



Republika e Kosovës • Republika Kosovo • Republic of Kosovo
Institucioni i Avokatit të Popullit • Institucija Ombudsmena • Ombudsperson Institution

Ex officio

Case No. 594/2017

REPORT WITH RECOMMENDATIONS

Of the Ombudsperson of the Republic of Kosovo

*concerning effective defense in criminal proceedings and guarantee of equality
of parties - assignment of the defense council at the public expenses*

addressed to:

Mr. Nehat Idrizi, Presiding of the Kosovo Judicial Council

Mr. Enver Peci, President of Kosovo Supreme Court

Mr. Blerim Isufaj, Presiding of the Kosovo Prosecutorial Council

Mr. Aleksandër Lumezi, Chief- Stet Prosecutor

Mr. Besim Morina, Acting director of the Academy of Justice

Kopy :

Mr. Abelard Tahiri, Minister

Ministry of Justice

Prishtinë, 19 September 2017

I. The purpose of the Report

1. The purpose of this Report is to draw attention on violation of one of the fundamental rights in criminal proceedings, the right on effective defense in criminal issues. In this regard, particular consideration will be given on guaranteeing of this right free of charge by the state for defendants, as a manner of maintaining the interest of justice and guaranteeing equality of parties, as a fundamental principle in criminal proceedings.
2. On enforcement of constitutional and legal competences, the Ombudsperson, through this Report aims to address the legal basis pertaining the right of defendants in criminal proceedings to have defense counsel, focusing on the right of appointment of attorneys free of charge (at public expense) in cases when the defendant lacks financial means to have one. For this purpose, the domestic legal basis and international standards will be analyzed as a source of obligation for state bodies to guarantee effective implementation of this right.
3. The Ombudsperson, initially, states that equality of parties as a fundamental principle of contemporary criminal proceedings is an integral part of fair trial, as a right set forth in Article 6 of the European Convention on Human Rights (hereinafter: ECHR). Therefore, the right to have defense counsel in criminal proceedings will be analyzed initially in the spirit of the ECHR and the European Court of Human Rights decisions (hereinafter: ECtHR) as primary sources under the Constitution of the Republic of Kosovo (hereinafter: the Constitution). Also, the right to protection, apart as a constitutional category is adjusted more specifically by other legislation, primarily with the Criminal Procedure Code (hereinafter: CPC).
4. Based on the problems which exist currently in Kosovo justice system related to guaranteeing of the right to effective defense in criminal issues, and considering this as a fundamental right and a precondition for the equality of parties in criminal proceedings, the Ombudsperson through this Report aims:
 - to analyze current problems and challenges in Kosovo criminal justice system regarding failure to guarantee the right to effective defense, namely guaranteeing free of charge defense counsel for the defendants ;
 - to analyze liabilities of judicial institutions (in particular of the court) which derive from the Constitution, the CPC as well as other legislation at effect to guarantee the right to effective defense in criminal proceedings, through interpreting accurately the legal provisions at force.
 - to recall liabilities for the judicial bodies which derive from international acts in relation to guarantee the right to effective defense in criminal issues, in particular from the ECHR and ECtHR decisions concerning this right.

- based on findings accomplished to give specific recommendations as solution for the future, in accordance with the constitutional and legal authorizations that the Ombudsperson has.

II. Legal bases

5. The Report is based on Article 132, parag.1-3 of the Constitution, which reads:

1. *The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.*
2. *The Ombudsperson independently exercises her/his duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo.*
3. *Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law.*

And Article 135, parag.3 which stipulates that:

- *The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed”.*

Furthermore, this Report is based also on the Law No. 05/L-019 on Ombudsperson, actually on Article 16 where determines that:

- *The Ombudsperson has the power to investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights” (parag.4);*
- *The Ombudsperson may provide general recommendations on the functioning of the judicial system. The Ombudsperson will not intervene in the cases and other legal procedures that are taking place before the courts, except in case of delays of procedures.” (parag.8);*

as well as Article 18, parag.1 which determines that Ombudsperson has the following responsibilities:

- *“to investigate alleged violations of human rights and acts of discrimination, and be committed to eliminate them” (subparagraph 1);*
- *“to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases;” (subparagraph 2);*

- “to inform about human rights and to make efforts to combat all forms of discrimination through increasing of awareness, especially through information and education and through the media;” (point 4);
- “to make recommendations to the Government, the Assembly and other competent institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms, equality and non-discrimination” (subparagraph. 5);
- “to publish notifications, opinions, recommendations, proposals and his/her own reports” (subparagraph.6).

