



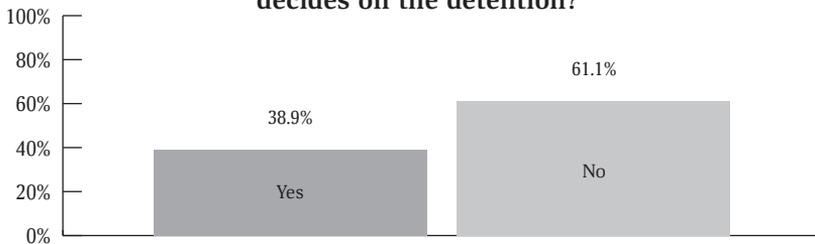
Question 15

Are the accused and his lawyer allowed the insight into the case file before the detention is imposed, so they can be introduced to the evidence, assess their legality and prepare for the hearing on imposing the detention?



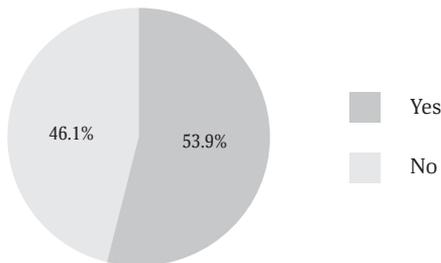
Question 16

Is the direct and contradictory hearing secured when the court decides on the detention?



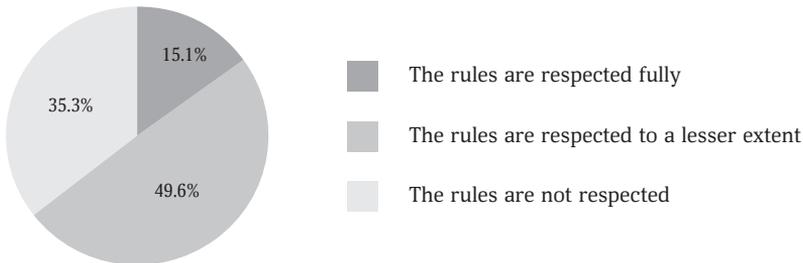
Question 17

Are there, in practice, rules about the direct/cross-examination at the trial?



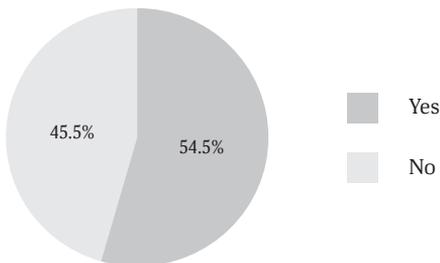
Question 18

If your answer to the previous question is “YES”, please indicate whether the rules prescribed by the law are respected:



Question 19

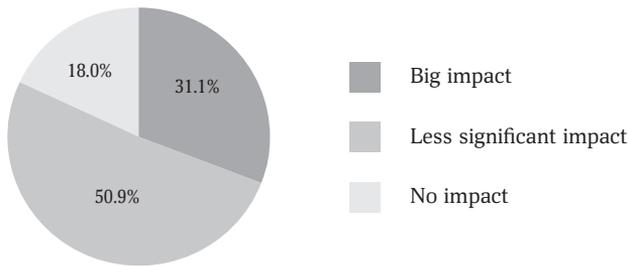
Is it possible to read the statement of a co-defendant’s or a witness at the trial without the examination by the defense?



The respondents who answered to the previous question affirmatively, explained that this is a very common practice, utilized whenever the court is not able to secure the presence of a witness, or a co-defendant. A respondent from Macedonia said that this practice is often exercised in organized crime cases. Also, some respondents said that this practice is common for plea bargaining cases, when one of the co-defendants pleaded guilty. However, respondents from Serbia recommended that defense should object to this practice.

Question 20

According to your opinion, what impact does the witness expert/- professional consultant deployed by the defense have on the court?



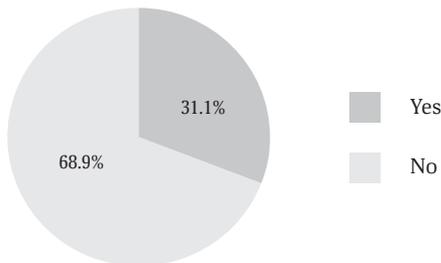
Question 21

Do the courts practice appoint the witness expert/professional consultant at the expense of the public budget?



