

# The Right to Effective Representation in Criminal Proceedings and the *Ex Officio* Appointment System

August 2022



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# LIST OF ABBREVIATIONS

<b>CPC</b>	Criminal Procedure Code
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>KBA</b>	Kosovo Bar Association/Kosovo Chamber of Advocates
<b>KJC</b>	Kosovo Judicial Council
<b>KPC</b>	Kosovo Prosecutorial Council
<b>Moj</b>	Ministry of Justice
<b>MoU</b>	Memorandum of Understanding
<b>OSCE</b>	Organization for Security and Co-operation in Europe Mission in Kosovo

# 1. EXECUTIVE SUMMARY

This report provides an overview of research conducted by the Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) in 2020 and 2021 of the effectiveness of defence representation and the functioning of the *ex officio* appointment system in criminal proceedings. The report summarises the findings of surveys circulated to and returned by judges, prosecutors and lawyers and aims to assess whether the issues identified in the OSCE's 2016 report, "Review of the Implementation of the New Criminal Procedure Code of Kosovo" remain relevant.<sup>1</sup>

Kosovo institutions adopt an *ex officio* appointment system for delivery of legal aid to indigent defendants in criminal proceedings. This involves assignment of individual, private counsel (Kosovo Bar Association members) to represent defendants who require legal aid.<sup>2</sup> The report features an overview of the key international standards for defence representation and legal aid as well as an overview of the *ex officio* appointment system under the Criminal Procedure Code and regulations issued by the Kosovo Judicial Council (KJC), Kosovo Prosecutorial Council (KPC) and Kosovo Bar Association (KBA).

Among other findings, the report confirms that there is a general support for the *ex officio* appointment system and that, in the majority of cases, the relevant regulations are applied by courts and prosecutors. Lawyers reported lower rates of satisfaction with the *ex officio* system and this is likely linked to the fact that some lawyers report that they rarely or never receive appointments. In this respect, the report commends steps taken by the Kosovo Bar Association to improve transparency regarding selection. One of the main concerns regarding the appointment system itself is that it does not take account of the nature of the case and qualifications of the defence lawyer. Therefore, a newly qualified lawyer with limited experience might be appointed to a complex case.

The report highlights that the *ex officio* appointments are only made occasionally in 'non-mandatory' cases. Both international standards and the Criminal Procedure Code require that a defendant be represented at public expense if he or she does not have the means to pay for representation and when such representation is necessary in the 'interest of justice'. The report finds that the provisions on 'mandatory' and 'non-mandatory' cases are overly complex and could be leading to a restrictive interpretation of the 'interest of justice' test that arguably does not comply with international standards, including definitions set by the European Court of Human Rights.

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1 Review of the Implementation of the New Criminal Procedure Code of Kosovo, OSCE Mission in Kosovo (June, 2016); available at <https://www.osce.org/kosovo/243976> (accessed on 7 March 2022).

2 According to the 'UNODC Model Law on Legal Aid in Criminal Justice Systems' (2017) one of three possible models are generally used for the provision of legal aid in criminal cases: i) public defender systems; ii) contract service systems; or iii) *ex officio* or assigned counsel/panel lawyers. Available at [https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model\\_Law\\_on\\_Legal\\_Aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf) (accessed on 20 April 2022).

In relation to both *ex officio* and privately instructed defence counsel, a significant proportion of prosecutors and judges responding to the surveys reported that they often or very often had concerns regarding the quality of defence counsel (23 per cent in privately instructed cases and 30 per cent in *ex officio* cases). In 2016, the OSCE observed that, “even in cases where defence counsel is present, the defence often does not engage in the proceedings as actively as it should”;<sup>3</sup> the findings of this report suggest that this a continuing concern.

Another finding of the research is that there are recurring barriers to effective representation. Lawyers reported concerns regarding access to case files; lack of notice regarding hearings and short preparation time; concerns were also raised regarding the lack of continuity of defence representation.

With regard to the funding of *ex officio* appointments, the report notes that there has been no increase in fees since 2014 and the fee for case preparation in particular appears low. There is also no remuneration for consultation with clients (in detention or otherwise). It is recommended that there should be a comprehensive analysis of the functioning of the current *ex officio* appointment system including a cost/benefit analysis and needs assessment. The review should also consider the possibility of separating the budget for *ex officio* appointments from the budgets of the KJC and KPC to ensure budgetary autonomy.

The report concludes with additional recommendations including the need for specialised training for lawyers practicing criminal defence; advocating consideration of having an additional qualification or mandatory training for lawyers before they can be included on the *ex officio* appointment list; and that courts and prosecutors need to remain cognisant of their duty to intervene in cases where it is evident that the defence counsel is neglecting his/her duty.

The OSCE would like to thank all those who participated in the preparation of this report and particularly the Kosovo Bar Association, Kosovo Prosecutorial Council, Kosovo Judicial Council and the lawyers, judges and prosecutors who completed the online surveys. This report is intended to be used by all criminal justice stakeholders as well as academia and civil society.

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3 Footnote 1, p. 4.

## 2. INTRODUCTION

*"[...] legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law and that it is a foundation for the enjoyment of other rights, including the right to a fair trial, as a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process [...]."*

United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (October 2012) <sup>4</sup>

The OSCE monitors the Kosovo justice system for compliance with rule of law and fair trial standards. This includes a comprehensive trial monitoring programme through which the OSCE monitors proceedings in Basic Courts throughout Kosovo. The right to effective representation in criminal proceedings is fundamental to equality of arms and the right to a fair trial and therefore, the assessment of standards of defence representation is an integral part of the OSCE's work to support rule of law in Kosovo. In its 2016 report, "Review of the Implementation of the New Criminal Procedure Code of Kosovo", the OSCE concluded that, " *[...] the defence often does not engage in the proceedings as actively as it should. As a result, in many trials, there is no equality of arms between the defence and the prosecution, and the fair trial rights of the defendants are not appropriately enforced*". <sup>5</sup>

The aim of this report is to provide an up-to-date analysis of the system for appointment of *ex officio* defence counsel in criminal cases and assess standards of defence representation. The report is largely based on the findings of surveys distributed to judges, prosecutors and lawyers throughout Kosovo; those findings are supplemented with information from the OSCE's trial monitoring programme; and interviews with the Kosovo Bar Association (KBA), Kosovo Prosecutorial Council (KPC) and Kosovo Judicial Council (KJC).

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4 Available at [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf) (accessed on 10 March 2022).

5 Review of the Implementation of the New Criminal Procedure Code of Kosovo (OSCE, June 2016) p. 35, available at <https://www.osce.org/kosovo/243976> (Accessed 25 February 2022).



The importance of defence representation is widely recognised in international instruments including the International Covenant on Civil and Political Rights and the European Convention on Human Rights and is subject of extensive jurisprudence before both the European Court of Human Rights and the UN Human Rights Committee. From this body of case law it is possible to extract guidance on the minimum standards for criminal defence. However, in developing legal systems the importance of defence representation can sometimes be overlooked in favour of a focus on effective prosecution and adjudication of criminal offences. This report argues that the two are not mutually exclusive. In fact, by providing a check on the actions of the courts and prosecution, effective defence representation raises the standards of justice for all parties. There is also compelling evidence that by improving court efficiency reducing use of detention and preventing miscarriages of justice, a well-resourced legal aid system can generate long term financial savings.<sup>6</sup>

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6 A Tool for Justice: A Cost Benefit Analysis of Legal Aid, the World Bank (September, 2019) available at <https://documents1.worldbank.org/curated/en/592901569218028553/pdf/A-Tool-for-Justice-The-Cost-Benefit-Analysis-of-Legal-Aid.pdf> (accessed on 7 March 2022). See further page 20.

### 3. METHODOLOGY

This report is based on:

- i) Desk research of Kosovo and international standards regarding legal aid and defence representation in criminal cases.
- ii) Online surveys circulated by the Kosovo Bar Association, Kosovo Prosecutorial Council and Kosovo Judicial Council to respectively lawyers, prosecutors and judges.
- iii) Observations from the OSCE trial monitoring teams on cases monitored from January 2020 to December 2021.
- iv) Meetings with the Kosovo Bar Association (KBA), Kosovo Prosecutorial Council (KPC) and Kosovo Judicial Council (KJC).<sup>7</sup>

In 2020, the OSCE developed three questionnaires for judges, prosecutors and lawyers. The questionnaires were anonymous and were circulated online through the *Survey Monkey* platform. The purpose of surveying judges, prosecutors and lawyers was to gain an understanding of the different perspectives on defence representation and the *ex officio* appointment system. The questionnaires were tailored to be relevant to the work of different categories of respondents and were circulated in Albanian and Serbian languages from 24 June to 24 September 2020.<sup>8</sup>

In total, surveys were completed by 212 respondents, namely 156 lawyers, 32 judges and 24 prosecutors throughout Kosovo. A lower response rate from judges and prosecutors could be explained by these professions feeling less invested in the subject of the surveys. Nonetheless, the responses received were sufficient to provide insights into the views prevailing in these professions although some caution is needed in interpreting the statistical significance of the prosecution and judicial responses.

Between 2020 and 2021, the OSCE monitored more than 2,000 hearings in approximately 800 cases.<sup>9</sup> OSCE trial monitoring focuses on priority case categories such as terrorism, organised crime and corruption, domestic and gender-based violence among others (thematic monitoring), as well as looking at systemic issues that affect the justice system as a whole.<sup>10</sup>

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<sup>7</sup> Interviews took place between January 2020 and March 2022.

<sup>8</sup> For example, questions regarding the investigation stage were mainly addressed to lawyers and prosecutors.

<sup>9</sup> Trial monitoring levels were reduced during this period due to COVID-19.

<sup>10</sup> The OSCE Mission in Kosovo trial monitoring methodology is based on that developed by ODIHR and reflected in the publication, 'Trial Monitoring, A Reference Manual for Practitioners', ODIHR (2012) available at <https://www.osce.org/files/f/documents/5/f/94216.pdf> (accessed on 28 April 2022).

## 4. LEGAL FRAMEWORK

### 4.1 International Standards

Both the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) enunciate the right to effective representation and legal aid for indigent defendants.

Article 6, ECHR, defines the right to a fair trial including the right of the defendant to, *“adequate time and facilities for the preparation of his defence”, and “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”*.<sup>11</sup>

Article 14, ICCPR states, *“[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality [...] To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; [...] to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it [...]”*.<sup>12</sup>

These provisions have been interpreted by the European Court of Human Rights and UN Human Rights Committee respectively to confer minimum guarantees with regard to the right to effective defence representation.<sup>13</sup>

The UN Basic Principles on the Role of Lawyers similarly describes the right to representation, including by means of legal aid for indigent defendants. The principles also extend to the responsibilities of governing bodies to provide oversight and training; as well as defining the fundamental duties of lawyers.<sup>14</sup>

The first international instrument on the right to legal aid was the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

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11 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 15* (Strasbourg, ETS 5, 4 November 1950), available at <https://rm.coe.int/1680a2353d> (accessed 15 November 2021).

