

ACCESS TO JUSTICE IN CENTRAL AND EASTERN EUROPE

Public Interest Law Initiative • Bulgarian Helsinki Committee
Polish Helsinki Foundation for Human Rights • INTERIGHTS

EUROPEAN FORUM ON ACCESS TO JUSTICE

Organized by the Public Interest Law Initiative
in collaboration with the Open Society Justice Initiative
5-7 December 2002 • Budapest, Hungary

FORUM REPORT

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In Central and Eastern Europe

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PUBLIC INTEREST LAW INITIATIVE
Columbia University Budapest Law Center
BUDAPEST • HUNGARY

INTERIGHTS
LONDON • UNITED KINGDOM

BULGARIAN HELSINKI COMMITTEE
SOFIA • BULGARIA

POLISH HELSINKI FOUNDATION FOR HUMAN RIGHTS
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Now known as



PILnet

The Global Network
for Public Interest Law

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TABLE OF CONTENTS

Acknowledgments	vii
Preface	ix
Keynote/Address: Ferenc Mádl, President of Hungary	1
Part I. Welcoming Remarks	5
Part II. Access to Justice in Central and Eastern Europe	13
Part III. International Standards on Access to Justice	21
Part IV. Organizing the Legal Aid System: Comparative Experiences	33
Part V. Access to Justice: The Way Ahead	47
Appendices	
I. Agenda	53
II. List of Participants	57
III. Bibliography	75

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The Forum Report is the result of contributions from many of the participants in the European Forum on Access to Justice. We owe a special thanks to all the speakers, moderators, presenters, and participants for taking part in the Forum and thus making this publication possible. Edwin Rekosh, Zaza Namoradze, and Borislav Petranov played key roles in organizing the panels of experts and moderating the Forum discussions.

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PREFACE

The European Forum on Access to Justice took place in Budapest, Hungary, on December 5–7, 2002. The Forum was organized by the Public Interest Law Initiative in collaboration with the Open Society Justice Initiative within the framework of the project Promoting Access to Justice in Central and Eastern Europe. This project is a partnership of the Public Interest Law Initiative, INTERIGHTS, the Bulgarian Helsinki Committee, and the Polish Helsinki Foundation for Human Rights.

The main goal of the project was to assess the true dimensions of, and develop means toward solving, a crucial problem undermining the functioning of the rule of law and constitutional democracy in the countries of Central and Eastern Europe—the widespread deficiencies in the provision of legal aid, and their disproportionate negative impact on vulnerable groups in society, thereby putting social cohesion at risk.

Participating in the Forum were representatives of Ministries of Justice, the judiciary, and civil society from Central and Eastern Europe, Russia, Central Asia, and the Caucasus, as well as representatives of international institutions such as the European Union, the European Parliament, the Council of Europe, and the World Bank.

The European Forum on Access to Justice was the culmination of several years of work by the project partners to assess the state of legal aid in Central and Eastern Europe and to raise awareness of the need for reforms. Although the countries in the region have clear international obligations to provide free legal aid so that the machinery of justice may be within reach of everyone, state-supported legal aid for the poor has not been, until recently, a priority of governments and international bodies in the reform of justice systems. Reforms that have otherwise transformed legal institutions and the practice of law in the region have suffered from a lack of attention to ensuring that these new legal mechanisms also reach the impoverished and marginalized.

As a companion volume to this Forum Report,¹ the project has also published nine country reports on the state of access to justice in the EU accession countries of Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia, commissioned in the summer of 2002, in preparation for the Forum. A tenth report, prepared by PILI, compares the laws and practices governing the provision of legal aid in each of the report countries. Copies of the reports were provided to Forum participants, and the results of the studies were formally presented at the first Forum session immediately following the welcoming remarks. Also presented during this session

were the results of project empirical studies on access to justice in Poland and Bulgaria, conducted by the Bulgarian Helsinki Committee and the Polish Helsinki Foundation for Human Rights.

In the following session, expert speakers gave an overview of international standards on access to justice, and speakers from the Council of Europe, the European Commission, and the European Parliament discussed access to justice from a European perspective and as a consideration for full EU membership. On the third day of the Forum, experienced legal aid practitioners from Israel, the Netherlands, the United Kingdom, and the United States provided participants with detailed information on various aspects of legal aid delivery systems in their respective countries. The closing session of the Forum focused on the way ahead for access to justice in the region. Representatives of the Lithuanian Ministry of Justice and the Open Society Fund of Lithuania described their work in setting up pilot legal aid offices in that country. The President of the Hungarian Helsinki Committee described its advocacy work and progress made thus far by the Hungarian government in addressing the need for an improved legal aid system in Hungary.

The European Forum on Access to Justice also provided an opportunity for NGO representatives, lawyers, judges, and governmental officials to exchange views on the state of legal aid and needs for reform. The Forum also played a role in raising public awareness, through media coverage, and in raising awareness in professional circles through the participation of high-level Justice Ministry officials, Bar Association representatives, representatives of international organizations, and respected academics in the field.

The efforts of the project partners to assist in improving access to justice in Central and Eastern Europe and beyond the region will continue. All of the partners, as well as an increasing number of other collaborators, are undertaking growing efforts to help improve the provision of legal aid. It is our hope that these efforts will help states to come closer to achieving the ideal of equal access to justice for all.

¹ *Promoting Access to Justice in Central and Eastern Europe: Forum Report* is part of a series of publications that also includes *Access to Justice in Central and Eastern Europe: Source Book*, *Access to Justice in Central and Eastern Europe: Country Reports*, and *Access to Justice: Problems of Legal Aid in Central and Eastern Europe* (in Russian).

KEYNOTE ADDRESS

By **Ferenc Mádl**, President of the Republic of Hungary

Your Excellencies, Ladies and Gentlemen:

The rule of law is—and must be—the essential feature of the new democracies in Central and Eastern Europe. The rule of law is a set of *ideas and practices* in order to promote the idea that law should prevail over violence, that all procedures should be governed by law rather than by the arbitrary will of men. Besides the ideas that inspire political communities to accept the rule of law, we need well-defined practices of implementing the principles of the rule of law. One should emphasize the importance of practice: how are democratic principles implemented in their everyday functioning?

All of us know that the magnificent principles of rule of law are valuable to the extent they can be translated into reality. And one important aspect of the practical functioning of rule of law is access to justice. “Equal justice under law”—this motto stands on the front of the building of the United States Supreme Court. Equal justice cannot be achieved without securing equal access to legal assistance and legal representation for everyone. This fact convinced lawyers decades ago—as well as today—that special emphasis should be put on the

importance of access to justice.

The political philosophy behind this approach clearly lies in the distinction between the “negative” and “positive” notions of liberty.

Positive liberty in this sense means the affirmative effort of the state to make liberty accessible to all. This effort inspired in the early seventies the “Florence Access-to-Justice Project,” when eminent lawyers founded the European University Institute in Florence, Italy. The idea behind it was to analyze the legal, economic, social, and psychological obstacles that made it difficult for many people to make use of a good legal environment and of their right to liberty.

This “Access-to-Justice Project” originated in extensive comparative research on the “quality of justice” published in 1973 (*Fundamental Guarantees of the Parties in Civil Litigation*). This study on the minimum standards of judicial fairness led to the next problem: who has access to the system of justice?

A worldwide inquiry was conducted in the mid-seventies on legal aid. Professor Mauro Cappelletti of Florence defined the access-to-justice movement as “a multifaceted response to perhaps the most basic challenge of our modern legal systems.”

What kind of challenges have the access-to-justice movements generated? The main task is to provide machinery to make social rights effective. Unfortunately courts are often very slow and expensive. Poor people without the necessary financial means are hard put to obtain appropriate legal aid. This is unacceptable in a democracy because justice cannot depend on the ability to pay.

This movement was based on the pressure of a clearly expressed social need. So, legal aid was put on the law reform agenda in the late 1960s. One can recall, as we know, the reform that began in the United States with the Legal Services Program. In Europe, France was the forerunner in 1972 when its nineteenth-century legal aid service was replaced by a modern *securité sociale* approach. In this system the costs of legal service are expected to be borne by the state.

After the downfall of communism, Central and Eastern European countries also have had to face the problem of how to provide effective legal aid to the poor. Ten countries that are candidates of the European Union took part in a survey that analyzed access to justice in the respective countries. The project was initiated and funded by the European Commission and later co-funded by the Open Society Institute.

Ten country papers were prepared on the

national solutions of access to justice. The Hungarian case is very similar to those of the other countries. The Hungarian constitution declares that “everyone subject to criminal proceedings is entitled to defend himself at all stages of the proceedings.” However, this general rule must be implemented effectively. In Hungary, the new Code of Criminal Procedure is expected to enter into force in a few weeks [on January 1, 2003]. The new code will strengthen the procedural guarantees of the right to counsel and legal aid.

It is good to know that much improvement has been achieved in recent years on the issue of the right to counsel. It was less encouraging, however, to learn from the reports that a lot needs to be done both in criminal and civil cases. To quote just some of the findings of the reports we can see that first, the availability of legal aid in criminal cases should be broadened to secure the right to counsel when deprivation of liberty

is at stake; secondly, clear financial and substantive criteria for granting legal aid on grounds of indigence should be established; and thirdly, legal aid in civil cases should be similarly provided.

Finally, one should point out that the present system of assigning cases to lawyers lacks proper management and efficiency. What really matters is

“Unfortunately courts are often very slow and expensive. Poor people without the necessary financial means are hard put to obtain appropriate legal aid. This is unacceptable in a democracy because justice cannot depend on the ability to pay.”

—Ferenc Mádl, President of the Republic of Hungary

not the formal presence of a lawyer but the reality and quality of the performance. Therefore, the comparative reports suggest that a specialized body (for example, a Legal Aid Board) with a mandate to administer the legal aid system could provide better coordination between the different agencies involved.