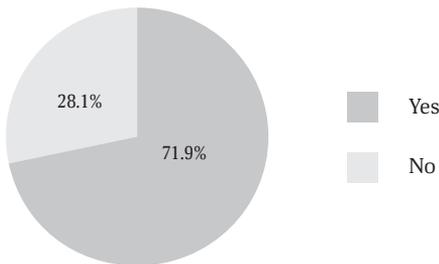
Question 22

Is the rule that the burden of proof is on the prosecutor being respected at the trial?



Question 23

Do courts intervene during the evidentiary proceeding in order to help the prosecutor to prove the accusation?



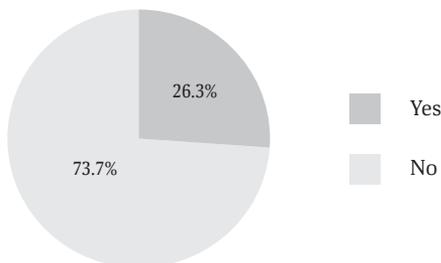
The respondents who answered “YES” to the previous question explained that the courts often intervene in favor of the prosecution. They even introduce evidence that the parties did not, and this evidence usually supports the accusation. Judges ask witnesses and defendants questions and, according to an attorney from Serbia, they “*pressure the defendant to answer a question, sometimes with close questions.*”

According to another respondent from Bar Association of Serbia, judges often advise the prosecution on how to amend the indictment. Further, several respondents from Serbia and BiH stated that, at the main hearing, judges usually ask questions that support the prosecution’s case and often perform acts that should be performed by the prosecutors. A respondent from Macedonia said that judges intervene by asking questions that would enable the prosecutor to take further actions, or questions that the prosecutors missed.

A respondent from National Chambers of Advocates of Albania stated: “*There have been cases when the defense lawyer has requested new evidence, such as to conduct a fingerprint examination of the weapon, and such request has been rejected by the court. Such a case has been in favor of the prosecutor.*”

Another respondent from Kosovo Bar Association said that “[very] often when the prosecutor prepares the indictment based on the declarations provided at the police station and when the prosecutor cannot have the same witnesses during the trial, the prosecutor proposes to the court to accept them as evidence and most of the cases the court accepts such proposal.”

Question 24

In case of a reasonable doubt, do the courts rule in favor of the defendant?

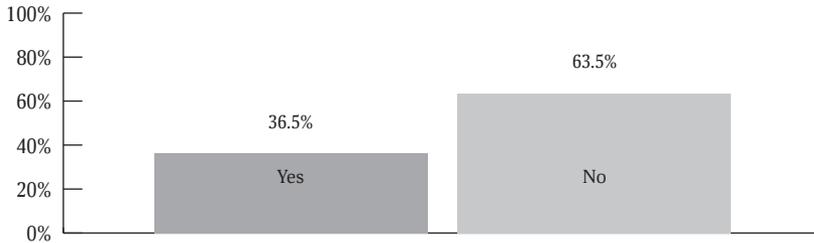
Some of the respondents who answered “NO” to the previous question said that judges still do not fully comprehend their role within the adversarial procedure and that they support the prosecution in most cases. Other respondents stated that sometimes there is a pressure on judges to convict accused persons, due to the high costs of procedures, political influences, or just the lack of integrity of a judge.

Some respondents from Kosovo Bar Association and Bar Association of Macedonia stated that the courts usually do not decide in favor of the defendant in a case of a reasonable doubt and that this practice is specifically present during the pre-trial detention phase.

A respondent from Bar Association of Federation of BiH said that the first instance courts are especially reluctant to apply the principle *in dubio pro reo*, since they fear their judgment will be annulled by higher courts.

Also, one respondent from National Chamber of Advocates of Albania wrote that “[a]ccording to article 128 of the [Albanian] CPC, the reasonable doubt must be based on evidence. It must not be hypothetical, abstract but real and objective. Frequently the court decides based on what the prosecutor has requested as a security measure. In very few cases the court is less biased and uninfluenced by the prosecutor.”