12 International Covenant on Civil and Political Rights, available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed on 9 March 2022)

13 For further discussion on the decisions of the UN Human Rights Committee see, *International Standards on Criminal Defence Rights: UN Human Rights Committee Decisions, Open Society Justice Initiative* (April 2013) available at <https://www.justiceinitiative.org/uploads/d4a5fd83-2158-4f5a-9bf4-7d9dd2fed055/digests-arrest%20rights-human-rights-committee-20130419.pdf>. Further information on ECHR standards and ECtHR jurisprudence can be found in *Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb)*, Council of Europe, available at [https://www.echr.coe.int/documents/guide\\_art\\_6\\_criminal\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf) (accessed on 9 March 2022).

14 *Basic Principles on the Role of Lawyers* Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990; available at <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx> (accessed on 10 March 2022).

The principles underline the importance of adequate funding for legal aid systems and, among other things, specify that authorities, *"should put in place mechanisms to ensure that all legal aid providers possess education, training, skills and experience that are commensurate with the nature of their work, including the gravity of the offences dealt with, and the rights and needs of women, children and groups with special needs"*.<sup>15</sup>

With respect to the EU *acquis*, Directive 2016/1919 'on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings' incorporates the aforementioned standards into EU law.<sup>16</sup>

## 4.2 Kosovo Legal Framework

The right to defence representation, including free legal assistance for indigent defendants is incorporated into Kosovo law. While there are some ambiguities in the current legal framework, the law can be interpreted in compliance with international standards. The key legal instruments governing *ex officio* appointments are:

- a) The Constitution
- b) The Criminal Procedure Code
- c) The Law on Free Legal Aid (No. 04/L-017)<sup>17</sup>

### 4.2.1 The Constitution

Article 29 states, *"Everyone who is deprived of liberty shall be promptly informed of his/her right not to make any statements, right to defense counsel of her/his choosing [...]"*,<sup>18</sup> and *"[...] enjoys the right to use legal remedies to challenge the lawfulness of the arrest or detention"*.<sup>19</sup>

Articles 30 and 31 list the right to the accused, including the right to a fair and impartial trial. Both Articles refer to the right to free legal assistance for, *"those without sufficient financial means if such assistance is necessary to ensure effective access to justice"*.<sup>20</sup>

In addition, Article 22 incorporates both the ECHR and ICCPR into Kosovo law and Article 53 requires courts to interpret Kosovo law in line with the jurisprudence of the ECtHR.<sup>21</sup>

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15 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Principle 13.

16 EU Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (26 October 2016) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1919&from=en> (accessed on 10 March 2022).

17 As amended by Law No. 08/L-035 on Amending and Supplementing the Law No.04/L-017 on Free Legal Aid. Available at [ActDetail.aspx\(rks-gov.net\)](ActDetail.aspx(rks-gov.net)) (accessed on 20 April 2022).

18 Article 29(3).

19 Article 29(4).

20 Article 31(6). See also Article 30(5), which enshrines the right *"to have assistance of legal counsel of his/her choosing, to freely communicate with counsel and if she/he does not have sufficient means, to be provided free counsel"*.

21 *Ibid.*, Article 53 of the Constitution.

## 4.2.2 Criminal Procedure Code

The rights of defendants are reflected throughout the Criminal Procedure Code and are in line with international standards.<sup>22</sup> Key provisions include:

- i. **Articles 3 to 5:** presumption of innocence, *in dubio pro reo*, *ne bis in idem* and the right to a trial within reasonable time.
- ii. **Article 9:** equality of the parties and equal status of prosecution and defence.
- iii. **Article 10:** privilege against self-incrimination.
- iv. **Article 11:** adequacy of defence including the right to representation of the defendant's own choosing and adequate time and facilities to prepare the defence. This provision also specifies that, "*if the defendant has insufficient means to pay for legal assistance and for this reason cannot engage a defence counsel, an independent defence counsel having the experience and competence commensurate with the nature of the offence shall be appointed for the defendant on his or her request and paid from budgetary resources if required by the interests of justice*".
- v. **Article 13:** rights of persons deprived of liberty including the right to have legal assistance of his/her own choice.
- vi. **Article 48:** duty of the prosecutor towards the defendant, including the duty to obtain exculpatory as well as inculpatory evidence.
- i. **Articles 53 to 61** deal with the defendant's right to defence counsel, qualifications of counsel, *ex officio* appointments, limitations and dismissal. Article 53 provides for the defendant's right to defence counsel during all stages of the criminal proceedings and the right to be informed of the right to representation.<sup>23</sup>
- vii. **Article 125(3):** warnings to defendants prior to pre-trial interview or testimony. This provision obliges the prosecutor to read a warning advising the defendant of their right to silence and right to legal advice. The warning also needs to be provided in writing together with the summons.
- viii. **Article 136 and 141:** enables the defence to request the prosecutor to take or engage expert testimony and Article 137 allows the defence to challenge experts selected by the prosecution.
- ix. **Article 149:** Entitles the defendant and his/her representative to be present during a 'special investigative opportunity'.
- x. **Article 246(1):** obliges the court to instruct the defendant of his/her right to legal assistance. In 2016, the OSCE reported that, "*[t]he Supreme Court stated in a decision dated 1 February 2015 that it is not sufficient for judges to simply mention the right to legal assistance when instructing the defendant of his rights. He or she should be asked whether he or she intends to retain counsel privately, to*

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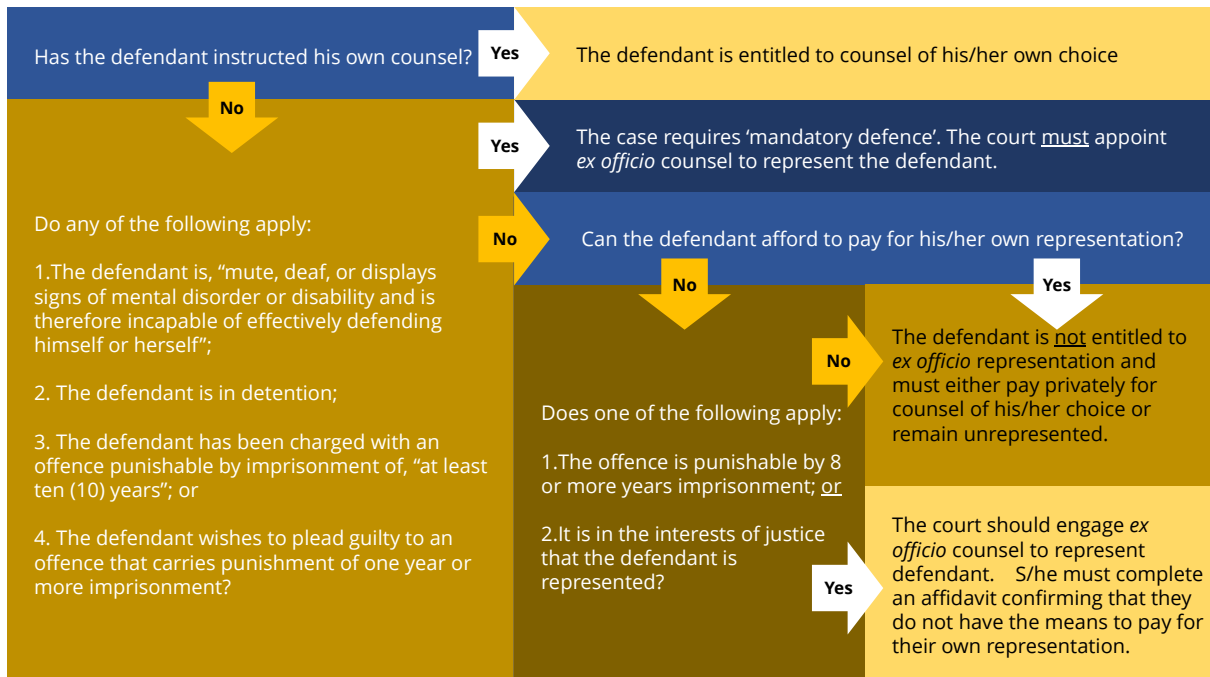
<sup>22</sup> Criminal Procedure Code, Law No. 04/L-123, available at [https://www.oak-ks.org/repository/docs/CRIMINAL\\_PROCEDURE\\_CODE\\_502172.pdf](https://www.oak-ks.org/repository/docs/CRIMINAL_PROCEDURE_CODE_502172.pdf) [Accessed 15 November 2021].

<sup>23</sup> See Article 53 (1) and (2) of the Criminal Procedure Code of Kosovo.

*file a request for counsel to be appointed at public expense, or to waive his or her right under Article 53 of the CPC.”<sup>24</sup>*

Articles 57 and 58 establish the criteria for appointment of *ex officio* counsel. Cases are categorised as either of ‘mandatory defence’ in which case *ex officio* counsel must be appointed unless the defendant has instructed his/her own counsel;<sup>25</sup> and cases where there is not ‘mandatory defence’. In cases where there is not ‘mandatory defence’; the court can still appoint *ex officio* counsel if the defendant is unable to pay for his/her representation *and* either i) the criminal offence is punishable by eight or more years imprisonment; *or* ii) the court finds that it is in the ‘interests of justice’ that the defendant is represented.

The key distinctions between mandatory and non-mandatory cases is that in the latter, the appointment of *ex officio* counsel is means-tested and at the discretion of the court whereas in mandatory defence cases appointment is obligatory if the defendant fails to instruct his/her own representative.



**Figure 1. Overview of the framework for *ex officio* appointments created in the Criminal Procedure Code (Articles 57 and 58)**

<sup>24</sup> Supreme Court decision Pml.nr.23/2015 dated 1 February 2015. Reported in OSCE, *Review of the Implementation of the New Criminal Procedure Code of Kosovo* (OSCE, June 2016), p. 11, available at: <https://www.osce.org/kosovo/243976> (accessed 25 February 2022).

<sup>25</sup> Article 57, Criminal Procedure Code.

The appointment system itself is regulated by decisions of the KBA,<sup>26</sup> KJC,<sup>27</sup> and KPC,<sup>28</sup> taken in 2013 and 2014. These state that all *ex officio* lawyers must be appointed through the KBA but their fees are paid by either the KJC or KPC depending on the stage of the case and work done (see further under Section 5.4.2).