III. Summary of facts and reasons of this Report drafting by the Ombudsperson

6. The Ombudsperson, within the scope of constitutional and legal powers, particular attention has addressed to the rights of defendants in criminal proceedings as well, as an integral part of human rights in general. Due to the specific position of the persons who are defendant in the criminal proceedings, respecting of their rights, was subject to continuous monitoring, research and provision of specific recommendations for the criminal justice.¹
7. One of the challenges of Kosovo criminal justice system remains also guaranteeing the right that the defendant, as a criminal defense subject, is provided with an attorney and when necessary, the assignment of the defense counsel is provided at public expenses. Problems related to failure to implement this right arise from findings from different researches and supervisions.
8. Actually, concerning the failure to respect the right related to defendants’ representation by defense counsels in criminal matters, the Ombudsperson has been notified from the survey conducted by Kosovo Law Institute (hereinafter KLI) accomplished in year 2017. KLI monitored court hearings in criminal proceedings in the Criminal Division of General Departments in Basic Courts in Pristina, Peja and Prizren. This monitoring took place from February 1 to 31 May 2017, regarding the lack of defendants’ representing by defense counsels, in occasion of which 524 court hearings on criminal matters were monitored.
9. The Ombudsperson notes that the same concern is disclosed in OSCE report published in 2016. According to this report, out of 216 cases of initial reviews (where the defense was not mandatory) monitored in the general departments during January 2014 - June 2015, only in 11 cases defense counsels were assigned, in 137 defendants did not have defense counsel, and in 68 other cases, defense counsels were assigned by the defendants themselves. Also, in initial deliberations in the Departments of serious crime, out of 96 monitored cases (where the defense was not mandatory), only in 8 cases the defense counsel was assigned at public expenses, while in 70 cases the defendants did not have defense counsel , and in 18 other cases the attorneys was engaged by defendants on their

¹ See in specific the report with the title: “*The defendant’s rights in the criminal procedure – at the stage of investigation and the filing of the indictment*” published on 20 October 2016 (http://www.ombudspersonkosovo.org/repository/docs/1077-2016_Raport_me_rekomandime_445741.pdf).

own expenses.²

10. Based on above given facts as well as other information provided by the Ombudsperson Institution (hereinafter OI) within exercising of its powers, the Ombudsperson, in the course of this Report will point out the right of the defendant to have a defense council, also in cases when the defendant lacks financial means to cover costs for the defense council, the attorney should be appointed free of charge (at public expense).

IV. Effective defense in criminal matters as fundamental right for the defendant

11. Starting from the position of the defendant in criminal proceedings, which faces suspicion of committing criminal offense and the possibility of imposing criminal sanctions, makes compulsory the need to strictly respect rights and procedural guarantees against him. In this regard, it is of particular importance that the defendant is equal with the state prosecutor who represents the prosecution body, which is articulated with the principle of equality of parties in criminal proceedings.
12. The Ombudsperson, from the outset, points out that the equality of parties, as a fundamental principle in criminal proceedings, is an integral part of the fair trial as set out in Article 6 of the ECHR. On this basis, effective protection in criminal matters should be ensured as a precondition for respect of human rights and fundamental freedoms, namely the defendant, so that he/she undergone a regular trial process.
13. The Ombudsperson reiterates that the equality of parties in criminal proceedings implies in the first instance equality from professional aspect between the defendant and the state prosecutor. In this regard, given that the defendants in majority of cases are laic (without legal knowledge) and on the other hand are burdened emotionally due to the procedural position, such professional equality can only happen if the defendant is represented by the attorney.
14. Equality of the defendant with the state prosecutor from a professional point of view is the premise of effective procedural equality, in the sense of protection that no harm will the defendant endure because of lack of knowledge of his rights in criminal proceedings. Attorney's engagement is a guarantee that the defendant's dignity will not be harmed, will be presumed innocent and will effectively use all legal remedies to be defended from the charges, and at the end of the criminal proceedings against him, to have a lawful and fair decision, as guaranteed by law, constitution and international instruments.
15. More ever, the Ombudsperson draws attention that the defendant's right to have a defense counsel in criminal proceedings is of an absolute character, and as such, represents an obligation for the state to provide an attorney in all cases when the defendants have no financial means to pay themselves for the defense costs.
16. This character of the right for professional defense by an attorney arises from international acts, the Constitution and criminal legislation of the Republic of Kosovo.

² For additional information see OSCE Report: Review of implementation of the new Criminal Procedure Code of Kosovo, 26 June 2016 (OSCE Report).