Question 25

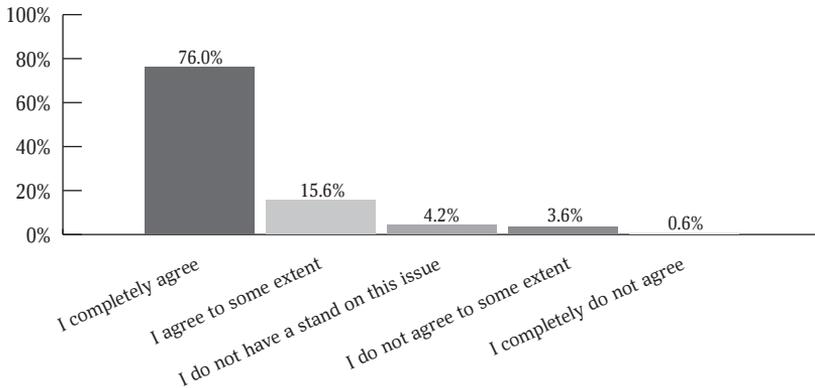
Has plea bargaining been fairly implemented in the justice system?

Several respondents from Bar Association of Serbia said that the result of plea negotiations should be a sanction below the prescribed minimum. A number of respondents from Serbia and BiH stated that in cases with two or more co-defendants, a plea agreement with one co-defendant has a negative influence on the court's judgment on the responsibility of others who have not pleaded guilty. Some respondents said that the agreements are usually presented to defense in a "take it or leave it" manner. Other said that the courts properly apply legal provisions in this regard.

A respondent from Kosovo Bar Association said that plea bargaining is implemented, but rarely, and that there were cases where prosecutors did not accept the plea. A respondent from Macedonia said that the result of plea bargaining depends on who is the defendant in the case, i.e. his position, financial status, party affiliation, and his relation with the judge or prosecutor. Another attorney from Bar Association of Macedonia stated that prosecutors usually set more serious charges in the plea agreement so the defendants are usually imposed higher sanctions.

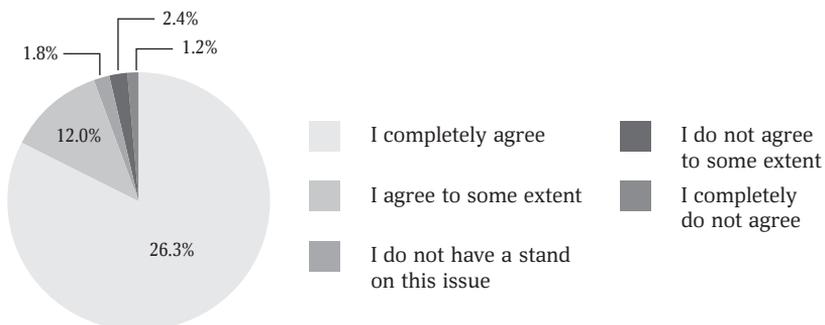
Question 26

Order on investigation should be delivered to accused immediately after it was issued, with the possibility to appeal to the judge for preliminary proceedings.



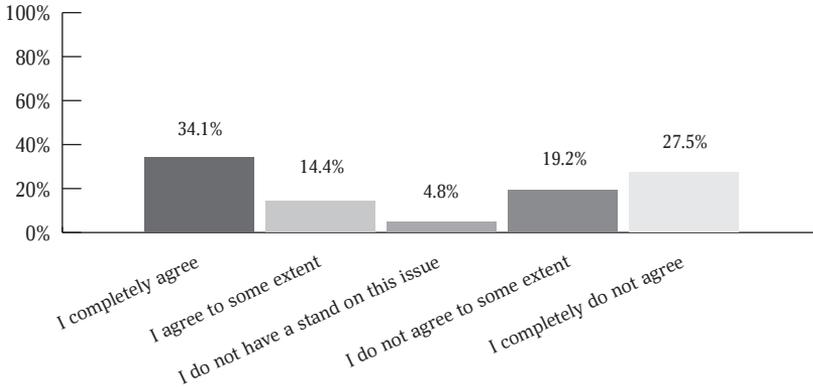
Question 27

Even if the accused pleads guilty at the main hearing, the court should examine whether the acts that he pleaded guilty for represent the elements of the crime for which he was accused, as well as whether the conditions for a verdict on abandonment.