We all hope that this conference will highlight the importance of legal aid and bring about more awareness of it. It is a problem that unfortunately has remained a little bit underestimated within the movement of access to justice. To do more is

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—Ferenc Mádl, President of the Republic of Hungary

especially important in the perspective of the accession to the European Union. I wish you the very best in your efforts to this end.



President Ferenc Mádl of Hungary addresses participants of the European Forum on Access to Justice.

WELCOMING REMARKS

- András Szecskay, Vice-President of the Budapest Bar Association
- Miklós Hankó Faragó, State Secretary, Ministry of Justice, Hungary
- Jürgen Köppen, Ambassador, Delegation of the European Commission to Hungary
- Diana Wallis, Member of the European Parliament
- Hans Jurgen Gruss, Chief Counsel, Europe and Central Asia, the World Bank
- James Goldston, Open Society Justice Initiative
- Edwin Rekosh, Public Interest Law Initiative, Columbia University, on behalf of the Promoting Access to Justice Project

András Szecskay welcomed everyone to the European Forum on Access to Justice on behalf of the Budapest Bar Association and introduced the speakers around the table. He emphasized that promoting access to justice is a timely and relevant topic for Central and Eastern Europe, and for Hungary in particular as a candidate country for the European Union. He noted that society as a whole benefits by ensuring justice and due process for all, and that “there is no access to justice unless there is access to good legal assistance during each stage of the legal process.”

After pointing out that it is most appropriate that this conference is being held at the Budapest Bar Association, Mr. Szecskay described the Forum as an excellent

opportunity for meeting the challenges that the region is facing.

Miklós Hankó Faragó expressed his gratitude to the organizers and said that it

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—András Szecskay, Vice-President, Budapest Bar Association

was a great pleasure to give an opening speech to this gathering. He pointed out that a commitment to justice drives everyone to the general consensus

that a basic criterion for the rule of law is that justice is available to everyone. This must be more than an empty declaration that has little effect.

Mr. Faragó argued that two criteria must be met to make a system of justice work properly: an adequate number of well-trained professionals working for justice and an appropriate institutional system. Concerning an adequate number of well-

trained professionals, he suggested that Hungary abounds with legal experts who keep a close watch on whether people are receiving adequate legal assistance and whether their rights are protected. Concerning an appropriate institutional system, he said that it is a primary function of the state to scrutinize legal practices, but alongside the state there are a number of non-governmental organizations (NGOs) that keep a close eye on access to justice and other related matters.

At the same time, he noted that there are recurring problems related to legal aid and legal protection. Almost all of these stem from one root cause: the client is theoretically entitled to counsel, but in reality is unable to avail himself or herself of this right. There are many cases where an accused person cannot have access to defense counsel. As early as the first hearing, the person may be without a lawyer, which clearly contravenes good legal practice, especially considering that the preliminary investigation is often the most critical phase of the legal process.

Mr. Faragó also mentioned that the Ministry of Justice receives negative feedback, which must not be ignored, especially since Hungary is on the path toward European integration. He emphasized that “accession to the European Union will place tremendous challenges on us, but will also be an incentive to make the justice system

work more efficiently.” European Union accession means the candidate countries have many obligations. The process of accession should also generate a lot of public awareness. Mr. Faragó also said that “creating a just state means more than setting up legislation and institutions—legal aid and access to justice must be realized in practice.”

Mr. Faragó stated that as a result of the current process of modernization in Hungary, it will become more and more costly to arrange one’s legal affairs, and as a result

there will be a widening gap in one’s ability to pay for legal services. The state must recognize, declare, and respect basic rights, but that is not enough. The state must create a legal and institutional framework in which all of these rights can be realized. In

addition to establishing a system of justice, “the state must create an environment where access to justice does not depend on one’s legal knowledge, expertise, or financial standing.”

Mr. Faragó believes that because legal aid is considered a benefit, the Constitution does not state that the government must provide cost-free legal aid. If that benefit is to be funded by the state budget, there are certain criteria that must be met. One is that although the state must create equal opportunity for access to justice, it should encour-

“[T]he state must create an environment where access to justice does not depend on one’s legal knowledge, expertise, or financial standing.”

—Miklós Hankó Faragó,
State Secretary, Ministry of
Justice

age applicants to carefully consider whether or not to bring a case before the courts. Finally, he noted, “there should be a clear and transparent disbursement of state funds that would allow lawyers to deliver the highest quality of legal assistance.”

Mr. Faragó concluded his welcoming remarks by saying he firmly believes that the Forum will be an excellent opportunity to exchange views and find common ground in recognizing problems that everyone is facing. He announced that the Ministry of Justice has recently opened up a concept paper to general debate. This paper proposes a state legal aid system that will be put before the parliament in the first half of 2003.

“[T]here should be a clear and transparent disbursement of state funds that would allow lawyers to deliver the highest quality of legal assistance.”

- Miklós Hankó Faragó, State Secretary, Ministry of Justice

Ambassador Jürgen Köppen opened his remarks by noting that the European Union has helped finance the studies presented at the Forum. He said that, “whereas the research was conducted by independent private institutions, the fact that the EU is providing financial support for the studies shows that this is an important topic for the European Union.”

The development of a single European system of justice is one of the European

Union’s main objectives, and effective functioning of the legal system is one of the political criteria for EU accession. The EC has been monitoring the legal systems in the future member states and has ruled that in Hungary—and the nine other countries that will become members on May 1, 2004—these criteria have generally been fulfilled satisfactorily. As a result, the EC has identified more areas where progress is needed by the date of EU accession and beyond.

Ambassador Köppen noted the existence of a notion of a European system of justice and the desire to promote a European system of justice. Measuring the quality of justice is very difficult because in different countries there are different concepts of a legal system and how it should be structured. We should compare these concepts and have an exchange of ideas on best practices, he said.

Ambassador Köppen further discussed the role of the lawyers in the new challenges that the market economy brings to this part of Europe and the need to have a professional assessment of the legal sys-

“[W]hereas the research was conducted by independent private institutions, the fact that the EU is providing financial support for the studies shows that this is an important topic for the European Union.”

—Jürgen Köppen, Ambassador, Delegation of the European Commission to Hungary

tems. He added that there should be a model against which to measure how well a legal system is working.

Thus, he said, the role of this Forum is to develop evaluation criteria and look at how legal systems, particularly legal aid systems, work. Ambassador Köppen suggested that we should have in mind the differences in criteria used, and proceed in this exercise with an element of caution. For European participants who are not from the accession countries, he again emphasized that a well-functioning legal and judicial system is an essential part of the political criteria for membership, and that negotiations for accession or membership cannot even begin without it.

Diana Wallis, member of the European Parliament, spoke next. She emphasized the importance of this conference and debate in the context of European Union enlargement, which is becoming very real and very near. Ms. Wallis's remarks focused on civil and commercial access to justice. She suggested examining the standards that the new member states should achieve as the EU celebrates the tenth year of Europe's internal market. Opinion polls show that 80 percent of the EU population thinks that the internal market has been a tremendous success. A free market, however, is founded very

much on systems of civil and commercial law. This is critical for the European market if it is going to continue to function well.

Even for member states, Ms. Wallis said, the internal market is still a work in progress. But it will not work if citizens across the EU cannot secure their rights. The EU encourages citizens to travel and to purchase goods and services across state borders. This demands a legal framework that is accessible to all. Ms. Wallis emphasized that within the European Union, people

must be able to secure their rights when something goes wrong; they must have access to justice under the legal system in any member country.

She praised the reports on access to justice prepared for the Forum but emphasized that even in the current member states, this is an agenda that they are still working on. Ms. Wallis suggested looking at both how far the EU countries have come and how far they have to go. She claimed that “the idea of linking EU citizens' rights and free movement within Europe can only be real if there is access to justice and access to courts all across Europe.”

Ms. Wallis highlighted the fundamental idea that access to the courts in any member state must be as easy as access to the

“[T]he idea of linking EU citizens' rights and free movement within Europe can only be real if there is access to justice and access to courts all across Europe.”

—Diana Wallis, Member of the European Parliament

courts in one's home country. This is what access to justice means.

She further described the situation in the current member states and a number of initiatives undertaken by the European Commission to secure access to justice. The European Parliament has recently been discussing a proposal from the Commission that relates to legal aid: the "Legal Aid Directive." The goal of the Legal Aid Directive is to improve access to justice in cross-border cases by establishing a minimum level of legal aid regardless of ability to pay. No EU citizen should be prevented from securing his or her rights because of a lack of cooperation among member states. This directive is limited to cross-border cases and concerns the rights described in Article 47 of the Charter of Fundamental Rights of the European Union (the right to effective remedies and a fair trial).

Ms. Wallis said that legal aid is only one part of access to justice. In particular, she pointed out the importance of alternative dispute resolution and the European Ombudsman.

Finally, she noted that we all have to do some new thinking. This is where the accession countries can help the European Union and the European Parliament to learn how to provide simpler, less expensive ways to deliver high-quality legal services.

Hans Jurgen Gruss of the World Bank spoke next. He stated that the representatives of the World Bank would like to listen and to learn from the discussion at the Forum. He started his speech with a plea, that "when we talk about access to justice, let's not just look at the topic technically; let's talk about it with passion and emotion." Everyone in society must be able to benefit from the judicial system. It is not the rich who are suffering from a non-functioning judicial system, but the poor. "Having access to justice is an essential element of poverty reduction."