The KBA maintains a list of lawyers available for *ex officio* work and when making an appointment will approach the next lawyer on the list to try to ensure equitable distribution of work. If that lawyer is not available, the following name on the list is contacted and so on. As of March 2022, there were 969 lawyers on the list of counsel available for *ex officio* appointments of whom 221 (23 per cent) were women.<sup>29</sup> All lawyers on the list are eligible to accept any *ex officio* case in their region, regardless of seriousness or complexity. This means that a recently qualified lawyer on the *ex officio* list can be appointed to deal with a complex case in spite of potentially lacking post-qualification experience.

In 2016, the OSCE supported a Memorandum of Understanding (MoU) that was signed by the KBA, KJC, KPC and Kosovo Police. The aim of the MoU was to formalise the KBA appointment system; the MoU also introduced minimum periods of post-qualification experience for *ex officio* lawyers to be allowed to represent cases before the Serious Crimes and Juvenile Departments. To give effect to the MoU, on 30 June 2016, the KBA issued the 'Regulation on Ex Officio Appointment and Free Legal Aid'. However, the regulation was challenged by lawyers who lacked the minimum post-qualification experience to accept Serious Crimes and Juvenile Department cases. On 19 April 2017, the Government approved a decision proposed by the Minister of Justice, which suspended the KBA Regulation.<sup>30</sup> The OSCE has been informed that said decision is being challenged in the courts and proceedings remain ongoing.<sup>31</sup>

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26 Kosovo Bar Association, *Decision on the engagement of lawyers ex officio*, No. 1190/2014, 3 October 2014, available at [https://oak-ks.org/repository/docs/DOKUMENTE/Vendim\\_i\\_Keshillit\\_Drejtues.pdf](https://oak-ks.org/repository/docs/DOKUMENTE/Vendim_i_Keshillit_Drejtues.pdf) [Accessed 15 November 2021].

27 Kosovo Judicial Council, *Decision on the engagement of lawyers ex officio*, Decision No. 23/2014, 5 February 2014, available at [https://oak-ks.org/repository/docs/DOKUMENTE/Vendim\\_KGJK.PDF](https://oak-ks.org/repository/docs/DOKUMENTE/Vendim_KGJK.PDF) [Accessed 15 November 2021].

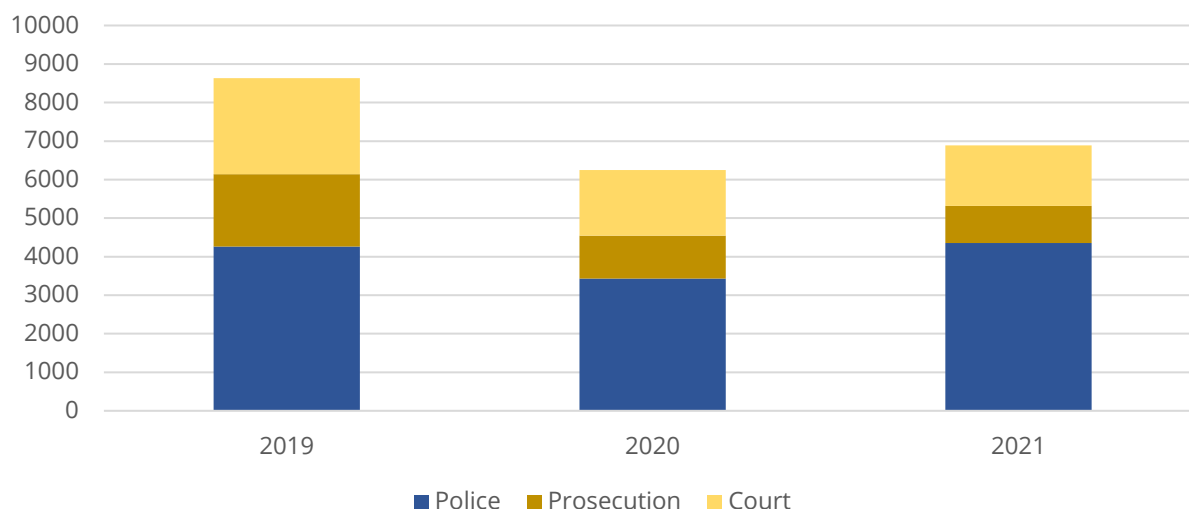
28 Kosovo Prosecutorial Council, Decision No. 150/2013, 13 August 2013, available at [https://oak-ks.org/repository/docs/DOKUMENTE/Vendim\\_KPK.PDF](https://oak-ks.org/repository/docs/DOKUMENTE/Vendim_KPK.PDF) [Accessed 15 November 2021].

29 The OSCE was informed that this number fluctuates constantly due to deregistration, suspension, registration of new lawyers, lawyers asking to be removed from the *ex officio* list and other reasons.

30 Article 44, Law on Bar (31 May 2013) states, "[t]he Government of Kosovo supervises the lawfulness of general KCA acts and is authorized to suspend the application of an act that is in conflict with the law, until the competent court makes a decision on it. This supervision is limited to the adherence to the law and legislation, by not violating the administrative autonomy of the KCA." Available at [https://www.oak-ks.org/assets/uploads/files/aplikacione/Ligji\\_per\\_avokatine-\(Anglisht\)\\_164184\\_427315.pdf](https://www.oak-ks.org/assets/uploads/files/aplikacione/Ligji_per_avokatine-(Anglisht)_164184_427315.pdf) (accessed on 10 March 2022).

31 Due to the ongoing legal proceedings the OSCE is not able to comment on the merits of the MoU.

## Number of *ex officio* appointments through the Kosovo Bar Association



**Figure 2. Number of *ex officio* appointments through the Kosovo Bar Association<sup>32</sup>**

### 4.2.3 Law No. 04/L-017 on Free Legal Aid

Law No. 04/L-017 on Free Legal Aid outlines the system for free legal aid in civil, administrative, minor offences and criminal procedure. The aim of the law is to provide free legal assistance to those who do not have the means to pay for representation.<sup>33</sup> While the law states that it applies to all phases of the criminal process, in practice the law is not applied to criminal defence representation.

The law establishes the Free Legal Aid Agency (FLAA) as the only institution in Kosovo, “responsible for organization and providing of free legal aid”.<sup>34</sup>

The OSCE has been informed that the FLAA policy is to refer cases to the KBA when they receive requests to provide legal representation to defendants in criminal cases. The OSCE observes that conflicting legislation and apparently overlapping systems for the provision of legal aid/*ex officio* representation potentially undermine coherent implementation.

<sup>32</sup> Data provided by the Kosovo Bar Association.

<sup>33</sup> *Law on Free Legal Aid*, Law No. 04/L-017, Article 1 and Article 5(2.4), available at [https://www.ecoi.net/en/file/local/1223586/1226\\_1404464803\\_kosovo-law-free-legal-aid-2012-en.pdf](https://www.ecoi.net/en/file/local/1223586/1226_1404464803_kosovo-law-free-legal-aid-2012-en.pdf) [Accessed 15 November 2021].

<sup>34</sup> *Ibid.* Article 19.

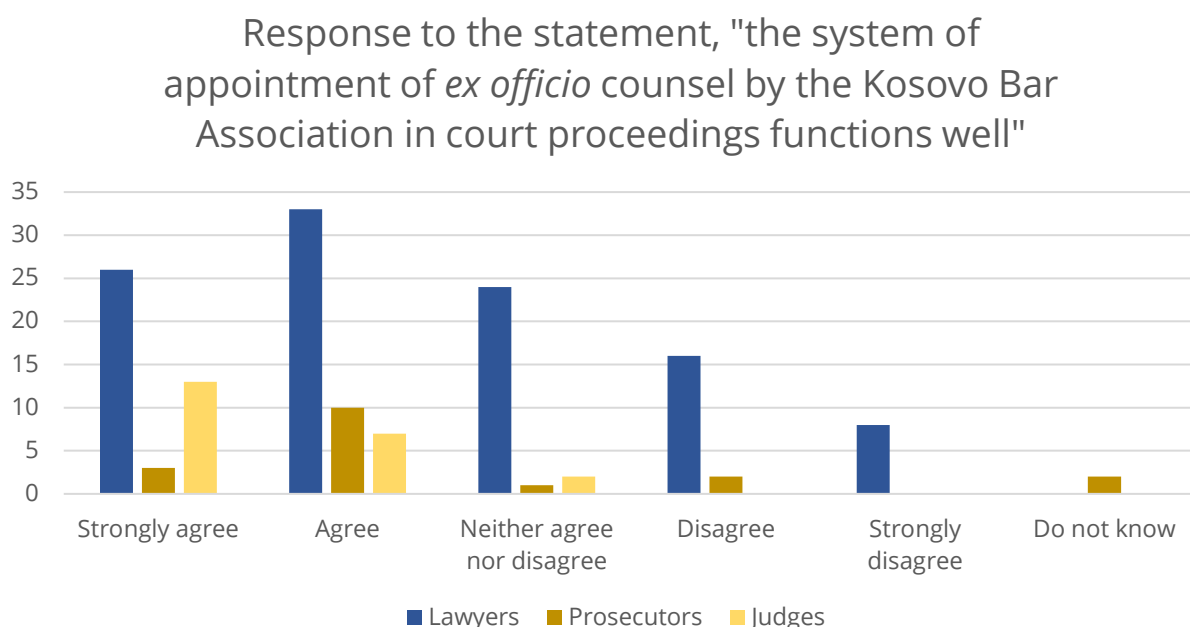


## 5. RESEARCH FINDINGS

The following sections outline the main findings of the surveys circulated among lawyers, prosecutors and judges. The findings are supplemented with the results of OSCE trial monitoring and desk research.

### 5.1 *Ex officio* Appointment System

One positive finding of the surveys was that the majority of respondents (82 per cent of judges, 72 per cent of prosecutors and 55 per cent of lawyers) agreed or strongly agreed that the current system for appointment of *ex officio* lawyers functions well.