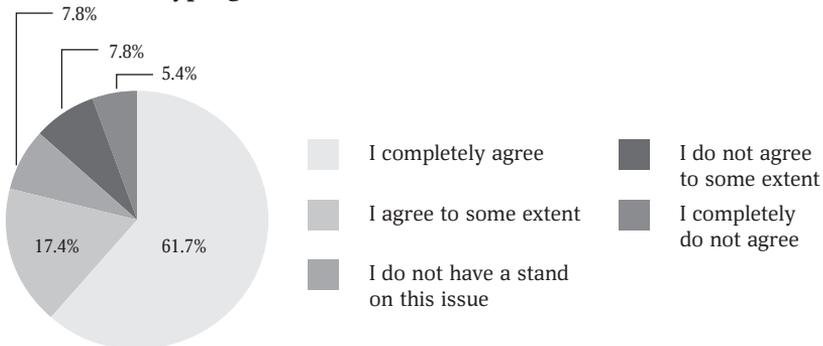
Question 28

The court should be bound by legal qualification of the criminal offence determined by the public prosecutor.



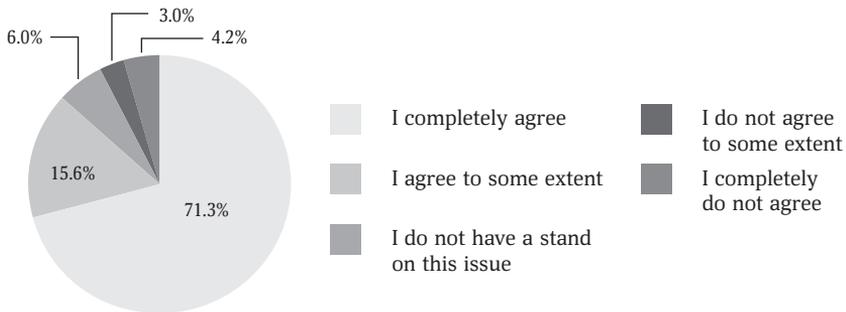
Question 29

The hearing should be recorded in video and audio form, the stenographic record should be used only exceptionally, while the typing records should not be allowed at all.



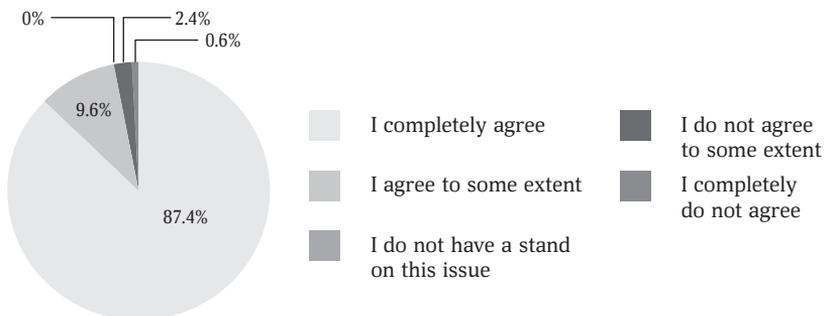
Question 30

Evidence should be presented before the judge for preliminary proceedings so he may determine whether there is a grounded suspicion that the accused committed a crime for which the imposing of detention is requested.



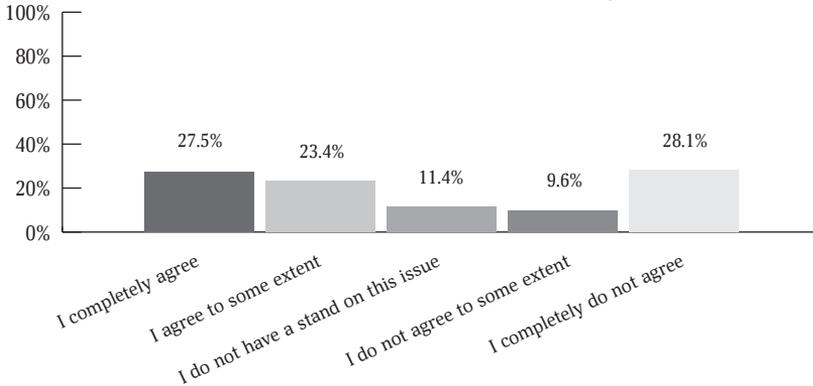
Question 31

The public prosecutor should submit all the evidence to the defense attorney within a short period of time before filing a proposal for imposing the detention, so the accused and his counsel may be introduced to evidence and, if needed, challenge them.