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—Hans Jurgen Gruss, Chief Counsel, Europe and Central Asia, the World Bank

Mr. Gruss suggested looking at why legal and institutional reform is so important to an organization like the World Bank. He pointed out that legal and institutional reform is an integral and essential part of the World Bank's mission, which is poverty reduction. He described the evolution of this idea. The recognition that legal and judicial reform is essential for development and poverty reduction has proceeded slowly, but now the World Bank sees a functioning legal system as essential for all countries to improve the livelihood of their people. Poverty is not just a lack of food, shelter, or education, he said. It manifests itself in terms of poor and marginalized segments of society who lack empowerment. Mr. Gruss emphasized that "having access to justice is an essential ele-

ment of poverty reduction.” Lack of access to justice by poor segments of society should be important to all functioning societies. He added that “when we discuss lack of access to justice, we should realize that it manifests itself in many ways: physical barriers (courts may be very far away), cost issues, language problems, lack of knowledge of the legal system, and lack of trust in the courts.”

Today, Mr. Gruss said, the World Bank recognizes that having a functioning legal system is essential for all countries to improve the livelihood of their people.

He argued that in order to improve access to justice, a very comprehensive strategy must be adopted in which legal aid and legal assistance should be an essential element. The focus should be on those groups in society for whom access to justice is a particular problem: women, children, and indigenous people.

Mr. Gruss stated that the World Bank is trying to learn from and work with its counterparts in various countries to determine how best to deal with these issues. They are working with both civil society and government officials in many countries to find out what is working and what is not. Based on these assessments, there are several legal and judicial

reform projects under implementation, for example in Ecuador, Morocco, and Guatemala. The major elements of these projects are

- focusing on poor segments of society—women, children, and those who are marginalized in society;
- improving access to justice as part of overall legal system reform;
- improving the level of trust in the judicial system, including promoting the view of the justice system as an institution that defends the rights of individuals.

Mr. Gruss concluded his speech with an assurance that whatever we learn here he would take back to Washington and improve discussions there on the subject.

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—Hans Jurgen Gruss, Chief Counsel, Europe and Central Asia, the World Bank

James Goldston of the Open Society Justice Initiative spoke of the new realities the world is facing. We are living in an age of globalization—of trade, of culture, and of law. Actors, both in the governmental and non-governmental spheres, have become involved in what was traditionally perceived as sovereign states’ affairs.

At the same time, international law is gaining in weight and importance. A body of international criminal law is emerging,

and for the first time a permanent international criminal court has been created. Furthermore, the distinction between domestic and international law is eroding.

Mr. Goldston argued that in Central and Eastern Europe these trends can be seen as well. The European Convention on Human Rights (ECHR) is widely used, and a major advance in the harmonization of member states' laws is under way. He emphasized that the Open Society Institute (OSI) is seeking to capitalize on these trends. As part of this effort, OSI has expanded its operations to encompass parts of Asia, Africa, and Latin America,

and a new entity has been created—the Open Society Justice Initiative—to promote rights-based law reform. Mr. Goldston outlined the Justice Initiative's work to provide hands-on technical assistance in strengthening legal advice and education, and in addressing issues of national and international criminal justice.

Mr. Goldston further stated that the legal culture of an open society cannot be predetermined, but that it must be cultivated from within. In many countries where law has been equated with political power, these reforms must show that the law really does matter and that it can pro-



Zaza Namoradze, Director of Budapest Office of Open Society Justice Initiative, and Edwin Rekosh, Executive Director of Public Interest Law initiative, chat with President Mádl at the opening reception.

tect citizens. “One of the Justice Initiative’s primary areas of program activity involves broadening access to justice, support for public interest advocacy, and improvement of legal aid for indigent criminal defendants.”

He underlined three principal goals of the Justice Initiative in the area of access to justice:

- expand government financial backing,
- support the development of alternative institutional models, and
- improve the quality of free legal assistance to persons charged with crimes.

Mr. Goldston said that in no country had the Justice Initiative devoted more energy to this effort than in Lithuania, where the first nationwide network of public defender offices is being created,

proving that even with budget constraints the state can provide high-quality legal assistance at low cost.

He stated that justice for all must be more than an empty phrase. As the Justice Initiative explores program opportunities in other regions, such as South America and Asia, it hopes to foster a comparative exchange of ideas among regions.

Edwin Rekosh welcomed everyone on behalf of the Promoting Access to Justice Project and the co-organizers of the Forum. The Forum builds on a series of activities, including similar forums held in Bulgaria and Poland and the reports commissioned in the candidate countries. The purpose of the Project and the Forum is to study in depth some of the problems related to the provision of legal aid and to develop and promote solutions for dealing with those problems.

ACCESS TO JUSTICE IN CENTRAL AND EASTERN EUROPE

Moderator: Edwin Rekosh, Public Interest Law Initiative

Presenter: Wiktor Osiatynski, Central European University

Discussants:

- Krassimir Kanev, Chairperson, Bulgarian Helsinki Committee
- Lukasz Bojarski, Helsinki Foundation for Human Rights in Poland

The purpose of the first session was to share the results of the studies that have been done by the Promoting Access to Justice Project around the region. Studies in eight different countries have been executed, as well as more detailed information from two particular countries: Bulgaria and Poland.

Wiktor Osiatynski provided the overview of the country reports and made some comments on them. He stated that work on promoting access to justice and legal aid reform in Central and Eastern European countries is very important; for any society that wants to have a mechanism for social change, protecting the rights of the people and channeling the needs of the poor, access to justice is crucial. There are different means of change, Mr. Osiatynski noted, among which the peaceful ways toward social change are representative democracy and legal change.

He emphasized that the reports show there are problems with the legal aid systems in the region, which is a part of the

broader problem of access to justice. At the same time, as can be seen from the reports, in the last few years there have been steps toward improvement in legal aid in several countries. This is very important, as without legal aid delivery mechanisms and monitoring, there is no efficient legal aid system. Still, despite many positive developments, much remains to be done, and the problems vary from country to country.

Mr. Osiatynski further summarized the gaps in the systems discussed in the reports:

- There is no clear procedural requirement for granting legal aid outside mandatory defense in criminal cases. Appointment of a counsel in the non-mandatory cases is very rare, which results from the lack of procedural rules on how to handle such requests and lack of awareness. Codes of Criminal Procedure contain no specific obligation to inform a person about the possibility to

- apply for legal aid.
- In some countries there is no “means test” and no uniform standards concerning when and how to appoint *ex officio* counsel.
 - There is a lack of guarantees of the presence of counsel in the preliminary investigation. This is important because there is no court control at this stage, and the individual is extremely vulnerable to the executive authorities, with no separation of powers between the courts and the executive.
 - There is the question of post-conviction reimbursement. If the defendant is found guilty, there may be an obligation for him or her to reimburse the expenses for the legal aid.
 - The appointment procedure for counsel is not transparent.

A crucial flaw in the criminal systems of many countries is also the lack of legal aid for the victims of crimes. Victims should be included in criminal procedures, as representation of victims is as necessary and important as representation of the alleged perpetrator, Mr. Osiatynski noted.

He also emphasized that in civil cases there is no mandatory right to a legal aid, and legal representation is optional. As the reports state, “the quality is unsatisfactory,

there is lack of standards, no statistical data, no satisfactory managing process, and systems are decentralized.”

Mr. Osiatynski stressed that the importance of legal aid in criminal cases, in some civil cases, and in all administrative and constitutional cases is paramount. The state should regulate and support legal aid. No constitutional democracy or state based on rule of law can survive without a comprehensive legal aid system.

He reminded the audience that in the 1950s in Western Europe and in the 1990s in Eastern Europe, a step from democracy to constitutional democracy was taken. This meant the respective societies have accepted that there are some rules that are of a higher order and that cannot be changed by the will of representatives. Wiktor Osiatynski emphasized that constitutional democracy requires mechanisms

“[T]he quality [of civil legal aid] is unsatisfactory, there is lack of standards, no statistical data, no satisfactory managing process, and systems are decentralized.”

—Wiktor Osiatynski, Central European University

for individuals who are helpless without the courts and a proper legal framework to protect their rights in courts. Without these things, democracy is just a fiction and could cause disillusionment and frustration.

Krassimir Kanev provided an overview of the legal aid system that now exists in Bulgaria. As in other countries of Eastern Europe, the access to justice movement, which developed after World

War II, did not affect Bulgaria. Mr. Kanev declared that the system of access to justice is extremely inefficient, exclusive, and discriminatory. Legal aid is provided in the framework of a *judicare* system of free lawyers provided by the court or the pretrial investigation body and paid by the state.

Until January 2000 the Bulgarian Criminal Procedure Code (CPC) provided for free legal aid by the body that investigates the case or by the court, in a very limited number of cases—when the defendant is physically or mentally handicapped, is a juvenile, faces more than ten years of imprisonment, or does not speak Bulgarian (which normally concerns only foreigners and not Bulgarian citizens who belong to ethnic minorities and do not speak Bulgarian), as well as defendants when there is a conflict of interest and one of them has a lawyer, and defendants being tried in absentia.

On January 1, 2000, an amendment was adopted that added a new provision, that a defendant who cannot afford a lawyer and wishes to have one, if the interests of justice so require, is entitled to one. This provision is based on the European Convention on Human Rights. The lawyers should be provided by the court or by the investigation office. Nevertheless, the poorest parts of the society are excluded from the system.

Mr. Kanev noted that there are three institutions that deal with free legal aid in

Bulgaria: courts (criminal and civil), national investigation services, and the police. There is no separate budget line for free legal aid in any of these institutions' budgets. The legal aid funds are combined with other budget lines—for example, fees for experts.

Mr. Kanev then turned his attention to the research his organization conducted in Bulgaria in 2001 as part of the project entitled “Promoting Access to Justice in Central and Eastern Europe.” Two surveys were conducted trying to determine the percentage of criminal defendants who did not have legal representation. In one survey, more than 1,800 criminal files, provided by the Ministry of Justice, were investigated. In another, personal interviews with 1,000 prisoners were conducted through a representative selection.