17. A system of mandatory and non-mandatory defense (optional) system is established in the Kosovo justice system regarding defense in criminal proceedings. The main problem that occurs in Kosovo courts practice deals with assignment of defense counsels at public expense in cases where the defense is not compulsory according to the law, therefore it is optional (which comprises the main focus of analysis in this Report).
18. Appointment of the defense council at public expenses, when the defense is not mandatory is regulated in Article 58 of the CPC, where paragraph 1 (sub-paragraph 1.1 and 1.2), determines that if the conditions are not met for mandatory defense, a defense counsel shall be appointed at public expense for the defendant at his or her request, if: *there exists no conditions for mandatory defense and the criminal proceedings are being conducted for a criminal offence punishable by imprisonment of eight (8) or more years; or when in the interest of justice, independently from the punishment foreseen, a defense counsel is appointed to the suspect or defendant upon his or her request, if he or she is financially unable to pay the cost of his or her defense.*
19. The Ombudsperson reiterates the need of affirmative interpretation of the cases when appointment of the defense council at public expenses *“is required by the interest of justice independently from the punishment foreseen...”*, where actually in criminal courts’ practice the defendants are not represented by defense councils. These conclusions results also form the surveys and the reports referred previously.
20. CPC has no specific definition or criteria related to the interpretation when the *“the interest of justice”* exists for appointment of the defense council at public expenses. Thus, with regard in explaining this criterion, the Ombudsperson will be based on interpretation of other legal provisions concerning the right to assign defense council at public expenses, definitions of international acts and specifically standards instituted by ECtHR jurisprudence, as binding source and with priority for the criminal justice system in Kosovo.

A. International Standards – ECtHR practice

21. The Ombudsperson reiterates that the liability of justice institutions in Kosovo to enforce international standards on human rights derives from the Constitution, respectively from its Article 22, where some of core acts on human rights are listed, which *“are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions...”*This principle stands for the right to have defense council in the criminal proceedings, including appointment of the defense council at public expenses. With the intention of proving this fundamental right, the Ombudsperson will further analyze provisions of these acts, with the focus on interpretations provided on ECtHR decisions.
22. So in compliance with Article 22 of the Constitution, firstly, the right to have defense council is explicitly stated in provisions of the Universal Declaration on Human Rights also (hereinafter UDHR), where its Article 11 *parag.1* it is determined that: *“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his*

defense". From this it derives that accomplishment of the presumption of innocence, as a fundamental principle of the criminal procedure, is related to guarantees that the defendant ought to have for defending from charges.

23. Defendant's right for effective defense is determined with the International Covenant on Political and Civil Rights (hereinafter ICPCR), Article 14, *parag.3*, of which states that everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;..."; (c) To be tried in his presence, and 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**; From the above stated Covenant it is noted that even the ICPCR provisions points out defendant's right, when the defendant cannot afford the defense attorney by himself, he should get one appointed at public expense (free of charge) when this is required by the "*interest of justice*" (as a criterion defined also in the CPC).
24. Related to Article 14 *parag.3* of the ICPCR, of special importance are explanations given by the Human Rights Committee (HRC) within UN General Commentary No. 32 on "*Right to equality before courts and tribunals and to fair trial*" of the date 23 August 2007.³ In this commentary, in the very beginning is stated that the right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law (*paragraph 2*) explaining that depending from the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way (*paragraph 10*). While as per the "*interest of justice*" it is explained that this criteria is evaluated based on the gravity of the criminal offence and dependable on possibilities for the success of the case, to decide whether the defense counsel should be appointed by the court. Furthermore, in the meaning of this right, it is stated that the attorney ought to have effective role in the interest of the defendant. (*parag.38*).
25. With the special emphases, the Ombudsperson explains that as per equality of arms standard in the criminal procedure, the importance of effective defense, as well as the criteria for appointment of a defense counsel at public expenses in the criminal justice system in Kosovo, implementation of ECHR and standards built by ECtHR are of a fundamental importance.
26. Thus, Article 6, *parag.3* of the ECHR determines that each defendant has at least the right to: *a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b to have adequate time and facilities for the preparation of his defense; c to defend himself in person or through legal*

³ More on Commentary No.32 of the HRC see <http://www.refworld.org/docid/478b2b2f2.html> [17 072017].

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;

- In this provision, the ECHR defines the right to defense and, in particular, when it is necessary to provide free of charge legal aid (*point c*) which is mainly related to the concept of equality of arms and respect for this principle. ECtHR in its practice has given due concern to equality of arms principle, pointing out that everyone that is a party in the process must have equal opportunity to present own case and that no party should enjoy any considerable advantage against the opponent.⁴ Furthermore, the Court for Criminal Matters, the principle of equality of arms has closely linked with equal facilities that the defense should have in relation to the state prosecutor, enabling the use of all legal remedies without any unreasonable obstacles or delays,⁵ including not limitation of access to facts and evidence related to his case or even access to public documents.⁶ Additionally, the principle of equality of arms should also be pointed out through witnesses or experts, which regardless of which party are proposed, should enjoy the same facilities before the court, otherwise it constitutes a violation of Article 6 of the ECHR.⁷
27. As per the right to defense, of special importance is definition of Article 6, *parag.3* (c), which as cited above, ensures the right that the defendant can defend himself or through the attorney, and in cases when he has not sufficient means to pay for him/her, to be given it free of charge when the interests of justice so requires.
28. Concerning the right of engagement of the defense counsel, in compliance with the aforementioned provision, the ECtHR set it as a fundamental standard that this right cannot be merely formal procedure, but engagement of the defense council (at public expense) should be efficient in representing the defendant in the proceedings. Thus, in relation to this standard, the Court in the case of *Artico v. Italy* stated that although the authorities cannot be responsible for every omission conducted by the attorney related to the defendant defense functions exercising, it should be noted that Article 6 para. (c) refers to "**assistance**" rather than "**appointment**". Therefore, in all cases when authorities become aware that the attorney evades defense obligations and fails to effectively defend the defendant, they should either replace him or force him to fulfill the task entrusted to him.⁸
29. From the given standard expressed by the ECtHR, the Ombudsperson draws attention that similarly for Kosovo criminal courts, this obligation arises as well which ensures that the defense counsel is assigned to the defendant and that such assignment must be accomplished in a most efficient way. Thus, it is about the standard of an active role of the court in ensuring that the defendant has adequate representation in criminal