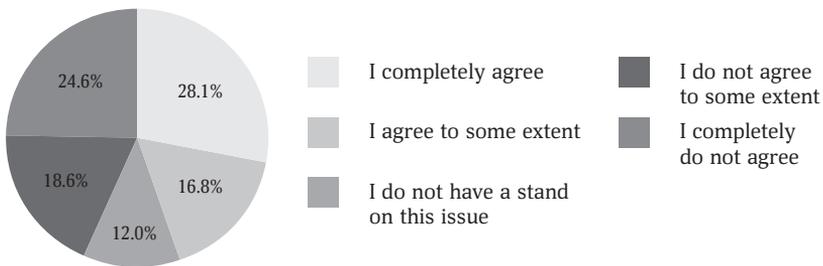
Question 32

The public prosecutor should be allowed to request the court to reproduce statement(s) given by the accused during the investigation, in case the accused does not give a statement at the main hearing.



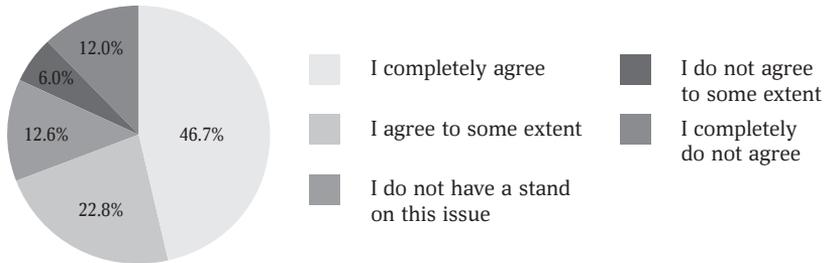
Question 33

Summary proceedings should be set aside and regular proceedings should be conducted for all the criminal offenses.



Question 34

Formulation: “No one can be prosecuted for a criminal offense for which the court by its decision legally acquitted or convicted him/her” does not fully guarantee application of the “ne bis in idem” principle, and the words “criminal offense” should be replaced by the term “act”



2. CONCLUSIONS FROM THE ROUNDTABLES CRIMINAL LAW REFORM - REGIONAL PERSPECTIVES

With the goal to reach a consensus among different stakeholders on the minimum standards relating to the rights of the defendant and position of the defense in adversarial criminal proceedings, three roundtables were organized within the Criminal Law Reform Project. The first roundtable was organized in Nis, Serbia, on 13 May, 2016. The second roundtable was organized in Sarajevo, Bosnia and Herzegovina, on 20 May, 2016, while the third one was organized in Korca, Albania, on 6 June, 2016.

The roundtables gathered a total of 88 criminal defense attorneys, judges, prosecutors and other legal professionals, who were presented the draft findings of the CLRP Assessment Report, and then asked to provide their comments and opinions related to key problematic issues identified in the Report. The text below presents a summary of the feedback received at the roundtables, with references to specific points of the Report that were addressed.

- When it comes to right of a defendant to be advised on his rights immediately at the moment of deprivation of liberty, a general impression shared by the prosecutors in FBiH is that this point is very relevant and it is consistent with BiH constitutional law and court decisions regarding deprivation of freedom – rights should be presented to the defendant from the moment freedom is restricted.
- In terms of the right to know that an investigation is being conducted and to be served the prosecutor's written order, the prosecutors in FBiH did not support the suggestion that the defense is informed from the very beginning regarding investigation activities. According to them, if the prosecutor had to inform the defense from the beginning regarding the investigation and activities, it would force a fundamental change to the CPC. All the prosecutor's acts that affect privacy and other human rights are subject to supervision by the judge for preliminary proceedings.
- Attorneys the Kosovo Bar Association stated that, when the accused is not informed about the commencement of the investigation, this causes problems for the entire defense case.
- Regarding the right to appeal the order to conduct an investigation, prosecutors from Serbia and Macedonia stated that the appeal from the order to conduct investigation should not be allowed. According to them, the prosecution is the body that conducts the investigation and not the court. Therefore, the

court should not intervene and decide on this issue.