Mr. Kanev explained that it became apparent from these surveys that there was a huge number of people who go thorough the criminal justice system without having legal representation. In the first survey, “in 68 percent of the cases, defendants did not have lawyers in the pretrial phase; in 48 percent of the cases, defendants did not have representation before the trial court.”

In the second survey, 50 percent of the respondents did not have a lawyer in the

“[I]n 68 percent of the cases, defendants did not have lawyers in the pretrial phase; in 48 percent of the cases, defendants did not have representation before the trial court.”

—Krassimir Kanev, Chairperson, Bulgarian Helsinki Committee

pretrial phase and 41 percent did not have a lawyer before the court. In the prisoners' survey the figures are lower because persons charged with long sentences entitling them to mandatory counsel were represented in greater proportion. In addition, the first survey revealed that the vast majority of lawyers participating in cases (70 to 80 percent) were contracted and the rest were appointed *ex officio*. According to the investigators and defendants, contracted lawyers did much higher quality work at both the pretrial and trial phases.

Mr. Kanev pointed out that through the first year of the functioning of the new system, there was no progress or improvement in providing legal aid. During the second year (2002), improvement was largely restricted to those who received free legal aid at the trial phase, with little improvement at the pre-trial phase.

It also became clear that judges are more likely to appoint a lawyer at the trial stage, whereas the police and prosecutors are reluctant to appoint a lawyer, even when the accused demands one. Mr. Kanev stated that it was surprising to see that there is no correlation between the gravity of the crime charged and the likelihood to be represented.

In 2002 the Bulgarian Helsinki Committee also completed a survey on civil

legal aid. The Bulgarian law provides for legal aid in civil proceedings in a certain very limited number of cases. There is a possibility of appointment of a special representative in very limited cases, for example, for incapacitated persons under guardianship, minors, and trial in absentia.

Mr. Kanev concluded his remarks by citing a nationwide survey conducted in August 2002, which showed that "13 percent of the population of the country needed a lawyer, but could not afford it. This means, he said, that approximately 800,000 people are effectively excluded from the legal process."

"[T]hirteen percent of the population of the country needed a lawyer, but could not afford it. This means . . . that approximately 800,000 people are effectively excluded from the legal process."

—Krassimir Kanev, Chairperson, Bulgarian Helsinki Committee

Mr. Kanev suggested that tackling this situation would have a tremendous impact on the organization of the judiciary system, even if only half of these defendants were given a lawyer.

Lukasz Bojarski talked about the surveys and work that have been done in the framework of promoting the access to justice program of the Helsinki Foundation of Human Rights in Poland. In June the Polish National Forum on access to legal aid was organized by the Helsinki Foundation, together with the Parliamentary Commission on Judiciary and Human Rights, and held in the Polish Parliament—the first event on this topic in Poland. The

work concentrated mainly on legal aid paid by the state.

Mr. Bojarski started by explaining the structure of the legal profession in Poland. There are two independent legal professions in Poland: legal advocates (about 5,500 practicing) and legal advisors (approximately 16,500 practicing—6,000 of whom may represent private parties). Advocates may act in all cases, while legal advisors may not act in criminal or family cases. Unlike advocates, legal advisors may be contracted by a labor contract.

There is an *ex officio* system of granting legal aid in Poland. All lawyers are obliged to take legal aid cases paid by the state, but in fact legal advisors act in only about 1 percent of legal aid cases; almost the entire burden is on legal advocates.

Mr. Bojarski stated that no comprehensive research has been done on this issue, that no one collects sufficient data, and that there is not enough information available to describe the system and to know how it really works in practice. Thus, the initial recommendation of the Helsinki Foundation is that state agencies start to conduct research and collect data, so that a description of the system and better identification of the problems become possible. Recently the Polish Ministry of Justice started to collect data on legal aid expenditures, which are reported by individual courts and pros-

ecutors' offices and sent as attachments to the regular reports of those institutions. Nevertheless, there still exists no detailed information concerning at which stages of the proceedings the funds are spent, the nature of the procedures, and so on.

Another issue discussed by Mr. Bojarski was that the number of cases received by the courts in Poland is increasing: in 1991 there were less than 3 million cases brought to the courts, but in 2001 there were more than 8 million cases—an increase of 300 percent. At the same time, the number of

lawyers has changed very slightly (the number of advocates increased by only 5 percent). In 2001 there were 2.5 million criminal and family cases in the courts, and these cases could be represented only by advocates, which means there are 450 cases for each advo-

cate per year, on average. Mr. Bojarski revealed that “in 2000, out of 290,000 criminal defendants tried in district courts, 240,000 were convicted, and at least half of them did not have the assistance of a lawyer.”

Another problem in Poland, similar to the example from Bulgaria, is the lack of a separate budget line for legal aid, which is mixed with other expenditures. The system faces financial difficulties, and the judges, knowing the situation, do not grant legal aid even if they feel they should. The

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—Lukasz Bojarski, Helsinki Foundation for Human Rights in Poland

Helsinki Foundation recommends that the solution is to establish a special fund for legal aid.

The next problem that Mr. Bojarski described was the lack of clear and accessible legal standards concerning legal aid.

During the surveys, more than 100 legal acts were reviewed, and 79 of them contain regulations concerning legal aid, broadly understood. There is no means test, and no list of information that should be attached to the application for free aid. In criminal cases in Poland, a defendant may be given

free legal aid if he or she “adequately demonstrates” an inability to bear the cost of defense. However, what “adequately demonstrates” means is unclear. Refusals to grant legal aid are often not motivated in writing and cannot be appealed. In civil cases, *ex officio* lawyers may be granted to those who are exempted from court fees. There are no objective criteria, and the presiding judge makes the decision. Mr. Bojarski pointed out that even judges expressed the need for a uniform means test. In civil cases, the judge grants *ex officio* lawyer if he finds that participation of the lawyer is necessary in that case. Many judges admit that they do not grant legal aid because there is no funding to pay for it. Mr. Bojarski revealed that the research shows that “in 2001 there were 4 million

civil cases in Polish courts, but in only 7,000 of them was legal aid provided.”

Judges also argue that waiver of court fees and appointment of *ex officio* lawyers consume a lot of their time that they could

have spent on adjudication. Other problematic issues are the quality of an *ex officio* lawyer’s representation and a lack of standards of conduct. For example, quite often the first contact of an *ex officio* lawyer and a client is in the courtroom, and many *ex officio* lawyers do not maintain files of the cases.

“Many judges admit that they do not grant legal aid because there is no funding to pay for it. . . . in 2001 there were 4 million civil cases in Polish courts, but in only 7,000 of them was legal aid provided.”

—Lukasz Bojarski, Helsinki Foundation for Human Rights in Poland

Mr. Bojarski also underlined positive developments in the Polish legal aid system—for example, the Polish National Bar established special teams of advocates working on the proposals to change the system. The National Bar Council drafted new regulations of admission to the Bar, and the Ministry of Justice has drafted new laws on court fees in civil matters, which includes a means test. The National Council of Legal Advisors has also promised to make disciplinary hearings public.

Following the presentation, member of the Human Rights Committee of the Polish Bar Association and the chair of the Legal Aid Schemes Bar Team, **Marcin Radwan-Rohrenschef**, intervened with some more information on the Polish

reforms. He informed the participants that there are two teams working in parallel on developing new solutions for legal aid. One team works on the issue of court fees, the other on legal aid schemes. Mr. Radwan-Rohrenscheff explained that they opted for the independent advocacy solution and not for the Public Defender's Office (PDO) because people have more trust in independent lawyers. Arguments against the PDO model included the poor effectiveness of public administrative structures and the fact that the culture of public

administration in Poland is low. Mr. Radwan-Rohrenscheff stressed that quality assessment of lawyers' work is difficult for many reasons, one of which is that the courts have an interest in how a case comes out, and the court decides on the remuneration of the lawyer. He also mentioned some other issues, such as independence of counsel, equal distribution of the cases among the advocates, the structure of the relevant legislation, and equality of the parties.

INTERNATIONAL STANDARDS ON ACCESS TO JUSTICE

Moderator: Borislav Petranov, Senior Legal Officer, INTERIGHTS

Presenter: Jeremy McBride, University of Birmingham

Discussants:

- Angel Galgo, Directorate General of Legal Affairs, Council of Europe
- Caroline Morgan, European Commission, Justice and Home Affairs Department, Judicial Cooperation in Criminal Matters
- Robert Bray, Senior Legal Advisor to the Legal Affairs and Internal Market Committee of the European Parliament

Borislav Petranov began by tracing the impetus for the Access to Justice Project back to the Colloquium on Public Interest Law, organized by the Ford Foundation and COLPI six years ago in Durban, South Africa, where many of the participants of this Forum were also present. Another impulse for the current project came from the dissatisfaction among human rights lawyers and activists with the disregard for international standards in this area in the countries of Central and Eastern Europe.

This history had an important bearing on the substance of this session, which went on to examine the relevant case law of international tribunals and treaty-monitoring bodies, then described the broad work of the Council of Europe in the field of access to justice, and finally reflected on the European Union work related to access to justice, and more specifically legal aid.