⁴ *De Haes and Gijssels versus Belgium*, 24 February 1997.

⁵ See *Borgers versus Belgium*, 30 October 1991; *Kuopila versus Finland*, 27 April 2000; *Makhfi against France*, 19 October 2004; *Zhuk versus Ukraine*, 21 October 2010.

⁶ See *Matyjek versus Poland*, 24 April 2007.

⁷ *Bönisch versus Austria*, 6 May 1985.

⁸ *Artico versus Italy*, 30 Prill 1980.

proceedings. Of course, court intrusion for this purpose (*pursuant to Article 6, paragraph 3 (c)*) is required only in cases where it is clearly noted that the attorney has failed to provide effective representation to the defendant.⁹

30. Furthermore, expressing the importance that the effective defense has on guaranteeing rights of the defendant, respect of the equality of arms principle and fair trial, ECtHR has given the opinion that in cases when it is observed that the representing attorney of the defendant lacked sufficient time or fail to have necessary facilities to prepare efficient defense of the defendant, the judge who presides the proceedings, has the obligation to undertake measures of positive nature to ensure that attorney's liability towards the defendant will be fulfilled. Ordinary, in cases of such nature session adjournment can be requested.¹⁰
31. On the other hand, the court has also clarified a special aspect regarding appointment of a free of charge defense counsel, which relates with defendant's right to choose the defense council on his own will. The Court holds that the right of choosing the attorney rests only in cases when defendant has sufficient means to pay for it, while when the attorney is assigned by the state, the defendant has no right to choose his legal representative and there cannot be other consultations regarding this aspect.¹¹
32. Further, the court has found that non- participation of the defendant's attorney, who was timely summoned (*one of strategy that lawyers can also use to delay the procedure!*) and rejection of the defendant to admit the attorney appointed by the court, does not constitute violation of Article 6, *paragraph 3 (c)* if criminal proceeding was conducted without the presence of an attorney. This standard was explained in the ECtHR ruling in the case of "*Balliu v. Albania*", where the court has ascertained that there is no violation of this provision by the courts in Albania regarding the conduct and termination of criminal proceedings against Mr. Balliu without the presence of an attorney, in course of which he was sentenced to life imprisonment for five murders, two attempted murders, a criminal offense of keeping ammunition and the criminal offense of setting and involvement in an armed group ... That decision, ECtHR based on the fact that, while Mr. Balliu's attorney was missing in majority of the hearings without any reasoning, the Albanian court had fulfilled its obligations (derived from Article 6, paragraph 3 (c) of the ECHR) until he ex officio was appointed a defense counsel, which Mr. Balliu refuse to accept.¹² Thus, in this case as well the standard has been confirmed that the defendant cannot choose a lawyer who is appointed by the state at public expense, and that this right cannot be used either for the subsequent delays of criminal proceedings.
33. The Court has given due concern to criteria of appointment of defense counsel at public expense, which, according to the ECHR as well, is based on two criteria or circumstances: ***lack of sufficient means to pay the lawyer*** and the ***interests of justice***. Regarding the lack of funds to pay the attorney, the ECtHR has emphasized that the level

⁹ *Kamasinski versus Austria*, 19 December 1989.

¹⁰ *Goddi versus Italy*, 9 April 1984.

¹¹ *M versus Great Britain*, 24 June 2008.