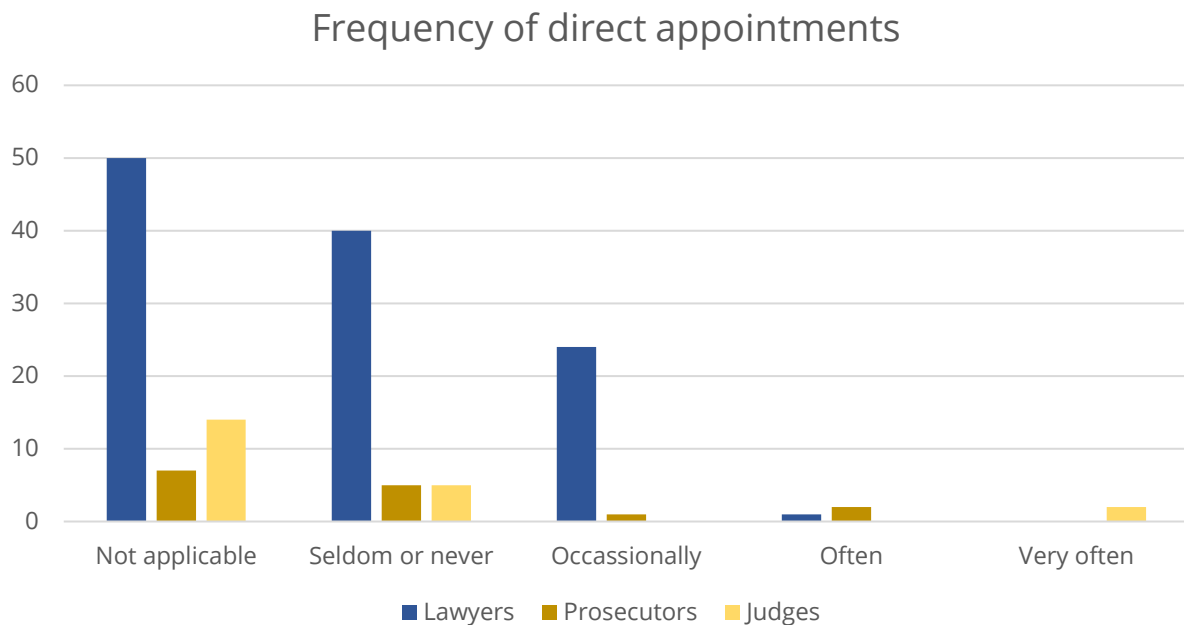
**Figure 3. Response to the statement, "the system of appointment of *ex officio* counsel by the Kosovo Bar Association in court proceedings functions well".**

Among respondents, lawyers were most likely to disagree with the statement, "*the system of appointment of ex officio counsel by the Kosovo Bar Association in court proceedings functions well*". In the narrative answers, several lawyers complained of a lack of transparency in the *ex officio* appointment system and reported that they were never or rarely appointed in *ex officio* cases. These concerns may explain the lower levels of satisfaction with the system among lawyers.

The *ex officio* list is divided by region; therefore, the number of appointments that a lawyer receives is likely to depend on the geographical area covered, the number of cases in that area (more populated areas will usually generate more cases) and the number of lawyers registered in the area. Equitable distribution of cases within regions is important

and cases should be allocated on rotation to the next available lawyer on the *ex officio* lists.<sup>35</sup>

Transparency in the appointment process is vital to ensure that stakeholders continue to use the system and do not revert to direct appointments. Since circulation of the surveys, the KBA has started publishing records of *ex officio* appointments on their website.<sup>36</sup> This is a positive step and the KBA is encouraged to continue improving transparency, which should in turn lead to greater confidence in the appointment system, particularly among lawyers.



**Figure 4. Frequency of Direct Appointments**

According to KJC and KPC regulations, prosecution, courts and police should always request *ex officio* appointments through the KBA and not appoint lawyers directly.<sup>37</sup> This safeguard ensures that lawyers appointed to act *ex officio* are independent and free to act in the best interests of their clients. The KBA appointment system also helps to maintain the perception of *ex officio* lawyers as offering an independent service that in turn reassures defendants and builds public trust in the *ex officio* system.

Prior to conducting the surveys, the OSCE received reports of concerns that judges and prosecutors were appointing lawyers without going through the KBA.<sup>38</sup> While the OSCE's

<sup>35</sup> Although not currently the case, it is arguable that selection should also be based to some extent on qualification, so that it should be the next available and suitably qualified lawyer on the *ex officio* list.

<sup>36</sup> See <https://www.oak-ks.org/en/ex-officio/14> (accessed on 27 January 2022).

<sup>37</sup> Footnotes 34 to 36.

<sup>38</sup> Prior to the 2013 and 2014 administrative instructions of the KBA, KPC and KJC, courts, prosecution and police would directly engage lawyers to represent indigent defendants. However, the direct appointment system was rightly felt to offer insufficient guarantee regarding the independence of the appointed lawyer. The use of direct appointments can enable courts/prosecution/police to select defence lawyers who are seen as more favourable to the courts/prosecution/police. Even if this risk is purely theoretical, the perception of bias can undermine public trust in *ex officio* representation.

trial monitoring team has not observed any instances of such practice, it was nonetheless felt important to include in the surveys a related question to establish whether direct appointments were being made.

The responses to the surveys show that, while in most cases appointments are correctly made through the KBA, direct appointments are periodically made as well. In total, 24 lawyers (15 per cent) reported that they occasionally receive direct appointments. However, the clear majority of all respondents said that they either seldom or never made/received direct appointments or marked the question as 'not applicable'.

The surveys also included an optional question for respondent judges and prosecutors to explain the circumstances in which they use direct appointments. Most respondents used this space to reiterate their commitment to the KBA appointment system and to explain that they do not make direct appointments. Where respondents said they had made direct appointments, the narrative answers explained that these were made in exceptional cases where it was not practicable to appoint a lawyer through the KBA given the urgent need for representation (see further under Section 5.4.2.d).

Another concern related to the appointment of *ex officio* lawyers was that some respondents reported that the system does not ensure continuity of representation. In particular, it was noted that a lawyer who represents a defendant at the investigation stage is not necessarily then appointed to represent the defendant at court. This risks undermining the quality of representation (as newly appointed lawyers will be less familiar with the case and the client), it also creates additional work as the newly appointed lawyer must become familiar with the case and new client, which can delay proceedings. In cases where a defendant is vulnerable due to age, mental health issues or other disabilities, this lack of continuity can be particularly damaging. The importance of continuity is reflected in the EU Directive on Legal Aid for Suspects and Accused Persons in Criminal Proceedings and for Requested Persons in European Arrest Warrant Proceedings which states, “[w]here legal aid has been granted to a suspect, an accused person or a requested person, one way of ensuring its effectiveness and quality is to facilitate continuity in his or her legal representation. In that respect, Member States should facilitate continuity of legal representation throughout the criminal proceedings [...]”<sup>39</sup>

## 5.2 Representation at the Investigation Stage

Both prosecutors and judges reported that the majority of suspects are represented during the investigation stage of a case. However, lawyers reported that they were frequently only appointed after the suspect had been interviewed. This is also supported by the Strategy on Rule of Law 2021-2026 which states that “[a]ccess to a lawyer is often

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39 Preamble Paragraph 25, EU Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (26 October 2016) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1919&from=en> (accessed on 10 March 2022).

provided only after questioning by the police”.<sup>40</sup> The police interview is a vital stage in the investigation process and it is important that suspects have access to timely and effective legal advice when interviewed.

According to the Criminal Procedure Code, suspects must be informed of their rights, including the right to “to receive the assistance of defence counsel and to have defence counsel provided if he or she cannot afford to pay for legal assistance”.<sup>41</sup> It is also important that suspects are made aware that the right to legal advice is a continuing right that can be exercised at any time.

A significant proportion of judges (45 per cent) and prosecutors (50 per cent) reported that they were occasionally concerned regarding the standard legal advice was provided by defence counsel during an investigation. This was also reflected in the fact that 56 per cent of prosecutors agreed or strongly agreed that defence counsel representing suspects under investigation should be better regulated and 67 per cent agreed or strongly agreed that lawyers providing representation to suspects under investigation should receive better training. In the narrative answers, prosecutors expressed concerns that the appointment of *ex officio* defence counsel does not take account of the nature or seriousness of the case with the result that inexperienced lawyers can be appointed to represent defendants in serious/complex cases.

Overall, the responses suggest that, while in most cases the system and standard of representation during investigations is satisfactory, in a significant minority of cases there are concerns regarding the effectiveness of representation.



**Figure 5. Frequency of concerns regarding the standard of legal advice during the investigation stage**

<sup>40</sup> Problems with access to courts and prosecution offices, Strategy on Rule of Law 2021-2026 (July 2021) at page 22 available at <https://md.rks-gov.net/desk/inc/media/8EF86336-E250-4EA2-9780-D4B8F7E853B5.pdf> (accessed on 10 March 2022).

<sup>41</sup> Article 167(1.4), Criminal Procedure Code.

In comparison, respondent judges and prosecutors were asked how often they were concerned about what a suspect had said during an investigation when not legally represented. The answers serve to highlight the need for effective legal representation during investigations with 39 per cent of prosecutor and 27 per cent of judicial respondents reporting that they were 'often' or 'very often' concerned about what an unrepresented defendant had said during the investigation.

### 5.3 *Ex Officio* Representation at the Trial and Pre-Trial Stage

In mandatory defence cases, i.e. those cases where, according to the Criminal Procedure Code, defendants must be represented, the surveys found that defendants are usually represented; 45 per cent of prosecutors and 50 per cent of judges reported that either the question was not applicable or they seldom or never encountered unrepresented defendants in mandatory defence cases. However, the remainder of respondents reported unrepresented defendants at least occasionally in mandatory defence cases.

OSCE trial monitoring from January 2020 to December 2021, has not recorded concerns regarding the provision of representation in mandatory defence cases.<sup>42</sup> However, the survey findings suggest that there are unrepresented defendants in some of such cases. In explaining why a defendant might be unrepresented in a mandatory defence case, at least one judge and one prosecutor replied that this could be attributable to the, "economic conditions of the defendant". These answers suggest a level of confusion over when *ex officio* representation should be means-tested.

The limited criteria for cases to be of 'mandatory defence' results in most cases falling into the non-mandatory defence category, including serious matters. However, the great majority of the prosecutors and judges stated that defendants are never, seldom or only occasionally granted *ex officio* legal representation in non-mandatory cases. This issue has also been reported in reports of other organisations,<sup>43</sup> as well as the OSCE's 2016, "Review of the Implementation of the New Criminal Procedure Code of Kosovo", which provides a detailed analysis of concerns regarding unrepresented defendants.<sup>44</sup>

In the surveys for this report, both prosecutors and judges reported that they are often concerned about an unrepresented defendants' ability to present their case. Similarly, the majority of respondent lawyers stated that the number of unrepresented defendants appearing in criminal cases is a problem.