Jeremy McBride started his presentation on international standards on access to justice with the observation that at one time the idea of a right to access to justice under international law was almost unthinkable; it applied only to foreigners under the doctrine of state responsibility for injury to aliens. But nowadays it is clear that international treaties provide the right to access to justice. Mr. McBride suggested how ironic it is that the terms “access to justice” and “access to courts” are not expressly mentioned in international treaties, apart from treaties on the status of refugees and stateless persons, for whom such access is still probably the most difficult to achieve. But with the interpretation given to the “right to a fair hearing” since the *Golder* case in the European Court of Human Rights (European Court), it is clear that access to court, and more broadly access to justice, is guaranteed by interna-

tional human rights treaties. This general guarantee is supplemented by specific obligations regarding the provision of legal aid in criminal cases and by the components of the right to an effective remedy. There is a limitation of the scope of

European Convention on Human Rights

Article 6, para. 1:

In determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 6, para. 3:

Everyone charged with a criminal offence has the following minimum rights:

...

(c) 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 for free when the interests of justice so require.

Article 13—Right to an effective remedy:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

this right in the European Convention, in the sense that it deals only with criminal cases and civil rights and specific human rights covered by the treaties. Mr. McBride noted that it is a problem that the reach of the guarantees does not affect all dealings with the administration of justice, which does not entirely fall within the above categories.

Mr. McBride emphasized that the scope of the right to access is broad, and that in addition to legal aid it covers issues such as:

- formal restrictions on bringing proceedings,
- the need for formal authorization to bring them,
- problems with immunities that protect certain groups,
- procedural requirements that can be oppressive,
- practical and financial restrictions, in particular the cost of litigation and provision of legal assistance,
- the implementation of rulings where there are still considerable difficulties, as evidenced by considerable recent case law in Strasbourg.

Despite the relative clarity of what the right of access to justice provides, there are still evident failures to provide it in practice, which could be seen from the national reports and from the volume of cases before the European Court. Mr. McBride stressed that “one of the most significant single issues before the European Court of Human Rights is access to justice.”

In its recent case law, the Court has also started to address the issue of costs and financial obstacles to litigation. In *Kreuz v. Poland* (decision of 19.06.2001, Application no. 28249/95), it has found that costs could be too high. Other financial matters, such as the need to make a payment in order to bring an appeal or to carry out the execution of the judgment, can be seen as practical obstacles and will not always be acceptable. Mr. McBride acknowledged that the process for determining eligibility for financial assistance is difficult to administer.

He further noted that in criminal proceedings, the obligation to provide legal

“One of the most significant single issues before the European Court of Human Rights is access to justice.”

—Jeremy McBride, University of Birmingham

representation is very strong, and it is explicitly required by the European Convention on Human Rights (ECHR) “when the interest of justice so require.” If there is a risk of imprisonment, even for just a month, as well as in complex proceedings and in prison disciplinary proceedings leading to prolonged imprisonment, there is a need for legal representation.

ECHR Case Law Regarding the Right to Free Legal Assistance in Civil Cases

Airey v. Ireland, decision of 11 September 1979, Series A no. 32

Although the ECHR contains no provision on legal aid for civil disputes, “[H]owever, despite the absence of a similar clause for civil litigation, Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.”

Mr. McBride recognized that this right is much weaker in civil proceedings. It is considered most essential when highly complex and highly emotional issues such as in family cases are discussed. The largest number of cases has hardly followed the landmark case of *Airey*. Defamation, for example, is a topic where there has not been a great deal of sympathy. In the *McVicar v. U.K.* case (decision of 07 May 2002, Application no. 46311/99), the reason legal assistance had not been provided was that the domestic court felt that an educated journalist would be competent in making an argument before the court. But even in this particular case, the possibility

of legal representation was not ruled out. The European Court took account of the fact that the journalist had some legal advice.

Mr. McBride further articulated the increasing concern about the competence of lawyers. It will be very difficult to persuade the European Court that a lawyer has been incompetent, and there have not been any such rulings in any particular case so far, he admitted. But there is such an opportunity if it is possible to prove that a certain advantage has been lost because of the incompetence of an assigned lawyer. The UN Human Rights Committee case law in this sphere is stronger than the case law of the European Court of Human Rights. In particular, the question of competence appeared in capital cases, where lawyers were reluctant to provide legal assistance. The European Court of Human Rights, in Mr. McBride's opinion, does not want to second-guess professional judgments in this sphere.

The Court is also getting into the issue of the timing of denial of legal aid; in other words, sometimes situations change, and after initial refusal there may be a situation where such a decision needs to be revisited. In *R.D. v. Poland* (decision of 18 December 2001), the refusal was on very short notice before a deadline for the submission of documents, and it was impractical to find another lawyer, yet a lawyer was needed for this, so the way in which the case was handled led to a violation of the right of access to court.

Although the Court accepts that the

administrative or other body deciding on legal aid is entitled to make a judgment about the prospects of success of the case, if the Court feels that the body is

ECHR Criteria for Legal Aid in Criminal Cases

The European Convention on Human Rights requires states parties to provide free legal assistance to criminal defendants who meet certain eligibility requirements:

Financial criterion

- insufficient means to afford representation must be established by defendant.

“Interests of justice” criteria

- what is “at stake” for the defendant, such as length of imprisonment or severity of the sentence otherwise
- legal and factual complexity of the case
- ability of the defendant to defend himself or herself personally

The European Court of Human Rights may hold a state liable if it determines that the state has failed to provide legal aid to a defendant who has demonstrated financial need and fulfills one or more of the “interests of justice” criteria.

making judgments on substantive matters and thereby substituting itself for the trial court, it is not going to be happy, Mr.

McBride argued. In *Essaadi v. France* (decision of 26 February 2002), for example, the Court concerned itself with the composition of a legal aid panel, in terms of legal experience and representation, and whether it has been a satisfactory panel for judging suitability for legal aid. He noted that there is likely to be growth in the case law in this sphere.

The European Court will be also concerned if there is no system of legal aid at all. In *Faulkner v. the U.K.* (decision of 30 November 1999), the European Court called attention to the total absence of a system of civil legal aid and encouraged the adoption of one.

The European Court is also concerned with the issue of legal complexity, which is the other side of the coin of legal assistance. Simplification can reduce if not completely eliminate the need for a lawyer. There have been cases where the court was overwhelmed by the difficulty of the legal process and where people have not been able to determine their rights.

The Court is beginning to be concerned also with time limits and limitation periods, which could lead to denial of legal access. It would accept short periods, which serve some interests, but if a limitation period is highly prejudicial it would be considered unacceptable. The Court understands the need for compliance with procedural requirements, but it will look at the way these requirements work in practice. So, if someone is prejudiced in a formalistic approach by the

application of a particular requirement, the Court might decide that the right to access to justice is being denied. Mr. McBride suggested that the application of the rules should be proportionate to the particular circumstances, and rigid application of the rules can lead to violation of Article 6 of the European Convention on Human Rights.

Mr. McBride further suggested that the Court is also focused on the way that specific immunities are applied to specific groups of society. He noted that the situation in which a specific group is exempted from the ordinary law will be scrutinized very closely. This will be the case when police, for example, may be granted immunity from certain legal provisions. The area where there is a scope for growth is in the application of sovereign immunity; the Court has lately upheld and accepted the sovereign immunity principle in a number of cases.

Mr. McBride acknowledged that the Court is becoming less accessible because of its increasing caseload. But as a result it will become more demanding of national systems. Subsequently, obstacles on the way to access to justice will be easy to establish. Therefore, the Court wants to push for a better resolution of access to justice problems in the national legal systems.

DISCUSSANTS

Angel Galgo stated that the Council of Europe has been working on building access to justice in many ways, mainly in



Forum participants listen to panel on international standards.

the intergovernmental and regional spheres. The aim of the intergovernmental activities is to help different member states or applicant states to establish a framework in the legal system of access to justice consistent with the standards of the Council of Europe. Mr. Galgo also pointed out that there is important cooperation between the Council of Europe and the European Commission on the question of legal aid.

In his presentation, Mr. Galgo focused first on the Action Plan on Legal Assistance Systems, which was set up in May 2002 by the one of the Steering Committees of the Council of Europe, the European Committee on Legal Co-operation.

Council of Europe

European Committee on Legal Co-operation (CDCJ); Action Plan on Legal Assistance Systems

I. General considerations

...

6. In practice, appropriate legal assistance systems are essential to ensure equal access to justice for all and may include:

- the provision of legal assistance, including legal representation, by lawyers;
- providing information and legal advice at times and locations which take into account the needs of applicants, ensuring in particular that applicants are able to

- understand their lawyers;
- defending accused persons in criminal cases;
- preparing files in non-criminal cases and representing clients;
- assistance with dealings with public authorities, when a legal matter seems to be at issue;
- advice and assistance with regard to the enforcement, or challenges to the enforcement, of judgments, sentences or extrajudicial arrangements, including applications for remissions of sentence or pardons.

Note: The full text of this volume can be found in the companion *Access to Justice in Central and Eastern Europe: Source Book*.

There are four issues identified in the Action Plan:

- Setting up and strengthening the legal assistance systems, mainly through providing technical assistance, exchanging expertise, and developing some common positive strategies for the member states in developing legal assistance issues.
- Setting up practical organization of legal aid schemes. Information should be obtained relating to the best practices in the sphere, which might be used by the countries that are trying to establish new legal aid systems and trying to improve legal aid schemes.

- Establishing a legal assistance schemes Web site having the objective to raise public awareness of the existence of legal assistance systems and to maintain links to other Web sites where citizens can obtain information.
- helping promote cross-border legal assistance, to make the process more transparent and to provide information on the ways to get legal assistance.

Mr. Galgo emphasized that the Council of Europe and the member states are obliged to implement this Action Plan. What is new is that for the first time in legal assistance systems there are plans for some horizontal programs, which have to be implemented through cooperation and intergovernmental activities.