¹² *Balliu versus Albania*, 16 June 2005.

of requested evidence from the defendant to prove that he is shortage of sufficient financial means to pay for his defense, should not be too high. As per the second criterion, to guarantee the interests of justice, the court has emphasized several conditions such as: *the legal capacities (knowledge) of the defendant to represent his case without the assistance of the lawyer; the gravity of the offense conducted, the complexity of the case and the seriousness of the punishment that can be imposed*. In general, it is important to note that the court has highlighted the lack of proper legal qualification of the defendant, as a condition for appointing a defense counsel.¹³ Then, in a specific way, the court has set the standard that in all cases "*when deprivation of liberty for the defendant is possible, then the interests of justice require that he is appointed a defense counsel*".¹⁴

34. In this regard, the Ombudsperson states that one of the main criteria on which appointment of the attorney at public expenses to the defendant should be based in Kosovo, in terms of guaranteeing the interests of justice, should be the possibility of imposing of sentencing with effective imprisonment. As such, this criterion is even much easier to be determined by the courts.
35. In addition, in some other decisions as well the ECtHR has determined this criterion as mandatory for the state to appoint a free defense attorney (at public expense) when there is a possibility of imposing a punishment with imprisonment to the defendant.¹⁵
36. Another issue that the court has emphasized in its practice relates to the need to reconsider the decision in certain stages of proceedings depending on the complexity of the case when the request for the appointment of a free lawyer is rejected.¹⁶ On this basis, the Ombudsperson also insists that this standard should be applied on cases dealt by Kosovo courts.
37. Based on given arguments, the Ombudsperson draws attention that as per deciding on appointment of the defense council at public expenses, Kosovo courts also should base on these criteria and standards set by the ECtHR in order to have the court proceedings in compliance with the decisions of this court (as primary source for the Kosovo Republic institutions) and pursuant to Articles 22 and 53 of the Constitution.

B. Effective defense in criminal matters according to Kosovo Republic legislation – Assignment of defense counsel at public expense

38. As discussed above, under the Constitution, the right to effective defense in criminal proceedings in Kosovo must be implemented in accordance with the highest international standards, with special emphasis on those criteria defined by the ECHR and ECtHR decisions, which prevail over domestic legislation. This standard is defined with Article 22 of the Constitution, which stipulates that: "*Human rights and fundamental freedoms*

¹³ See specifically *Hoang versus France*, 29 August 1992; *Bulut versus Austria*, 22 February 1996; *Foucher versus France*, 18 March 1997; *Klimentyev versus Russia*, 16 November 2006; etc.

¹⁴ *Benham versus Mbretërisë së Bashkuar*, 10 Qershor 1996.

¹⁵ *Quaranta versus Swiss*, 24 May 1991.

¹⁶ *Granger versus Great Britain*, 28 March 1990.

guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions... ”.

39. The right to defense, as fundamental right for the defendant is determined in Article 30 (the rights of the accused) *parag.1* (sub*parag.2, 3 and 5*) of the Constitution, where among others predicts that: *“Everyone charged with a criminal offense shall enjoy the following minimum rights: (2) to be promptly informed of her/his rights according to law; (3) to have adequate time, facilities and remedies for the preparation of his/her defense; (5) 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.*
40. Also Article 31 which determines “Right to Fair and Impartial Trial”, stipulates that: *1.Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers. ...; 4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence. ...;6. Free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice.*
41. From these above stated provisions, it is clear that the Constitution clearly defines the right to defense as an effective right in criminal proceedings that can be exercised through the defense counsel, and in cases where the defendant lacks sufficient financial means, it is provided free of charge, as a precondition for effective access to justice.
42. Apart these constitutional guarantees, the Ombudsperson reiterates that related to the right to effective defense there is even more advance standard, while it is mandatory that these provisions are interpreted in compliance with ECtHR decisions, as determined with Article 53 of the Constitution that: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”*. As such, this definition forces that courts in Kosovo should be watchful and in all criminal cases when the defendant, due to lack of financial means, cannot afford to himself defense counsel, assign attorney free of charge (according to standards set by the ECtHR which have been handled in this Report).
43. Apart description given in the Constitution, the right of the defendant to have a defense counsel, also including the right of attorney’s engagement at public expenses, is regulated more thoroughly within the provisions of Criminal Procedure Code.
44. The Ombudsperson also reiterates that the CPC in its principal provisions gives due attention to the equality of arms between the defendant and the state prosecutor, as a party in a criminal procedure. Accordingly in Article 9 of the CPC as core principle of the criminal procedure is stipulated “**equality of parties**”, where the *parag.1* foresees that: *“The defendant and the state prosecutor shall have the status of equal parties in criminal proceedings, unless otherwise provided for by the present Code.”* In enforcement of this principle, as explained above in this Report, the equality of parties, in its full form, can be

exposed only in case when we have professional equality, a standard fulfilled on behalf of the defendant only by engaging defense counsel.