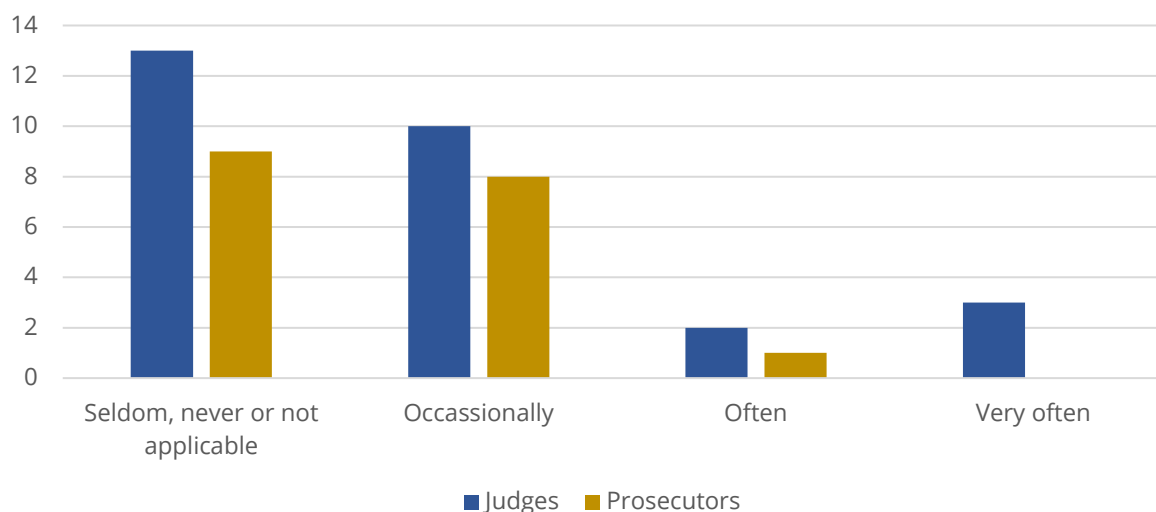
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42 This is possibly due to OSCE trial monitoring focus on thematic monitoring i.e. priority cases such as terrorism and corruption.

43 For example, Risk Assessment for the Kosovo Chamber of Advocates, UNDP (October, 2019) at paragraph 100; available at [https://www.ks.undp.org/content/kosovo/en/home/library/democratic\\_governance/corruption-risk-assessment-for-the-bar-association.html](https://www.ks.undp.org/content/kosovo/en/home/library/democratic_governance/corruption-risk-assessment-for-the-bar-association.html) (accessed on 10 March 2022)

44 OSCE, *Review of the Implementation of the New Criminal Procedure Code of Kosovo* (OSCE, June 2016), pp. 8-13, available at <https://www.osce.org/kosovo/243976> (Accessed 25 February 2022).

## Frequency of *ex officio* appointments in non-mandatory cases reported by prosecutors and judges



**Figure 6. Frequency of *ex officio* appointments in non-mandatory cases reported by prosecutors and judges**

It is worth reiterating that there are three routes to *ex officio* representation:

- 1) The case qualifies as one of mandatory defence in accordance with Article 57 either because the offence is punishable by ten years or more imprisonment, the defendant is in custody, because of vulnerabilities of the defendant or because the defendant wants to plead guilty and the offence is punishable by one year or more imprisonment.
- 2) The defendant does not have means to pay for his/her own legal representation and the offence is punishable by eight years or more imprisonment.
- 3) The defendant does not have the means to pay for his/her own legal representation and, “independently of the punishment foreseen” it is in the interests of justice that he/she is represented.

The third route requires that, in addition to the ‘means test’ the court must apply an ‘interests of justice’ test. The interests of justice test is not defined and the Strategy on Rule of Law 2021-2026 has highlighted that this presents a challenge in the provision of free legal aid.<sup>45</sup>

Guidance can be found in the jurisprudence of the ECtHR.<sup>46</sup> The ECtHR has held that determining the interests of justice depends on the court considering three criteria: i) the seriousness of the offence and severity of the likely penalty if convicted; ii) the complexity of the case; and iii) the social or personal situation of the accused.<sup>47</sup>

<sup>45</sup> Strategy on Rule of Law 2021-2026 (July 2021), p. 22, available at <https://md.rks.gov.net/desk/inc/media/8EF86336-E250-4EA2-9780-D4B8F7E853B5.pdf> (Accessed 15 November 2021).

<sup>46</sup> Ibid. paras. 474-476. See *Case of Quaranta v. Switzerland*, paras. 33-36; *Case of Zdravko Stanev v. Bulgaria*, para. 38.

<sup>47</sup> Similarly the EU Directive, Article 4, states, “[w]here a Member State applies a merits test, it shall take into account the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake, in order to determine

The wording of Article 57(1.2), Criminal Procedure Code, “independently of the punishment foreseen” is arguably confusing. It is submitted here that to meet international standards it must be interpreted only to emphasise that the third criteria applies to all offences regardless of the punishment foreseen and the severity of the likely penalty remains a relevant factor to the interests of justice determination.

According to the respondent judges, when deciding whether to appoint *ex officio* defence counsel in a case not subject to mandatory defence, the two main reasons for deciding that representation is required in the interests of justice are i) efficient case management and ii) the interests of the victim e.g. cases of domestic abuse, sexual offences, etc. Other reasons included vulnerabilities of the defendant and substantial or complex questions of law.

### Reasons considered relevant by judges to the determination of whether *ex officio* representation should be granted in the interests of justice



**Figure 7. Reasons considered relevant by judges to the determination of whether *ex officio* representation should be granted in the interests of justice**

It is positive that over half (54 per cent) of respondents felt that *ex officio* representation is in the interests of justice when necessary to protect the interests of the victim, such as in cases of domestic and gender-based violence. Kosovo criminal procedure does not establish a system to prevent unrepresented defendants from cross-examining complainants in these categories of cases. While OSCE trial monitoring has not encountered cases where victims of domestic/gender-based violence are cross-examined by defendants, this is an area where the legislation could be strengthened to increase the protection of vulnerable complainants and improve the quality of evidence that they are able to give.

*whether the interests of justice require legal aid to be granted. In any event, the merits test shall be deemed to have been met in the following situations: (a) where a suspect or an accused person is brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of this Directive; and (b) during detention."*

In non-mandatory cases, *ex officio* appointments are also means tested. However, the nature of the means test is purely declarative i.e. the defendant simply needs to state through an affidavit detailing their means that s/he has insufficient means to pay for representation,<sup>48</sup> the court is not expected to make further enquiries into their ability to pay. The majority of respondent judges reported through the surveys that defendants receiving *ex officio* representation seldom or never complete the required affidavit. This has also been observed by OSCE trial monitors.

One way to improve efficiency in the allocation of legal aid and ensure that resources are allocated to those most in need would be to establish criteria for the application of the means test at the representation stage i.e. to move from the purely declarative system currently in place to a system where the court or other body assess the means of the defendant against established criteria to determine their eligibility for *ex officio* representation. Such a system would be in line with the EU acquis assuming that it, *"take[s] into account all relevant and objective factors, such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that Member State, in order to determine whether, in accordance with the applicable criteria in that Member States, a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer"*.<sup>49</sup>

## 5.4 Effectiveness of Defence Representation at the Trial and Pre-Trial Stage

### 5.4.1 Assessment as Reported by Judges and Prosecutors

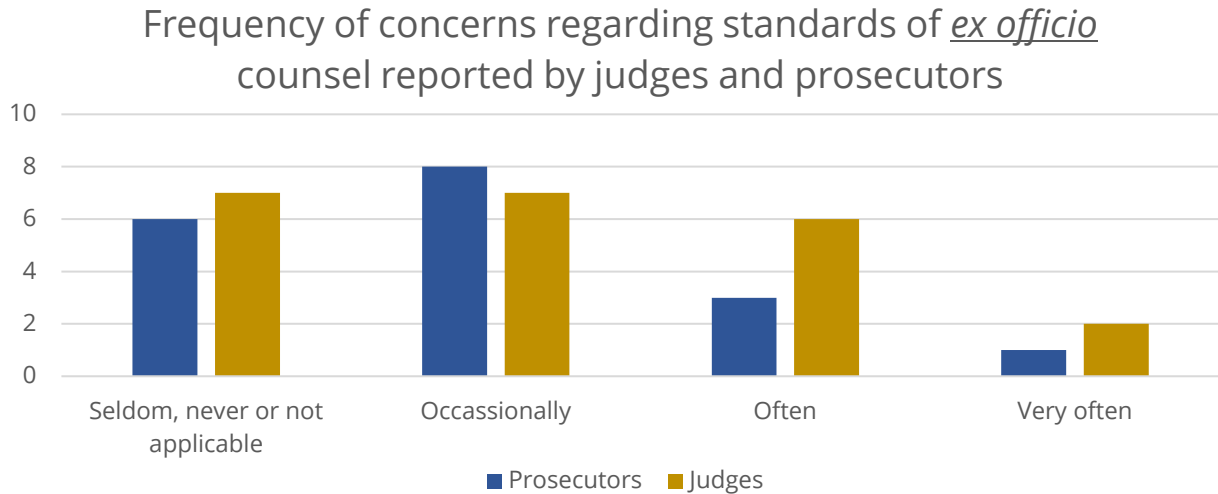
Judges and prosecutors were asked how frequently they had concerns about the standard of defence representation provided during court proceedings in relation to both *ex officio* and privately instructed counsel.

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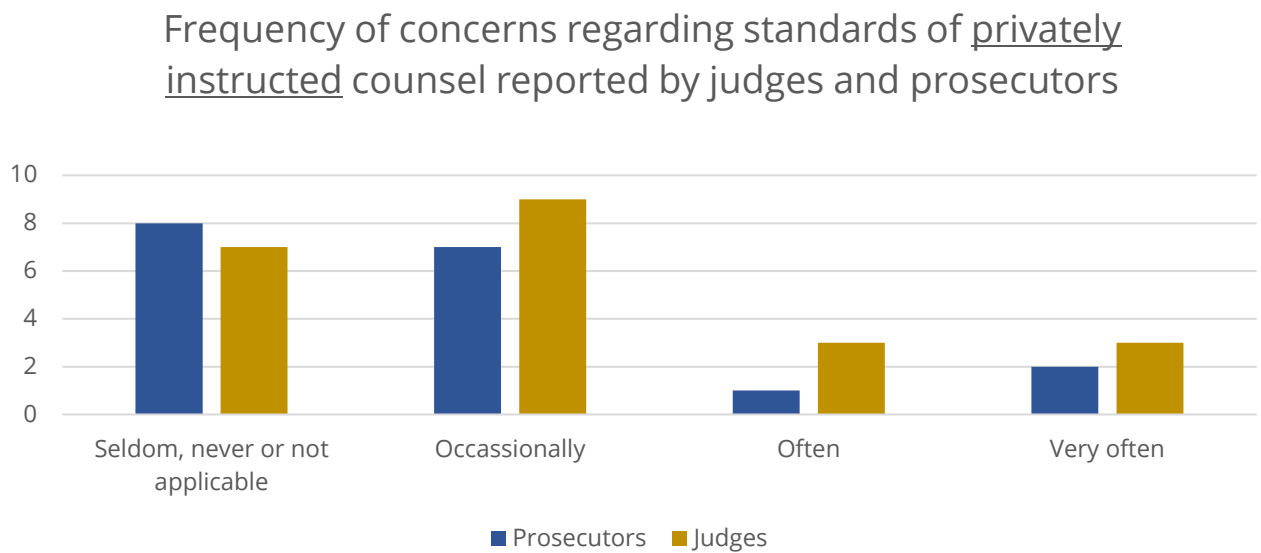
<sup>48</sup> Article 58(4), Criminal Procedure Code.