The second issue mentioned by Mr. Galgo was the creation of the European Commission for the Efficiency of Justice (CEPEJ), set up in September 2002 by the Committee of Ministers of the Council of Europe. He stressed that the Commission for the Efficiency of Justice is not under the authority of any other committee, and there is direct communication with the Committee of Ministers. The Commission has been conceived not only as a body to draft and submit opinions to the Committee of Ministers but to draft specific policies and action plans. Among the tasks of the Commission is the promotion of access to justice. Mr. Galgo acknowledged that there is no action plan for CEPEJ yet,

but there is a possibility that among its main concerns will be access to justice and legal assistance issues.

Caroline Morgan works on Judicial Cooperation in Criminal Matters, in the Justice and Home Affairs Department of the European Commission, which deals solely with criminal matters. The Department on Justice and Home Affairs is a part of what is called the “third pillar” of the European Commission, and its so-called framework decisions are unenforceable. However, Ms. Morgan mentioned that there are attempts to integrate the third pillar into the first pillar and to make the framework decisions enforceable.

Ms. Morgan’s work in the European Commission includes looking at the rights of suspects and defendants in criminal proceedings throughout the European Union. In order to work on common minimum standards, she produced a consultation paper and asked for comments from everybody interested, through a Web site. Questionnaires related to access to justice were sent to the member states. On the basis of this, an Expert Meeting was convened with experts representing the governments of the member states, experts chosen by her department, and representatives of NGOs of every member country. As a result, a green Consultation Paper² was drafted, describing existing policies in the field and their possible developments. The drafters hope that this paper might become a framework decision on common minimum standards. Ms. Morgan also

mentioned another framework decision on the standing of victims in criminal procedure. This instrument provides a right for victims to play a part in criminal proceedings if they want to, and provides a number of other specific rights for victims.

There are many reasons the European Commission is interested in the work on suspects’ and defendants’ rights. The four most important, in Ms. Morgan’s opinion, are:

- There has to be trust and belief that legal systems of other member states are working, guaranteeing justice, in order to successfully build an area of freedom, security, and justice.
- There is a great increase in movement within the European Union. People need to be confident that should something happen when they are outside their home state, they will receive the same treatment as they would at home.
- With the new candidate countries entering the European Union, there is a need for the current member states to put their existing systems in order.
- In the developing international criminal law, including International Tribunals and the International Criminal Court (ICC), the standards for defendants’ rights are very high. The

² See, European Commission, Justice and Home Affairs website
http://europa.eu.int/comm/justice_home/unit/penal/consult_paper_proc_safeguards_en.htm

European Union should try to raise its standards to the level of international standards.

Regarding the Green Paper, Ms. Morgan emphasized that its subject area is very broad. Then she underlined five areas of action for this year and some others for the next year.

European Commission Justice and Home Affairs

- Consultation Paper on procedural safeguards for suspects and defendants in criminal proceedings

Suggested measures:

- a national scheme for providing access to a lawyer and the rights to interpretation
 - ensuring the right to interpretation, which is of particular importance since the right of access to justice does not matter much if one cannot understand what is going on
 - a plan to introduce a “letter of rights” listing one’s rights, such as the right to a lawyer and the right to translation, which should be given upon request to the suspects
 - securing proper protection of vulnerable groups
 - consular assistance for foreigners
-
-

Further, Ms. Morgan suggested that the question of evaluation is important and there could be different ways of evaluating a member state’s performance. There could be a body set up to evaluate the member state’s performance and compliance with the standards, there could be a self-evaluation system, or—the solution Ms. Morgan deems preferable—there could be a Europe-wide independent body for evaluation. Another important issue in the paper is the question of developing sanctions, which should be efficient and quick; so far, this remains open. Ms. Morgan assured the audience that the department is planning to consider in future other issues mentioned in the consultation paper, such as detention prior to trial, bail, double jeopardy, and standards for the handling and gathering of evidence.

Robert Bray spoke about a recent initiative by the Legal Affairs and Internal Market Committee of the European Parliament, which had not been adopted yet at the time of the Forum. *Council Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid to such disputes* (Civil Legal Aid Directive), which involves civil and commercial proceedings, was adopted by the Council on 27 January 2003. A directive has binding force, requiring member states to adopt their own legislation in compliance with it.

European Union

Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid to such disputes
(27 January 2003)

The directive establishes minimum common rules on legal aid in all types of civil cases, which will be mandatory for all member states. The goal is to secure that a resident of one member state will be able to receive adequate legal aid for civil proceedings in another country. The directive will allow a resident of one country to apply for legal aid directly in the country of the forum, which implies that all member states should have relatively similar systems for granting legal aid in civil cases.

The preamble to this measure says that neither lack of financial resources nor difficulties of a cross-border nature of a dispute should hamper effective access to justice.

The directive lays down certain minimum common standards concerning legal aid in cross-border civil and commercial cases. It provides that there must be legal aid for

- pre-litigation advice,
- extra-judicial resolution of the case,
- bringing the case before the court,
- representation in the court.

Mr. Bray clarified that the thresholds for providing free legal aid will be determined by the member states themselves, based on the income situation of the recipient. Even

when the litigant comes outside the threshold, he or she could still argue that costs are too high because he or she comes from another state. One of the most difficult and interesting provisions, in Mr. Bray's opinion, stems from the fact that member states have different arrangements to deal with matters such as legal aid. The directive states that when effective access to justice could be provided through other mechanisms, those mechanisms shall not be deemed to be legal aid, but they can raise presumptions against granting legal aid, provided that they guarantee effective access to justice. That provision concerns contingency fees—"no-win, no-fee" types of arrangements, which are legal in some countries, such as the United Kingdom, but illegal in the others.

The directive stipulates that legal aid should be provided for the whole range of needs in cross-border disputes—translation, interpretation, and travel costs, as well as enforcement measures and appeal. Legal aid must be granted for mediation where mediation is required by law or ordered by the court.

Mr. Bray concluded with the statement that this instrument is obviously not perfect and is the result of a compromise. Nevertheless, he insisted that pressure on the member states can have a positive effect in raising the standards of civil legal aid.

DISCUSSION

Krassimir Kanev described two recent cases in Bulgaria of people who had not

received legal aid because they were poor and semi-literate. They were sentenced in the court of first instance, and they could not understand the simplest procedure regarding how to appeal. So the Bulgarian Helsinki Committee decided to argue before the European Court that because they had not been given a lawyer, they could not appeal and therefore were denied access to justice. These cases were rejected as inadmissible due to non-exhaustion of domestic remedies. But that was precisely their point—they could not exhaust the remedies because such “exhaustion” required the assistance of a lawyer. Asking Jeremy McBride to comment on these decisions, Mr. Kanev stressed that the Strasbourg Court has jurisprudence accepting applications where domestic remedies are not exhausted, if those remedies are not effective, but it seems to have no case law on non-availability of legal aid with respect to the exhausted requirements.

Jeremy McBride commented that the message was beginning to come from the European Court that legal aid and justice systems do not work as well as they should. For example, the failure of the Italian justice system has brought many problems to the European Court of Human Rights, and the Court does not want this; it has too much work as it is, and so stronger actions are taken in relation to Italy. A number of states will have similar problems, and the message is that their domestic systems should be improved. One of the problems

with the Court is that it may be excessively strict with exhaustion requirements and therefore might be working against its own interests.

The case mentioned in the question runs counter to the *Esaadi* case previously mentioned, where part of the reason a problem arose was that a person did not have legal aid. The Court decided that access to justice had been denied because of absence of legal aid at the initial stage of the proceedings. The Court sometimes speaks in two different directions, with some cases being thrown out without due consideration as a way of trying to cut down the workload. The approach of the Court contrasts badly with the Human Rights Committee, which has much less work. The Committee said on the matter of constitutional actions that if there is no legal aid for constitutional actions, then one cannot be expected to use such constitutional action and should come straight to the Committee. This is the approach the European Court of Human Rights should adopt, Mr. McBride said.

Hans Jurgen Gruss queried, concerning the discussed directives on legal aid in commercial and civil disputes across boundaries, whether this issue was really essential for creating a justice system in Europe. Or was this an example of over-regulation on a topic of little importance?

Robert Bray replied that implementation of these directives would naturally cost money, but that a situation where some member states had major problems

with their judicial systems was unacceptable. If we are going to allow people to travel and have basic human rights, he said, it is going to cost money. What the Euro-

pean Union was proposing was to implement what the countries have already committed to under the European Convention.

Part IV

ORGANIZING THE LEGAL
AID SYSTEM:
COMPARATIVE EXPERIENCES

Moderator: Zaza Namoradze, Open Society Justice Initiative

Presenter: Roger Smith, Director, JUSTICE, United Kingdom

Discussants:

- Peter van den Biggelaar, Executive Director, the Legal Aid Board, the Netherlands
- Moshe Hacohen, District Public Defender of Jerusalem, Ministry of Justice, Office of the Public Defender, Israel
- Daniel Greenberg, Executive Director, the New York Legal Aid Society, United States
- David McQuoid-Mason, Professor of Law, University of Natal, Durban, South Africa
- Rodney Warren, Chair, Access to Justice Committee, Law Society, United Kingdom

The session on different comparative models took place in the form of a discussion moderated by Zaza Namoradze.

Zaza Namoradze opened the session and presented the panel, which comprised international experts from different jurisdictions composing a representative sample of novel approaches to creating legal aid systems. They are each among the leaders in legal aid reform in their respective countries. Mr. Namoradze pointed out that this session was concentrated on solutions for improving access to justice and legal aid

delivery in different countries. He noted that distinctions among different national legal systems are not as strong as they used to be and that different jurisdictions may offer much to learn from.

Roger Smith underlined in the beginning that the theme is how common issues emerge from diverse experience. Everyone has a very different idea about the notion of legal aid, and the approaches at the level of detail are different. For example, in his opinion, the best services in the United States are provided by public defenders and services of lesser quality

are traditionally provided by private practice, while in the United Kingdom there are strong prejudices against public defenders and stronger arguments for private practice.