45. Further, based also on the fact that under the CPC at effect from 1 January 2013, the model with accusatory type premises is being applied unlike the previous code,¹⁷ defense counsel appointment and preparation of effective defense take special value due to the role that parties have presently in criminal proceedings. In this regard, obligation of the criminal courts is much bigger to be watchful for guaranteeing the right to effective defense of the defendant. Due to this, denial of the right of appointment of defense counsel at public expense (in cases where the defendant have no financial means and interests of justice requests so), as actually is the case with majority of monitored cases in courts, for the Ombudsperson is considered to be in contrary to the legal and constitutional liabilities that the courts have.
46. In addition, in other provisions of the CPC as well, defense of the defendant is stipulated as a fundamental right in criminal proceedings. This stand is continuously expressed in the CPC as well as in relation with many other procedural rights guaranteed to the defendant. As such, the right to have defense counsel (including cases when it is necessary to appoint one free of charge, at public expense) cannot be overpassed by criminal courts in Kosovo. Moreover, when this liability for criminal courts arises also from the ECHR and ECtHR decisions.
47. Thus, the Ombudsperson considers that even under the current provisions of the CPC the right to have a defense counsel, and the right to appoint a attorney at public expense, is a right that has mandatory character and should be applied by the courts in Kosovo.
48. CPC in Article 11 related to the adequacy protection standard, determines that: *“1. 1. The defendant shall have the right to have adequate time and facilities for the preparation of his or her defense. 4 2. The defendant shall have the right to defend himself or herself in person or through legal assistance by a member of the Kosovo Chamber of Advocates of his or her own choice. 3. Subject to the provisions of the present Code, if the defendant does not engage a defense counsel in order to provide for his or her defense and if defense is mandatory, an independent defense counsel having the experience and competence commensurate with the nature of the offence shall be appointed for the defendant. 4. Under the conditions provided by the present Code, if the defendant has insufficient means to pay for legal assistance and for this reason cannot engage a defense counsel, an independent defense counsel having the experience and competence commensurate with the nature of the offence shall be appointed for the defendant on his or her request and paid from budgetary resources if required by the interests of justice. 5. At the first examination the court or other competent authority conducting criminal*

¹⁷ As known, until entry into force of the new Criminal Procedure Code (1 January, 2013), our system implemented an inquisitorial system, where the judge played an active role in collecting evidence and greater functional responsibly for protection of defendant's rights in criminal proceedings. With the new code the model of the accusatorial system is accepted when the judge now does not have this role, but the burden falls on the state prosecutor and the defendant for the collection and presentation of evidence, therefore the defense

proceedings shall inform the defendant of his or her right to a defense counsel, as provided for by the present Code”.

49. From the given provisions it derives that the right to protection must be generally guaranteed in criminal proceedings (even when the defendant cannot afford defense costs), providing the defendant the necessary time for preparation of effective defense (which also corresponds with the standard stated by ECtHR decisions, as cited in this Report). It is up to the court to notify the defendant also, as foreseen in Article 16 of the CPC, which reads: *The court shall have a duty to inform the defendantof the rights to which that person is entitled according to the present Code as well as of the consequences of a failure to act, if that person might omit an action in the proceedings owing to ignorance or does not exercise his or her rights for the same reason of these rights.”*
50. Defendant’s right to have defense counsel is more specifically determined in Article 53 of the CPC, which stipulates that the defendant has the right to be assisted by a defense counsel during all stages of the criminal proceedings and that it is the obligation of competent authority (the police, the state prosecutor and the court) to notify the defendant about this right (see *parag.1* and *2*). Within this Article foreseen conditions when the defendant can waive from the right to have defense counsel are stipulated and in which cases waiving from such right is not possible (*parag.3-8*). Furthermore, CPC contains provisions regarding qualifications that the defense council should have as well (Article 54), limitations that the defense counsel has in relation with the representation in the criminal procedure (Article 55) and cases when the defense counsel is disqualified (Article 56).
51. Pointing out that the CPC determines two types of defense: **mandatory defense** (*in cases when the defendant does not engage defense counsel, ex-officio appointment of the defense counsel is the liability which is done at public expenses*) and **optional** (*cases when defense counsel can be appointed at public expenses after certain circumstances have been evaluated*).
52. Cases when defense is mandatory is determined in Article 57 of the CPC, where *parag.1* (*subparag.1.1-1.5*) foresees that the defendant ought to have defense counsel:
- *from the first examination, when the defendant is mute, deaf, or displays signs of mental disorder or disability and is therefore incapable of effectively defending himself or herself;*
 - *at hearings on detention on remand and throughout the time when he or she is in detention on remand;;*
 - *from the filing of an indictment, if the indictment has been brought against him or her for a criminal offence punishable by imprisonment of at least ten (10) years;*

obligations and responsibilities in the procedure are much larger. See also the Guide of Criminal Procedure Code of Kosovo, Prishtine 2013 (hereinafter CPC Guide) p.31 and further; OSCE Report, p. 8-20.