<sup>49</sup> Article 4, EU Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (26 October 2016) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1919&from=en> (accessed on 10 March 2022).





**Figure 8. Frequency of concerns regarding standards of *ex officio* counsel reported by judges and prosecutors**



**Figure 9. Frequency of concerns regarding standards of privately instructed counsel reported by judges and prosecutors**

It is reassuring to note that standards of representation were reported to be broadly similar. While more judges reported that they were ‘often’ concerned about *ex officio* counsel compared to privately instructed counsel, the clear majority of judges and prosecutors reported that they were never, seldom or only occasionally concerned regarding standards of representation regardless of whether provided privately or *ex officio*.

Among the questions with narrative answers, judges and prosecutors were asked to describe their concerns, if any, regarding standards of representation. The main concerns to emerge from these answers were:

- (i) Defence counsel were perceived to be ill-prepared/insufficiently acquainted with the case file;
- (ii) Some respondents complained that defence counsel do not provide materials and witness details in time, thereby delaying proceedings;<sup>50</sup>
- (iii) There were concerns about inexperienced defence counsel representing defendants in serious cases; and finally
- (iv) Some respondents expressed concerns that defence counsel 'go through the motions' but are not committed to providing representation to the highest standard.

OSCE trial monitors have also observed cases where defence counsel were noted to be ill-prepared to present their case, including failing to challenge prosecution evidence and submissions.<sup>51</sup> The final concern raised in the surveys, echoes the findings of the OSCE's 2016 report that states, "*even in cases where defence counsel is present, the defence often does not engage in the proceedings as actively as it should*".<sup>52</sup>

In providing the above list, it has to be emphasised that there were a relatively low number of responses from judges and prosecutors. Moreover, the majority of respondents expressed satisfaction with the current system and felt that it ensured adequate representation for defendants.

#### 5.4.2 Assessment as Reported by Lawyers

Lawyers were asked about the main limitations on their ability to provide effective representation to their clients. In the following sections we outline the key concerns raised.

##### a) Fees and Remuneration

By far the overriding concern of lawyers was regarding the rates of remuneration for *ex officio* work.

Although *ex officio* appointments are made by the KBA, fees for *ex officio* work are paid by either the KPC, for representation at the investigation stage, or KJC, for representation at the court stage. The fees for *ex officio* work are governed by two administrative instructions.<sup>53</sup> It is

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50 This concern was also identified in the OSCE, Review of the Implementation of the New Criminal Procedure Code of Kosovo (OSCE, June 2016), available at <https://www.osce.org/kosovo/243976> (Accessed 25 February 2022)

51 The most common concerns noted by trial monitors in relation to defence standards include: i) evidence being requested at a late stage leading to avoidable delay; and ii) lawyers being unfamiliar with the case and therefore asking irrelevant or inappropriate questions of witnesses and even in some cases their own clients; and iii) lawyers failing to apply the rules defined in the Criminal Procedure Code.

52 Footnote 52, p. 4.

53 Kosovo Prosecutorial Council, Administrative Instruction 2/2014 on procedures for compensation of defence counsel at public expense, No. 1352/2014, 26 November 2014, available at <https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/PSH/Legislacioni/ANudhzAdmn/Nr.1352.2014-Udhezim Administrativ nr.02.2014 per Procedurat per kompensimin e Mbrojtesve me shpenzime publike.pdf> (Accessed 15 November 2021) and Kosovo Judicial Council, Decision on the approval of the Administrative Instruction No. 9/2014 on the procedures for compensation of defence counsels at public expense, No. 80/2014, 18 June 2014, available at [https://oak-ks.org/repository/docs/DOKUMENTE/Udhezim\\_per\\_proceduren\\_kompensimit\\_mbrojtesve\\_me\\_shpenzime\\_publike\\_KGJK.pdf](https://oak-ks.org/repository/docs/DOKUMENTE/Udhezim_per_proceduren_kompensimit_mbrojtesve_me_shpenzime_publike_KGJK.pdf) (Accessed 15 November 2021).

striking that rates have remained unchanged since the administrative instructions were passed in 2014 meaning *ex officio* lawyers have had no increase in fees for almost eight years.<sup>54</sup>

The KPC's administrative instruction covers work provided by *ex officio* lawyers that are appointed, through the KBA, by the police or prosecution i.e. work at the investigation stage.<sup>55</sup>

The KJC's administrative instruction applies to *ex officio* lawyers appointed, through the KBA, by the court. The rates are harmonised in both administrative instructions as follows:

- Review of the case file: A single/one-time payment of 10 EUR for cases in the General Department and 20 EUR for cases in the Serious Crime Department or Department for Juveniles;<sup>56</sup>
- Representation of the defendant before the General Department:
  - For a criminal offence punishable by up to three years' imprisonment-40 EUR
  - For a criminal offence punishable by up to five years' imprisonment- 48 EUR
  - For a criminal offence punishable by up to ten years' imprisonment- 68 EUR
  - For organised crime cases- 127.50 EUR<sup>57</sup>
  - For a criminal offence punishable by more than ten years' imprisonment<sup>58</sup> -150 EUR<sup>59</sup>
- In the Serious Crime Department and Department for Juveniles, the tariff is 80 EUR.
- In all cases, if the session lasts more than one hour, the supplementary compensation is 30 per cent of the tariffs stated;<sup>60</sup> e.g. an *ex officio* lawyer representing a client charged with an offence before the General Department punishable by up to five years imprisonment, will receive 48 EUR for the first hour of the court session and 14.40 EUR per hour thereafter.
- Drafting regular legal remedies is remunerated at 40 EUR for an appeal against a court decision; from 40 EUR to 80 EUR for a submission; from 80 EUR to 160 EUR for an appeal against the judgement and for extraordinary legal remedies.<sup>61</sup>

The above are calculated based on 40 per cent KBA tariffs for private work.<sup>62</sup>

According to the administrative instructions, "[c]ompensation of defence counsel at public expense cannot exceed the amount of 500 EUR [...] for a month including their engagement in all Kosovo courts".<sup>63</sup>

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54 The regulations have not been updated following adoption of the Law on Courts therefore there is no reference to cases before the Special Department. Presumably, the applicable rates are the same as for Serious Crimes.

55 Articles 2 and 3 of the KPC's Administrative Instruction No. 2/2014.

56 Article 4 of the KPC's Administrative Instruction No. 2/2014 and Article 4 of the KJC's Administrative Instruction No. 9/2014.

57 Organised crime is defined in the Criminal Procedure Code as a Serious Crime, therefore it is not clear how this provision is applied under General Department fees. See Article 22, Criminal Procedure Code.

58 There is a discrepancy between the KPC and KJC administrative instructions in relation to this category of offences. According to the KPC administrative instruction, the rate is applied to offences punishable by more than ten years' imprisonment. Whereas, according to the KJC administrative instruction, the rate is applied to offences punishable by more than 20 years' imprisonment.

59 See footnote 58, these offences would, according to Article 22, CPC, be considered Serious Crimes.

60 Article 5 of the KPC's Administrative Instruction No. 2/2014 and Article 5 of the KJC's Administrative Instruction No. 9/2014.

61 Article 6 of the KJC's Administrative Instruction No. 9/2014.

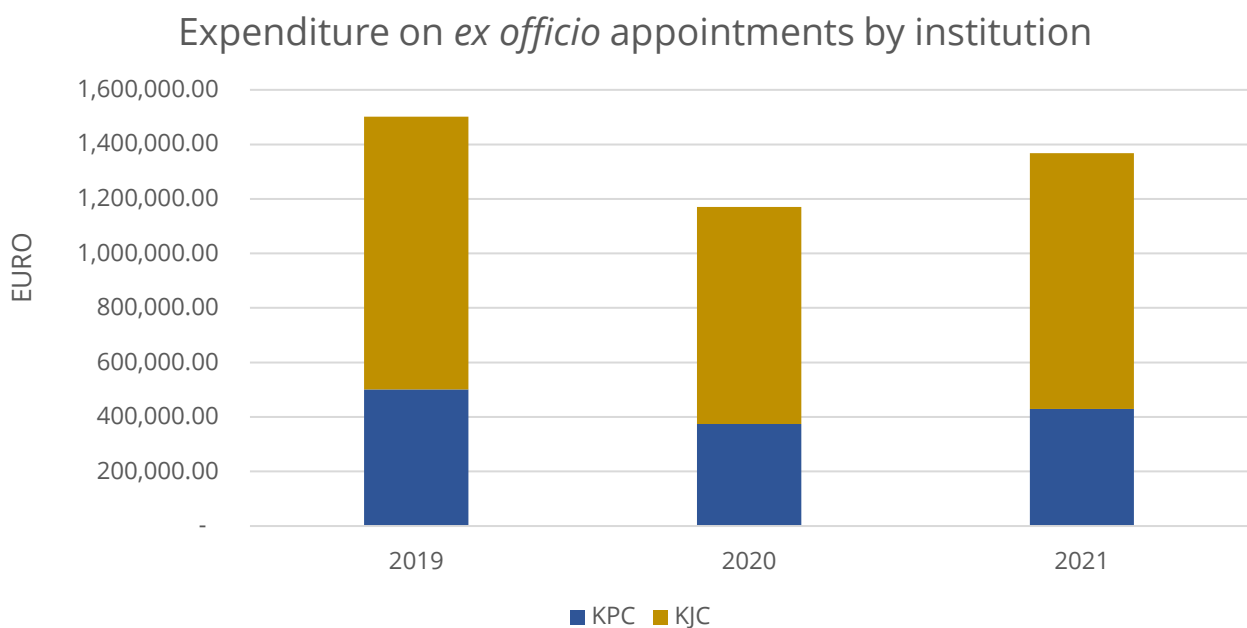
62 *Ibid.*

63 Article 6 of the KPC's Administrative Instruction No. 2/2014 and Article 7 of the KJC's Administrative Instruction No. 9/2014.

The purpose and application of this provision is somewhat unclear.<sup>64</sup> Without a defined purpose, this is arguably a somewhat arbitrary rule that risks creating an incentive to lawyers to delay proceedings.<sup>65</sup>

There is no compensation for consultation with clients i.e. consultation/advice (even if the client is in detention) is not paid; and no compensation for travel or waiting.