- In terms of the right of defense to inspect evidence before pre-trial detention hearing, prosecutors in Albania stated that every act, besides the ones expressly prohibited by the procedural law, must be shared between the parties from the preliminary investigation.
- Prosecutors in FBiH stated that this issue is well regulated by the law, and that in case the attorneys think they are not given sufficient time to review the evidence, they can request to be provided more time.
- In Serbia, an insight into evidence is possible for attorneys throughout the procedure, but is often limited. The law should be more precise in this regard, and should specify who can have access, when, within which deadline, etc. Attorneys in Serbia stated that this possibility is rarely practiced by the defense, even though the prosecutors would allow it. Defense should be more proactive and request access to evidence and case file.
- It was also stated that detention is a measure for securing the presence of the accused, so evidence should not be discussed in this stage.
- One of the participating judges stated that the pre-trial investigations would not be called like this in case information would be shared with the defense. However, the rights of the suspects must not be infringed. There have been cases when EULEX with the intention to respect the principle of sharing of information, has shared the file and information has leaked.
- When it comes to right of defense to inspect the entire case file and evidence, attorneys in BiH stated that prosecution often hides evidence of witness statements, and does not disclose all the evidence.
- Further, in FBiH, the right to inspect the file does not belong to the accused but his counsel. The question remains - who can inspect the files when the accused does not have a counsel.
- According to the attorneys from Serbia, defense is usually allowed to inspect the entire case file and evidence. The problem is that the prosecution does not control the investigation since they are not that much present in the field. Instead, the police are the ones dealing with evidence the most, and that's where the problem lies.

- Regarding the right of defense to attend the implementation of evidentiary actions during the investigation, most of the participants agreed on this point. Attorneys from Serbia also stated that, since in practice the police usually run the investigations, the presence of prosecutor should be mandatory for some evidentiary actions.
- An Albanian prosecutor opined that the judgment in absentia needs to be removed. Suspension of the case because of the absence of the parties that has existed before needs to be re-introduced.
- Regarding the prosecutor's obligation of discovery, an Albanian judge expressed his skepticism about the issue that the prosecutor brings evidence at the court. He is of the opinion that the prosecutor has an obligation to bring all the evidence.
- When it comes to using unlawful evidence, Serbian attorneys stated that the courts take evidence into consideration, notwithstanding their legality.
- Further, there is a problem with transparency of collecting and securing the evidence, especially in regard to micro traces that are usually presented as evidence in later stages of the procedure, but were not properly secured and cannot be examined again.
- In terms of the initiative of the court in the evidentiary procedure, a judge from Albania stated that there are many cases with errors in conducted acts, so the court still has an important role. In case the prosecutor does not ask for something, it is the court that does it.
- A prosecutor in Serbia stated that the problem also lies in the fact that most of the provisions of the CPC are related to the general proceedings, while almost 85% of the proceedings in Serbia are summary proceedings.
- An attorney from Serbia also stated that the problem of criminal procedure in this country is that the judges get the case file before the trial and they basically make a decision in advance.
- In terms of the specific rules of direct and cross-examination, attorneys from Serbia stated that judges sometimes deny their right to cross-examination or additional examination of witnesses. This is why the specific rules of direct and cross-examination should be prescribed.

- Regarding the role of professional consultant, attorneys from Serbia stated that it is specifically a problem in cases of *ex officio* defense, where the courts reject requests for appointing a professional advisor due to budgetary reasons.
- Also, inequality of arms exists when it comes to expert witnesses - in investigation, the expert witness is appointed by the prosecutor. At the trial, a judge does so. Defense has only a right to engage a technical advisor, but not the expert witness. During the investigation, defense can propose that the prosecutor order expert examination.
- According to the participants, a novelty of Kosovo CPC is the complete equality of arms, because expertise can be provided by all parties.
- When it comes to possibility for the prosecutor to change the legal qualification of the act, a prosecutor from FBiH claims that the prosecution should not be restricted from changing qualification of a crime as new facts emerge during investigation.
- A prosecutor from Serbia also stated that pre-qualification of the criminal act should be allowed by the end of the proceedings.