Private Advocate Programs/*Judicare* System

Pros:

- access to skilled, experienced private advocate
- encouragement of support by the legal community for legal services for the poor
- more choices for clients in obtaining representation

Cons:

- potential to be very costly
 - difficulty of ensuring quality of services
 - traditionally does not allow for community feedback
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Mr. Smith cited the learned keynote address of President Mádl of Hungary in noting that access to justice was conceived historically as a reaction against the notion that all that is needed to make the legal aid systems work is to fund the lawyer. He noted that lawyers and paralegal and legal services are only part of the network of assistance. For example, in England and Wales, one of the most important pieces of legislation relevant

to criminal procedure was the Police and Criminal Evidence Act of 1984, which allowed the government to provide money for lawyers to go to the police station while suspects were being interrogated. This led to a reform providing that all interrogations should be tape-recorded. That has increased the quality of pretrial process and is an example of a reform that combines payment of lawyers with procedural changes.

Mr. Smith also suggested that in terms of the delivery system of legal aid, the panel represents both old and new developments. For twenty to thirty years, the discussion of how legal aid services should be delivered took place between those who advocated provision of the services by salaried lawyers (the United States for both civil and criminal cases) and those who advocated the use of private lawyers (the United Kingdom's *judicare* and those jurisdictions that have been influenced by the United Kingdom, such as the Netherlands). Many jurisdictions (for example, England and the Netherlands) are currently interested in the notion of contracts with providers and putting requirements regarding quality on the practitioners who are providing policies. This profoundly changes the nature of the discussion about legal services, because in the contracting system it does not matter whether someone is a salaried lawyer or public defender or private practitioner paid by honorarium; what matters is the quality and the experience of the person.

Public Defender System

Pros:

- legal assistance provided by well-qualified lawyers
- good potential for quality control
- possibility of training and professional development
- greater ease in planning future budgets and tracking expenses
- greater likelihood of keeping statistics and ensuring accountability

Cons:

- heavy caseload for staff attorneys
 - risk of taking a routine approach in dealing with similar cases
 - perception of public defenders as part of the state's legal apparatus
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Mr. Smith noted that when setting up a legal aid scheme in relation to a criminal justice system, one will have to deal with a range of issues from the conflict of interest of co-defendants to separate payment for lawyers and experts. Quality is also a major issue. For example, there was an attempt in England to limit the caseload to prevent lawyers from being overwhelmed. Mr. Smith suggested that there could be tests to prove professional competence: in England and Wales, to represent clients in a police station, a lawyer will have to take a test—listen to a tape simulating a police interrogation and say where he or she would intervene.

Mr. Smith also articulated the need to set up intermediary bodies between the government and service providers to manage the legal aid systems. They are different in relation to civil and criminal bodies and could be called legal services commissions, legal aid boards, or different quasi-autonomous non-government organizations. They are not quite independent and not quite governmental either, because they separate the government from defendants and the practitioners, and they provide a professional base of developing provision of services.

Zaza Namoradze addressed the panel with some thoughts and questions. He asked the discussants what were the deficiencies of the legal aid system in their representative jurisdictions that prompted changes, did they have had similar problems to those in Central and Eastern Europe, and how did they mobilize support for making change? He also asked the panelists to cover important issues such as eligibility and quality of legal aid, payment rates for legal aid lawyers, funding, cost-efficiency, and quality of public defenders vs. *ex officio* lawyers, among others. The final question he raised before discussants was whether improvements in their legal aid system resulted primarily from the establishment of legal aid boards as a unified policy-making and management body for key issues related to legal aid matters.

Moshe Hacoheh noted that with respect to the civil legal aid system in Israel, which



Moshe Hacoen, Peter van den Biggelaar and Daniel Greenberg participate in panel on comparative experiences.

was established thirty years ago, indigent litigants previously did not have any representation, which led to the marginalizing of those groups. Legislators have set up a system that is essentially *judicare*, but screening of the applicants is done by a governmental body. In criminal cases, until seven years ago there was an *ex officio* appointed counsel system that provided very little representation because mandatory appointments were very limited, discretionary appointments were very rare, and there was not enough remuneration and no quality control. Now a mixed system has been adopted in Israel that does have state-employed public defenders who do trial work and administer the entire system, but the bulk of represen-

tation is done by public defenders who are private practitioners and are assigned cases, and by the Public Defenders Office, which also monitors the quality of their services.

In Israel the system is adversarial and accusatorial and has a common law tradition, so that the courts depend a lot on the presentation of evidence in the court. Mr. Hacoen suggested that what system should be adopted elsewhere depends on the traditions and the circumstances in that country. The reform in Israel was prompted by academics in a liberal climate and supported by the Ministry of Justice.

The eligibility criteria for legal aid in Israel are established by the legislature. There are two tests in the civil sphere: a

means test based on income and assets, and a merits test—a civil legal aid authority decides if a case has merit and is worth the expenditure of taxpayers’ money. If the person is not satisfied, he or she can appeal to the court. In criminal cases, outside of mandatory defense, there is also a means test. Often the government wants to limit eligibility because of the impact on the budget; discretionary decisions by courts also follow this tendency. There are no clear standards of who is indigent and who is not, noted Mr. Hacoen, which is a problem not only in Israel but also in many other countries.

In Israel a person cannot choose a lawyer if representation is paid for by the state. There are very few criminal practitioners in the Israeli system, and their rates are very high. The solution was to pay lower rates, try to increase the number of lawyers who deal with legal aid cases, train them, and guarantee quality not only thorough payment but also through quality control. The lawyers are divided into categories: inexperienced, moderately experienced, and very experienced. The more experienced lawyers are assigned to more serious cases.

Israel’s Office of Public Defender (OPD)

The Office of Public Defender in Israel was created in 1995. The Public Defender Statute establishing the OPD sets out two major goals:

- increasing the number of indigent defendants and detainees eligible to receive *legal aid* with the ultimate goal of providing every indigent defendant with adequate legal presentation, and
- improving the quality of representation and removing stigma associated with the former institution of court-appointed counsel.

The Public Defender Statute introduces a “mixed system,” in other words, a combination of public defenders who are full-time state employees and private attorneys contracted by the OPD to represent indigent defendants. An elaborate structure has been put in place to enable the internal attorneys to supervise the representation given by private attorneys in their capacity as public defenders. Although the OPD is a branch of the Department of Justice, mechanisms and safeguards exist for providing for the independence of the institution. Since the new system came into force, the eligibility for legal representation by a public defender has been extended to all defendants and pre-trial detainees who meet certain substantive and economic criteria, and to almost all juvenile defendants and detainees regardless of their income.

Note: This brief overview is based on Moshe Hacoen’s article “Israel’s Office of Public Defenders: Lessons From the Past, Plans for the Future,” published in the companion volume *Access to Justice in Central and Eastern Europe: Source Book*.

Mr. Hacoheh noted that in Israel, both internal and external lawyers are called public defenders because they are agents of the public, not only acting on clients' behalf. There is a system that monitors each case from the beginning, according to a set of basic standards, such as meeting the clients, defining the defense strategies, using expert opinion, and so on. There are forms that lawyers have to fill in to provide their feedback after each procedural activity. If the client is dissatisfied, he or she can approach the Office of Public Defender. There is also a centralized list of lawyers that can provide legal aid. In order to be included on the list, the lawyers have to go through a screening process, interviews, and more. Ethical issues are controlled by the Bar.

Statistics show that 20 percent of cases are dealt with by in-house lawyers, 80 percent by private lawyers. Mr. Hacoheh acknowledged that there is no clear data indicating that in-house lawyers are better than private ones. In Israel there is also a statutory fixed-payment schedule. Lawyers are paid a certain amount for the preparation of a case and additional amounts for every court session or for visiting a person, basically a fixed amount enshrined in the legislation per stage. But currently the government is pushing toward the contracting system, in which private attorneys take fixed-price cases.

Mr. Hacoheh mentioned a recent survey in Israel that came to the conclusion that full-time public defenders are cheaper, but the government faces ideological bar-

riers to increasing the number of civil servants in the system. The Office of Public Defender has substituted for a legal aid board by carrying out similar functions.

Peter van den Biggelaar presented an overview of the legal aid system in the Netherlands. He noted that the Netherlands is the first country on the Continent to establish a Legal Aid Board on the pattern of the United Kingdom model. In the 1970s a welfare state developed in the Netherlands. Law students generated the change when they started to provide legal services, especially on housing and social security issues. Law Shops run by universities were established in big cities. At the same time, the Ministry of Justice, as in Israel, took over the initiative, and it established state-funded Legal Aid and Advice centers, offering information and referring cases to private attorneys. In the 1980s the system faced problems (such as rising costs) and spun out of control. This led to the Legal Aid Act and the establishment of the Legal Aid Board in 1994.

The System of Legal Aid in the Netherlands

The legal aid system in the Netherlands is a mixed model where legal aid is provided by private lawyers and salaried lawyers employed by the Legal Aid and Advice Centers. The legal aid system is administered by five Legal Aid Boards, which provide legal assistance in both criminal and civil cases.

The new system was introduced under the Legal Aid Act of 1994, which had four main objectives:

- government-funded legal aid for those having insufficient financial capacity,
- sufficient supply of legal aid providers funded by the government,
- good financial management of the system, and
- a strong administrative organization enabling control and supervision of the system

Note: This brief overview is based on Peter van den Biggelaar’s article “The System of Legal Aid in the Netherlands,” published in the companion volume *Access to Justice in Central and Eastern Europe: Source Book*.