The OSCE notes that the fee for reviewing the case file appears low, especially when the fact that there is no compensation for client consultation is taken into account. The KJC is in the process of reviewing the regulations and it is understood that proposals include adding a tariff for consultation with clients in detention and setting new rates for representation before the Special Department.<sup>66</sup>



**Figure 9. Expenditure on *ex officio* appointments by institution<sup>67</sup>**

The overall expenditure, based on figures provided by the KJC and KPC, is illustrated in figure ten. This shows that over the last three years the average amount has been 1,346,704 EUR per annum (approximately 0.72 EUR per capita).

<sup>64</sup> It was reported that the rule was put in place to ensure the equitable distribution of *ex officio* cases. However, since the KBA appointment system has been in place, this should no longer be necessary. There was also suggestion that the provision could help courts and prosecution offices to manage their budgets. Another concern is that it is not clear how the rule is enforced. Lawyers' *ex officio* payments at the representation stage are made by the court and the OSCE is not aware of any mechanism by which courts can cross-check if the *ex officio* lawyer has received payment for another case in another court during the same month.

<sup>65</sup> For example a lawyer approaching the 500 EUR limit in a particular month might be tempted to seek a longer adjournment to ensure that s/he can be paid for the next hearing.

<sup>66</sup> The current administrative instructions pre-date the Law on Courts and therefore make no reference to fees for cases before the Special Department.

<sup>67</sup> Figures provided by the Kosovo Judicial and Prosecutorial Councils. See also, 'Comparative Assessment of Data on the Functioning of the Justice System in Kosovo (2014 - 2020), based on the methodology of the European Commission for the Efficiency of Justice (CEPEJ) for the evaluation of judicial systems' Ministry of Justice (February 2022).

The system would benefit from a comprehensive cost/benefit analysis as well as a needs assessment to establish how much is needed to provide adequate funding in line with international standards. It is likely that some funding increases, particularly to enable proper case preparation by defence counsel (through increasing fees for reviewing case files and providing compensation for client consultations), could generate long term savings. In 2019, the World Bank published 'A Tool for Justice: A Cost Benefit Analysis of Legal Aid', which provides a comprehensive analysis of how savings can be made through the better provision of legal aid.<sup>68</sup>

This is also reflected in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems which state:

*"A functioning legal aid system, as part of a functioning criminal justice system, may reduce the length of time suspects are held in police stations and detention centres, in addition to reducing the prison population, wrongful convictions, prison overcrowding and congestion in the courts, and reducing reoffending and revictimization. It may also protect and safeguard the rights of victims and witnesses in the criminal justice process. Legal aid can be utilized to contribute to the prevention of crime by increasing awareness of the law.*

*Legal aid plays an important role in facilitating diversion and the use of community-based sanctions and measures, including non-custodial measures; promoting greater community involvement in the criminal justice system; reducing unnecessary use of detention and imprisonment; rationalizing criminal justice policies; and ensuring efficient use of State resources."*<sup>69</sup>

It is also arguable that the current funding arrangements do not provide sufficient budgetary autonomy and that a system should be devised that would separate the *ex officio* budget from those of the KJC and KPC. Neither the KPC nor the KJC have separate budget lines for *ex officio* appointments, instead *ex officio* fees come from the budget line for 'goods and services',<sup>70</sup> or a budget line that also covers expert evidence.<sup>71</sup> Under the current system, it seems that there is a risk that competing demands for limited funds could act as a deterrent to increasing the use of *ex officio* appointments. The publication, 'Legal Aid in Europe Minimum Requirements under International Law' states authorities should, "*ensure that their legal aid systems are well funded, have adequate financial and staffing resources, and have budgetary autonomy*".<sup>72</sup>

A separate but related issue reported by lawyers was that the system for obtaining payment is overly bureaucratic. The regulations require *ex officio* lawyers to obtain their compensation form signed by both the Presiding Judge and Court President, for court cases, or the prosecutor

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68 A Tool for Justice: A Cost Benefit Analysis of Legal Aid, the World Bank (September, 2019) available at <https://documents1.worldbank.org/curated/en/592901569218028553/pdf/A-Tool-for-Justice-The-Cost-Benefit-Analysis-of-Legal-Aid.pdf>; accessed on 7 March 2022.

69 United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Introduction paras 3 and 4, available at [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf) (accessed on 10 March 2022).

70 In the case of the KJC.

71 In the case of the KPC.

72 Page 13, Legal Aid in Europe Minimum Requirements under International Law, Open Society Justice Initiative, available at <https://www.justiceinitiative.org/publications/legal-aid-europe-minimum-requirements-under-international-law> (accessed on 7 March 2022).

and Chief Prosecutor for cases at the investigation stage.<sup>73</sup> Thereafter, the lawyer must submit the form to the financial officer of the prosecution office or court who in turn checks and verifies the data before submitting for payment.<sup>74</sup> Submissions must be made within strict deadlines to be paid.<sup>75</sup>

It was reported to the OSCE that this system is burdensome for lawyers who have to spend additional time obtaining multiple signatures to receive their fees and according to the KBA, many lawyers are not claiming compensation for *ex officio* work because of the time involved in making a claim. However, according to the KJC, court legal officers are responsible for completing and obtaining the appropriate signatures on the form. The legal officer should complete the form, use one copy to obtain the judges' signatures, one copy for the court file and provide one copy to defence counsel. When counsel submits his/her form to the finance office, the office should check against the signed copy submitted by the legal officer. The OSCE is informed that while this system works very well in some courts, it is not applied consistently possibly explaining some of the concerns reported by the KBA.

#### **b) Disclosure and access to the case file**

Another barrier to providing effective representation reported by lawyers is access to the case file. To properly prepare and represent a defendant, lawyers need access not only to the evidence relied on by the prosecution but also to material that might assist the defence (for example, officer's notes that show previous inconsistent statements made by a witness).

This has been recognised by the ECtHR which has repeatedly held that access to information is an essential part of equality of arms and the right to a fair trial guaranteed by Article 6, ECHR. The ECtHR has held that in certain circumstances, limitations on/failure to grant access to the case file/disclose evidence can breach the equality of arms principle and the right to a fair trial.<sup>76</sup>

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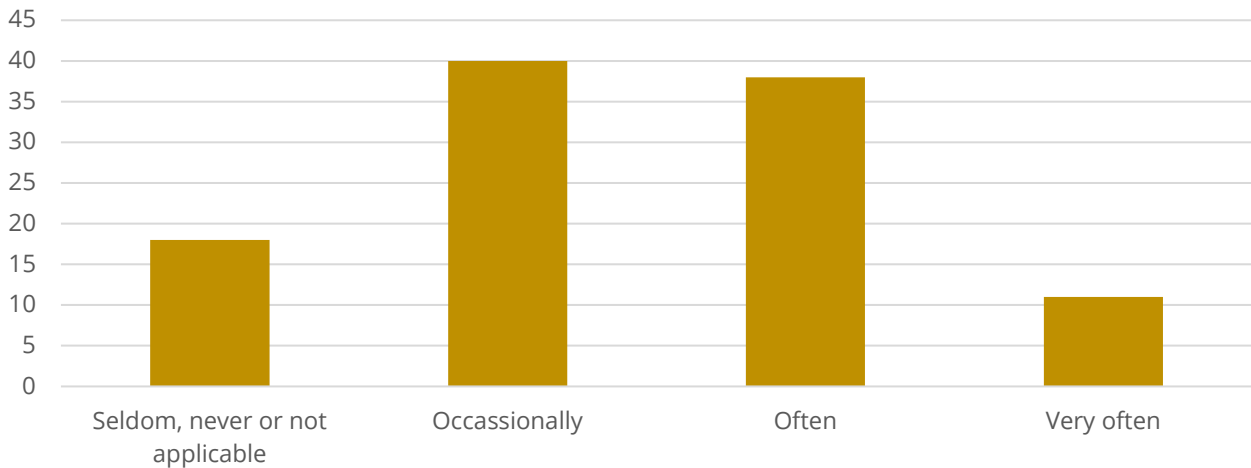
73 Article 8 of the KPC's Administrative Instruction No. 2/2014 and Article 9 of the KJC's Administrative Instruction No. 9/2014.

74 Article 10 of the KPC's Administrative Instruction No. 2/2014 and Article 11 the KJC's Administrative Instruction No. 9/2014.

75 Article 11 the KJC's Administrative Instruction No. 9/2014.

76 See for example: *Beraru v. Romania* (Application no. 40107/04) available at <https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%2240107/04%22%7D> (accessed on 10 March 2022); *Rowe and Davis v. United Kingdom* (Application no. 28901/95) available at <https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%2228901/95%22%7D> (accessed on 10 March 2022).

## Responses to the question, "how often do you encounter problems obtaining information from the prosecution/accessing the case file?"



**Figure 10. Responses to the question, "how often do you encounter problems obtaining information from the prosecution/accessing the prosecution file?"**

Only 17 per cent of respondents reported that they seldom or never encountered problems, while 46 per cent of respondents said that they encountered problems either often or very often. The two most common causes of difficulties were reported as i) evidence being disclosed late (70 per cent of respondents) and ii) the prosecutor refusing to disclose evidence (24 per cent of respondents).

A further concern regarding access to information/equality of arms, is that 44 per cent of prosecutors reported that they seldom or never receive requests from the defence to collect or preserve evidence that might be exculpatory.<sup>77</sup> Only 11 per cent of prosecutors reported receiving such requests 'often' and 44 per cent reported occasionally receiving requests.

### **c) Guilty pleas**

In its 2016 report,<sup>78</sup> the OSCE noted that the use of alternatives to trial was low.<sup>79</sup> This continues to be the case, with guilty pleas only entered in approximately 14 per cent of cases monitored by the OSCE.<sup>80</sup> Where there is sufficient evidence to prove the alleged offence/s and the

<sup>77</sup> Article 216, Criminal Procedure Code: 'Application by the Defendant to Collect or Preserve Evidence', "1. During the investigation the defendant may apply to the state prosecutor to collect certain evidence. 2. The state prosecutor shall collect such evidence or testimony if it is relevant to the proceedings and: 2.1. if there is a danger that the evidence or testimony will be lost or is unlikely to be available for trial, 2.2. if such evidence may justify the release of the defendant from detention on remand, 2.3. if the evidence or testimony sought has a reasonable probability that it will be exculpatory, or 2.4. if there are other justified reasons to collect such evidence or testimony. 3. If the defendant or defence counsel applies to the state prosecutor to collect certain evidence that is located outside of Kosovo, the state prosecutor may collect such evidence in compliance with Article 219 of this Code. 4. If the state prosecutor rejects the application to collect evidence, he or she shall render a decision supported by reasoning and notify the defendant. The defendant may appeal such decision to the pre-trial judge."

<sup>78</sup> Review of the Implementation of the New Criminal Procedure Code of Kosovo (OSCE, June 2016) pp. 24-26, available at <https://www.osce.org/kosovo/243976> (Accessed 25 February 2022).