- *for proceedings under extraordinary legal remedies when the defendant is mute, deaf, or displays signs of mental disorder or disability or a punishment of life long imprisonment has been imposed;*
- *in all cases when a defendant seeks to enter an agreement to plead guilty to a crime that carries a punishment of one (1) year or more of long period imprisonment or lifelong imprisonment, the defendant must be represented by counsel.*

In all these cases (of mandatory defense), if the defendant does not engage a defense counsel and no one engages a defense counsel on his or her behalf as determined by the law, then the court (or other responsible body) is obliged to appoint the attorney ex-officio at public expenses. (*parag.2*).

53. Unlike the above-mentioned cases when defense is mandatory, the main challenge for judicial practice in Kosovo remains appointment of a defense counsel at public expense in cases where under the CPC the defense is not mandatory (and appointment of the defense counsel can be made upon the request of the defendant and under certain conditions judged by the court).

54. Article 58 of the CPC predicts appointment of the defense counsel at public expenses in cases when the defense is not mandatory. Thus paragraph 1 reads (*subparag.1.1-1.2*) If the conditions are not met for mandatory defense, a defense counsel shall be appointed at public expense for the defendant at his or her request, if:

- *there exists no conditions for mandatory defense and the criminal proceedings are being conducted for a criminal offence punishable by imprisonment of eight (8) or more years; or*
- *when in the interest of justice, independently from the punishment foreseen, a defense counsel is appointed to the suspect or defendant upon his or her request, if he or she is financially unable to pay the cost of his or her defense.*

55. From these provisions it derives that CPC has determined two conditions or situations when the defense is not mandatory and defense counsel can be appointment at public expenses according to the defendant's request.

56. In the first case, when "*criminal proceedings are being conducted for a criminal offence punishable by imprisonment of eight (8) or more years*" the Ombudsperson holds that very high limit has been foreseen related to conviction with imprisonment of "*eight (8) years or more*", because referring to the Criminal Code of Kosovo, this criterion applies to a limited number of very serious offenses for which compulsory defense would be justified.

57. The Ombudsperson reiterates that the main problem in Kosovo courts' practice, relates to the cases when the defense is not compulsory and appointment of a defense counsel at public expense may be made when "*when in the interest of justice requires so independently from the punishment foreseen, a defense counsel is appointed to the suspect or defendant upon his or her request, if he or she is financially unable to pay the cost of his or her defense.*"

58. Based on the data from researches and monitoring of court hearings, it derives that in majority of criminal cases, courts do not appoint defense counsels at public expenses for such cases (*when the interests of justice require so and the defendant cannot cover defense costs*), and the criminal proceedings against the defendant ends without having a defense counsel. This practice constitutes violation of international standards, firstly, Article 6, paragraph 3 (c) of the ECHR and ECtHR decisions concerning this issue.
59. Moreover, as analyzed in this Report as well, the ECtHR has clarified many aspects regarding the appointment of a defense counsel at public expense (free of charge legal aid), in particular related to that what is considered to be "*the interest of justice*" and the standard of assessment of the financial situation, therefore, this practice set by the ECtHR should also be applied by Kosovo courts.
60. Article 58 foresees the liability of the court (or other responsible body) to instruct the defendant on his/her right to ask for appointment of defense counsel at public expense, before the first examination (*parag.2*). As per the time of filing the request for appointment of defense counsel at public expense, the CPC sets fair and affirmative solution, by giving the defendant the opportunity to make the request unrestricted throughout the entire criminal proceedings (*para. 3*). Prior to the appointment of a defense counsel at public expenses, the defendant shall complete a statement, pointing out his or her assets and declaring that he or she cannot afford legal counsel. (*parag.4*).
61. Recalling the ECtHR's standard, that in cases where a punishment with imprisonment may be imposed, free of charge defense counsel must be assigned (see *Quaranta v. Switzerland and Benham v. United Kingdom*, cases which have been addressed in this Report), the Ombudsperson insists that courts in Kosovo should also appoint defense counsel at public expenses in all cases when such criminal offenses are punishable by imprisonment. Consequently, the Ombudsperson supports constitutional liability that the courts have to enforce human rights provisions in accordance with ECHR decisions (Article 53 of the Constitution).
62. Based on preliminary treatment on international standards and analysis of the provisions of Kosovo legislation, the Ombudsperson holds that the right for appointment of a defense counsel at public expense is compulsory for the courts and is of absolute character. Moreover, this standard is broadly supported by ECtHR jurisprudence.
63. Therefore, the present practice of the courts needs to be amended, and in compliance with these mandatory standards, the defense counsel should be appointed at public expenses even in cases referred to in Article 58, *paragraph 1, subparagraph 1.1* of the CPC, and without any exclusion when the possibility of imposing a prison punishment is foreseen.
64. The Ombudsperson also notes that the right to have defense counsel, including the right of his appointment at public expenses, cannot be treated solely as a right in itself, but also connected with other procedural rights foreseen for the defendant, such as: the right to challenge the evidence, the right to object indictment, the right to suggest and examine the witnesses and experts, the right to use legal remedies, etc. Engagement of the defense

counsel for the defendant is a precondition for effective use of these rights, and implementation of the principle of equality of parties in criminal proceedings.