<sup>79</sup> The main alternatives to trial are guilty pleas through a negotiated plea agreement (Article 233, CPC) or regular procedure (Article 248, CPC). Other, less common alternatives to trial include, mediation (Article 232, CPC) and provisional suspension of proceedings (Article 230, CPC). 'Alternative Proceedings' are detailed in Chapter XIV, CPC.

<sup>80</sup> In 2021, the OSCE monitored 494 cases involving 1146 defendants of whom 156 entered a guilty plea to one or more charge.

defendant admits responsibility there are advantages to a guilty plea being entered at an early stage: for defendants, there are reductions in sentence and for the courts and prosecution early resolution of cases saves resources and improves efficiency.

Throughout the survey, lawyers complained that defendants are pressured into pleading guilty. On the other hand, judges complained that defence counsel obstruct guilty plea negotiations and contest the admissibility of guilty pleas to increase their fees from the case.

It would be beneficial for all the relevant institutions to issue clear guidelines on guilty pleas (both negotiated and those entered through regular procedure). Guidance from the KBA on how lawyers should advise defendants regarding the potential benefits of a guilty plea and ensure that defendants are not placed under pressure to plead guilty as well as to safeguard their own professional position (e.g. from a client who after pleading guilty, alleges that they only did so because they were placed under pressure from the lawyer or another party); could be helpful in this respect. Such guidance, detailing best practice and professional obligations, could also assist to rebut suggestions that lawyers are obstructing guilty pleas.<sup>81</sup>

#### **d) Inadequate preparation time and delays**

Responses to the surveys illustrated that lawyers feel that they are sometimes given insufficient notice prior to being appointed to a case and that consequently, they do not have enough time to prepare, or sometimes are forced to refuse the appointment due to conflicting commitments. This can also effect continuity when short notice is given and the lawyer previously instructed is no longer available, leading to appointment of a new lawyer.

Both the European Court of Human Rights<sup>82</sup> and the Human Rights Committee have held that it is incumbent on the court/local authorities to ensure adequate time to facilities for the defence to prepare.<sup>83</sup> This means that lawyers should be given adequate notice of hearings and be engaged sufficiently in advance of trial to enable them to review the case file, consult and advise the client and prepare the defence case. Continuity should be ensured whenever possible and appointed lawyers should only be changed in exceptional circumstances, such as when it is clear that a lawyer is failing to provide effective representation to his/her client or where the lawyer reports a conflict of interests.<sup>84</sup>

Judges also reported that the KBA appointment system can lead to delays because they need to wait for counsel to be assigned. It is worth noting that the KBA system does not ensure that there is a lawyer on standby to attend in urgent cases but requires the KBA to consult the list to find an available lawyer when a case occurs. In busier courts, a rota of standby (duty) ex

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81 For example, in England and Wales, lawyers are obliged to advise their clients of the potential benefits of pleading guilty in terms of costs and sentence and must confirm to the court that they have done so before the defendant is asked to enter their plea.

82 In *Daud v. Portugal*, the legal aid lawyer was appointed three days prior to a complex case; the court held that it was 'manifestly evident' that the lawyer did not have adequate time to, "study the file, visit her client in prison if necessary and prepare his defence". See para 39 available at [http://www.hrcr.org/safrica/arrested\\_rights/daud\\_portugal.html](http://www.hrcr.org/safrica/arrested_rights/daud_portugal.html) (accessed on 7 March 2022)

83 See International Standards on Criminal Defence Rights: UN Human Rights Committee Decisions, Open Society (April, 2013) for a summary of Human Rights Committee decisions on this and other points. Available at <https://www.justiceinitiative.org/uploads/d4a5fd83-2158-4f5a-9bf4-7d9dd2fed055/digests-arrest%20rights-human-rights-committee-20130419.pdf> (accessed on 10 March 2022).

84 In *Falcoa dos Santos v. Portugal*, the lawyer attended court but remained silent, failing to cross-examine the witness or make any interventions on behalf of the defendant. The European Court of Human Rights held that in such circumstances, where it was manifestly evident that the lawyer was failing to provide effective representation, the court had a duty to intervene.



*officio* lawyers to be present in the court building and attending to unrepresented defendants could resolve this issue and might ultimately improve court efficiency by avoiding adjournments.

Finally, it was reported by both judges and prosecutors that lawyers sometimes try to prolong proceedings/cause delay. The CPC provides powers to the court to sanction those causing avoidable delays to proceedings however, OSCE trial monitoring has found that courts rarely exercise these powers.<sup>85</sup> Better implementation of these existing powers could prove an effective deterrent to parties that cause delay and thereby improve case management.

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<sup>85</sup> Article 256, Criminal Procedure Code requires the defence to serve notice of any alibi, and witnesses they propose to call at trial, as well as any grounds for excluding criminal liability. This important provision is designed to enable effective case management. Failure to comply is punishable by a fine of up to 250 EUR. In addition, Article 308 'Failure of Defence Counsel to Appear at Main Trial' states: "*if a duly summoned defence counsel fails to appear at the main trial without notifying the court of the reason for his or her absence as soon as he or she learns about it, or if the defence counsel leaves the main trial without permission of the single trial judge or trial panel, the court shall ask the accused to engage immediately another defence counsel. If the accused fails to do so and it is impossible to appoint a defence counsel without prejudicing the defence, the main trial shall be adjourned.*"

## 6. CONCLUSION

In 2016 the OSCE identified concerns regarding the implementation of the 2013 Criminal Procedure Code and noted a failure to realise the enhanced role for lawyers foreseen in the law. Research for this report demonstrates that many of those concerns remain relevant. In addition, this report highlights issues regarding the adequacy of the current *ex officio* appointment system. Many of which are accurately summarised in the 2021 Kosovo Report which states, “[t]he level of legal aid provision, although improved, still remains inadequate due to conflicting legislation, lack of public awareness and different systems in place for providing free legal aid. In addition, there is no system of quality assurance in the provision of legal aid”.<sup>86</sup>

There is evidence that the high number of unrepresented defendants appearing before the courts continues to be a problem. This might be due to courts applying a restrictive interpretation of the ‘interests of justice’ test for non-mandatory cases and/or because of confusion regarding the correct interpretation of the law. The *ex officio* provisions in the Criminal Procedure Code are overly complex, the simplification could improve implementation and help to ensure that the system is in line with international standards.

Lawyers, in particular, highlighted concerns regarding funding for *ex officio* appointments. Some of these concerns appear valid, particularly in relation to low rates for case preparation. Any increase in fees will have implications for the total budget and it is recommended that there be a full needs assessment combined with a cost/benefit analysis to establish how best to fund the system.<sup>87</sup> One option that could enable more efficient use of resources would be to establish criteria for the means test and apply it to all cases (although this would also make the system more complex to administer and would probably require the establishment of a separate body or agency). These issues require more detailed consideration that is beyond the scope of this report.

Increasing fees for *ex officio* lawyers alone will not address issues raised with regard to the quality of representation. In fact, the concerns raised by respondents to the surveys seem to affect both *ex officio* and privately instructed counsel. International standards require authorities to ensure that lawyers provide effective representation in the interests of justice.<sup>88</sup>

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86 Kosovo 2021 Report, European Commission, available at [https://ec.europa.eu/neighbourhood-enlargement/kosovo-report-2021\\_en](https://ec.europa.eu/neighbourhood-enlargement/kosovo-report-2021_en) (accessed on 9 March 2022).

87 Among other things, the needs assessment would need to take account of the fact that the foreseen increase in in absentia proceedings could place additional demands on the *ex officio* system and see *ex officio* lawyers engaged in more complex and serious matters than typically seen currently.

88 Principle 13, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*. A similar requirement is enunciated in the *EU Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings*. Article 7 states, “1. Member States shall take necessary measures, including with regard to funding, to ensure that: (a) there is an effective legal aid system that is of an adequate quality; and (b) legal aid services are of a quality adequate to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession. 2. [...] 3. With due respect for the independence of the legal profession and for the role of those responsible for the training of lawyers, Member States shall take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services.”

The Kosovo Bar Association should provide training and specialisation for lawyers working in the criminal justice system as well as clear guidance on their professional duties and obligations. For *ex officio* cases, some form of oversight/quality control to ensure best use of public funds is advisable.

It should also be noted that there are positive findings from the research, including the fact that the current appointment system benefits from widespread support, particularly among judges and prosecutors, and that there does not seem to be a significant difference between the standard of representation provided by *ex officio* and privately instructed counsel.

Effective defence representation is vital for fair trials. Building capacity of a system that enables lawyers to effectively hold investigative, prosecutorial and judicial authorities to account ultimately raises standards throughout the criminal justice system, which is to the benefit of everyone.

## 7. RECOMMENDATIONS

### To the Ministry of Justice

- The Ministry of Justice should conduct a comprehensive review of the functioning of the *ex officio* appointment system including:
  - The current funding arrangements with particular consideration to how to ring-fence *ex officio* funding and ensure budgetary autonomy;
  - A cost/benefit analysis of the adequacy of the fees for *ex officio* appointments;
  - Establishing clear criteria and a body to review the means test to ensure that resources are focused on those most in need;
  - Regulation of *ex officio* lawyers including how best to ensure quality of provision.
- Consider simplification of the provisions on *ex officio* appointments contained within the Criminal Procedure Code and in particular consider whether the distinction between mandatory, non-mandatory cases could be replaced with an interests of justice and means test for all offences.

### To the Kosovo Judicial Council, Kosovo Prosecutorial Council and Kosovo Bar Association

- Issue joint guidance on access to the case file/disclosure including:
  - Duties of the defence;
  - Duties of the prosecution;
  - Duty of the court (particularly with respect to enforcing the relevant provisions if/when the prosecution fail to meet their disclosure obligations).

### To the Kosovo Judicial Council and Kosovo Prosecutorial Council

- Provide additional guidance for judges and prosecutors on the *ex officio* appointment system and particularly on the obligation to engage counsel in 'mandatory defence' cases and the application of the 'interests of justice' test.

### To the Kosovo Bar Association

- Consider mandatory training or an additional qualification for defence lawyers before they can be included in the list of *ex officio* lawyers and/or accept certain categories of cases e.g. Serious Crimes, cases involving juveniles.
- Ensure continuity of representation and that an *ex officio* lawyers appointed during the investigation stage is reappointed if the defendant goes on to need representation before the court.
- Provide additional trainings for lawyers practicing criminal defence including training on advising suspects under investigation, trial preparation and advocacy; as well as lawyers' duties under the CPC and KBA Code of Ethics.

## **To the Kosovo Police**

- Ensure that when a suspect requests legal advice the Kosovo Bar Association are contacted promptly to provide representation and that, after requesting legal advice, the suspect is not questioned without the assistance of a lawyer.