Main findings of the Ombudsperson

65. The right to have a defense counsel is one of the fundamental rights of the defendant, and articulation of the principle of equality of arms with the state prosecutor in criminal proceedings (equality in terms of legal knowledge). Being as such, the right to have a defense counsel is an integral part of fair trial.
66. This right as a precondition for a fair trial for the defendant is determined by the Constitution, provisions of the CPC as well as international acts for human rights, such as ICPCR and the ECHR which are directly applicable in Kosovo (and prevail over laws and other national legal acts). Additionally, application standard of this right has been explained by a considerable number of ECtHR decisions.
67. Particular aspect of the right to have defense counsel, poses the right of appointment of a defense counsel at public expense, in cases when the defendant has no financial means and when the interests of justice requires so.
68. While the CPC apart cases when the defense is mandatory (in cases when the defendant does not engage defense counsel, he is appointed ex officio), also determines the possibility of appointing defense counsel at public expense when the defense is not mandatory. The final one, according to the CPC, has been left in the court's discretion that upon defendant's request and the declaration that he has no financial means to pay the expenses of the defense, to decide whether the interests of justice require so.
69. The Ombudsperson, concerning the main task that this Report addresses and based on findings from the monitoring of the criminal courts' practice in Kosovo, finds that:
 - Courts in Kosovo, in absolute majority of criminal cases, where according to the CPC the defense is not mandatory, fail to appoint defense counsels at public expenses. Even in cases when the punishment with imprisonment was imposed, the defendants were tried without a defense counsels.
 - This practice represents violation of legal and constitutional liabilities that courts have regarding provision of guarantees on the right to effective protection of the defendant in criminal proceedings. As such, this practice of the courts constitutes a violation of the principle of equality of arms in criminal proceedings.
 - Furthermore, this constitutes violation of the liabilities which derives from international acts, such as ICPCR, ECHR and ECtHR decisions related with the right that the defendant enjoys free of charge legal protection.
 - Additionally, this is an indicator that the system of criminal justice in Kosovo does not apply and fails to be acquainted with international standards, in particular with the ECtHR practice.

70. As a conclusion, the Ombudsperson considers as of indispensable importance that the current practices are not to be repeated in the future, so that the decisions of bodies of criminal justice related to the appointment of defense counsel at public expense (in case the defense counsel is not assigned ex-officio) is in conformity with constitutional, legal and international standards which are mandatory (with the emphasis on ECHR and ECtHR decisions).

Ombudsperson's recommendations

Based on the analysis conducted in this Report and the findings achieved, pursuant to Article 135, *paragraph 3* of the Constitution of the Republic of Kosovo, Article 16, *paragraph 4* of the Law no. 05 / L-019 on Ombudsperson, the Ombudsperson recommends the following:

- **Ministry of Justice/ Legal Department:**

- *that in the scope of amendments/alternations of the CPC to determine more distinctly the right on appointment of defense counsel at public expenses, that this right is to be mandatory and in accordance with the practice set by the ECtHR;*

Supreme Court of Kosovo: that based on legal and constitutional responsibilities entrusted:

- *issue a legal opinion in order to instruct the lower instance courts to enforce ECtHR decisions also related to the appointment of defense counsel at public expense and based on this court's standards, the principle of equality of parties in criminal proceedings to be respected;*

Kosovo Judicial Council:

- *to instruct all courts so that judges in criminal matters have due concern to strictly respect defendant's right to have defense counsel, in particular for the right on assignment of a defense counsel at public expense. To this end, the ECtHR's practice will serve as the key reference.*
- *to decisively propose a higher budget related to the coverage of defense expenses in cases when the defense counsel ought to be appointed at public expenses*

Kosovo Prosecutorial Council and Chief-State Prosecutor: that based on legal and constitutional responsibilities entrusted to them undertake necessary measures:

- *to instruct and oversee the respect of defendant's right to be timely informed on the right of having a defense counsel, in particular the right of appointment of defense counsel at public expense;*
- *that the right on defense and equality of arms principle in criminal proceedings (with emphasis on the investigation and filing of the indictment phase) is strictly respected and in accordance with the highest professional standards.*

The Academy of Justice /Program Council:

- *that within their program provide additional trainings focused on the right of a defendant to have a defense counsel, in particular for the right of appointment of the defense counsel at public expense. Trainings related to this issue have ECtHR practice, as the main reference.*

In compliance with Article 132, paragraph 3 of Constitution of the Republic of Kosovo (“Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law”) and Article 28 of the Law No.05/L-019 on Ombudsperson (“Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions, including disciplinary measures, must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question.”), You are kindly asked to inform us on actions to be taken by You regarding this issue.

Sincerely,

Hilmi Jashari

Ombudsperson