Mr. van den Biggelaar indicated that there is no differentiation between civil and criminal legal aid systems in the Netherlands. There are three types of services: staff lawyers of the Legal Aid and Advice Centers provide thirty minutes’ free consultation for every citizen; extended consultations (up to three hours, with some financial contribution from the client) if the legal problem is expected to be solved relatively quickly; and a “certificate procedure” for long-term legal aid provided by lawyers from the centers or private lawyers, which is granted by the board. There is a contribution system whereby the applicant has to pay a financial contribution depending on his or her income. The law deter-

mines the limits, so the government cannot change it very easily. In criminal cases, however, there is one exception: the judge can decide that the case should go to a private lawyer and the applicant should be exempt from making this contribution (Seventy percent of criminal cases are free from contribution.) There is also a means test system—the client has to give information about income for the extended consultation, and the board checks this form.

Mr. van den Biggelaar emphasized that in the Netherlands there are 12,000 private lawyers, and among them 800 participate in the system. Those who want to participate have to go through a qualification procedure—to handle a certain number of cases, to be trained, and to have special qualifications to be placed in the duty solicitor scheme. In addition, clients have the freedom to choose a private lawyer or a staff lawyer from the advice center. Staff members of the legal advice centers are subsidized by the Legal Aid Board. Private lawyers are given fixed fees, based on the average time spent on particular types of cases.

Mr. van den Biggelaar stated that the Legal Aid Board in the Netherlands is independent, as established and guaranteed by law. He noted that the Parliament’s evaluations of its activities have been positive, and there is growing support from politicians.

Rodney Warren provided the participants with an overview of the system of

legal aid in the United Kingdom. The system was established in 1949, funded by the government, and operated by lawyers in private practice. In 1987 the Legal Aid Board was created, and it took over control of the escalating budget and addressed issues of quality. In 1999 a successor body, the Legal Services Commission, was created to take over responsibility, and it has moved to a franchising, or contracting, model.

Legal Aid Contracting System

Pros:

- degree of control over appointments
- some influence on quality of legal services and accountability
- feasibility of advance planning for future budgets and expenses

Cons:

- greater expense than public defender system
 - risk of compromise to vigorous client representation due to dependence on government contracts
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In the United Kingdom, the delivery of legal services in civil and criminal cases is largely through private practitioners. Mr. Warren noted that currently they have the first tests of the Public Defender system, but it is different from Public Defender systems in other countries. The difference in the United Kingdom is that the

government has set up six offices (there will be a total of eight), which run like private law firms but are paid by the state (the managers are going to be state employees). This will allow for a client to choose a lawyer. The system will have to operate on a competitive basis with law firms that are also providing legal aid.

In criminal cases in the United Kingdom, the eligibility for legal advice starts at the moment the individual arrives at the police station under arrest, to be interrogated by the police, and is asked whether he or she wants to have a lawyer, which will be free. The person can nominate his or her own solicitor, but if there is none, a duty solicitor is available. There is no means tests; everybody is entitled to the service. Studies in the United Kingdom show that only 40 percent of detained individuals ask for legal advice. Of that group, 70 percent nominate their own solicitor and 30 percent rely on the services of a duty solicitor. All duty solicitors are criminal lawyers in private practice who are paid by the government for making themselves available for consultations as a duty solicitor.

Mr. Warren acknowledged that the current system in the United Kingdom is very expensive. The British government spends the highest amount per capita on legal aid in criminal cases of any country—approximately one billion pounds have been spent in 2002. In addition, the government is setting up offices in expensive areas; they compete with private practices, and the costs are getting very high. Mr. Warren

emphasized that changes are on the way, which apart from cost management will

Mandatory Defence System

Pros:

- easy management
- limited administrative burden
- quick appointment procedure

Cons:

- limited scope of coverage
 - lack of control over appointments
 - limited supervision or quality control
 - minimal opportunities for training and professional development
 - difficulty in preparing accurate budgets for future
-
-

concern quality and ways to control how cases are dealt with and allocated.

David McQuoid-Mason pointed out that in South Africa there was a Legal Aid Board, but it was illegitimate as it was set up by the apartheid government to stop NGOs from providing legal aid. In 1973 the reformers focused on universities and started law clinics all around the country. Research similar to what is being done now in Central and Eastern Europe was undertaken in order to show how little the Legal Aid Board was doing and how many people went without representation. The reformers focused on all levels: the judiciary (addressing liberal judges), senior

prosecutors, the legal profession, universities, and government. The first court decisions, finding that every accused person has the right to be informed where he or she can get legal aid and that everybody has the right to a counsel, made a big change. Professor McQuoid-Mason advised participants in the Forum that in order to start the process, first they need to take the information about the current system and suggestions for improvement and reform to liberal judges, senior prosecutors, and private practitioners. He revealed that as a result of the above-mentioned efforts in South Africa, a three-year pilot project co-financed by the government and legal practitioners was organized.



David McQuoid-Mason addresses the audience during the panel on comparative experiences.

The Legal Aid Board and the Delivery of Legal Aid Services in South Africa

The Legal Aid Board (LAB) in South Africa was created in 1969 and began operating in 1971. After the reforms that started in 1973, the functions of the LAB were significantly changed, and now it is required to “render or make available legal aid to indigent people.”

There are now eight different methods the LAB is using to deliver legal aid services:

- state-funded private counsel (*judicare*), state-funded public defenders,
- state-funded candidate attorneys in rural law firms,
- state-funded law clinics,
- state-funded justice centers (“one-stop legal aid shops”),
- cooperation agreements with private specialist law firms,
- cooperation agreements with independent law clinics, and
- cooperation agreements with paralegal advice offices.

Note: This brief overview is based on David McQuoid-Mason’s article “The Legal Aid Board and the Delivery of Legal Aid Services in South Africa,” published in the companion volume *Access to Justice in Central and Eastern Europe: Source Book*.

Mr. McQuoid-Mason emphasized that lawyers should be professional and competent. It is generally recognized in South Africa, he said, that public defenders’ and in-house lawyers’ standards of delivery are higher than those of private lawyers. The South African system of legal aid relies on the courts; there is no system of checks. In the *judicare* there is a checking process, but it will be discontinued.

He noted that in the public defenders model, one can get better quality of legal service for less money, because the lawyers providing legal aid are committed to the job, even if they are paid less than a private firm. The pilot project in South Africa, for example, showed that the cost of public defender lawyers was 40 percent cheaper than the cost of private attorneys.

Mr. McQuoid-Mason synthesized three models that are in operation in South Africa:

- A system of apprenticeship for young lawyers for two years after graduation. Some 3,500 law students graduate per year, but the legal profession can give places for apprenticeship to only half of that number. Since the reform, apprentices have been allowed to assist the public defenders program. One supervising public defender takes up to ten apprentices, who work in district services and provide cheap but good-quality legal services.
- For rural areas, payment by the Legal Aid Board for an apprentice to go to work in a private firm. The apprentice

takes ten legal aid board cases per month and gives free advice to the population for one day a week.

- Contracts with public interest law firms and legal aid clinics that do certain types of legal work. All these measures allow getting cheap and good-quality services.

Daniel Greenberg highlighted that in the United States, each state has its own model, because the way services are delivered is left to the individual states. The Legal Aid Society in New York was organized in 1876, and funding it has been a problem for more than 100 years. Mr. Greenberg noted that

Advantages of a Hybrid System

Legal Aid Centers supplemented by contracts with private attorneys overseen by Legal Aid Board:

- efficiency of a centrally managed system
- leverage of existing resources within private bar
- capacity for statistical analysis, transparency, and budgetary planning
- means for training and quality control
- promotion of the engagement of stakeholders in the legal aid system

support for legal aid reform should be sought not only from judges, prosecutors, the Bar Association, and government, but also through organizations such as the World Bank. He said the real support must

come from community voices, church leaders, ethnic organizations, corporations, and similar sources, because they are influential. He acknowledged that quality could become an issue when a sum of money is given to an organization to deal with a set number of cases. Another problem is that often the judges do not like zealous advocates, who take up a lot at the judge's time. Judges cannot be the only ones to decide about the quality of lawyers' work and what is being done.

DISCUSSION

Rick Wilson, Open Society Justice Initiative Consultant: First an observation: My own experience in Latin America shows that many countries in the region accepted the Public Defenders model in response to the court reforms adopting a more adversarial process that is based on the principle of equality of arms, in order to create an institutional alternative to the prosecutors office. For example, Venezuela has 800 public defenders who provide legal aid all over the country.

The American Bar Association in the 1980s came up with a complex and comprehensive set of standards in legal aid. Do you find these standards to be useful? Have other countries developed a set of national standards to monitor, guarantee, and improve the quality of work? Do your organizations have the capacity to bring systematic challenges to the shortcomings of the system? Do you take impact cases in order to bring about changes in the system?

Daniel Greenberg: Quality standards have an effect within the organization, to show if lawyers have too many cases, to show if they are doing what they should do on the cases. They also have an exter-

Rodney Warren: These questions raise issues of politics. Standards developed by the American Bar Association appeared in the circumstances in which lawyers felt that they were not being given enough money, in order



Rick Wilson, of American University Washington College of Law, comments from the floor as project steering committee member
Ina Zoon and Vesselina Vandova from INTERIGHTS look on.

nal effect—helping to make a case for more funding to the funding agency. The New York Legal Aid Society has a special litigation unit that identifies systemic problems that come up in the individual cases and then litigates them on the larger level.

to ease the pressure. In England the politics are different. The system is very expensive. The Legal Aid Board is arguing that something has to be done about the quality. Quality standards are imposed by the funding institution to gain control over the system. The profession had to respond to this and said that standards are their business.

Systemic litigation is also a highly political issue. In England different language will be used when talking about public interest and strategic litigation. The language is important, as it sounds less hostile to talk about systemic litigation than strategic litigation. This is a real good use of the money.

David McQuoid-Mason: NGOs and legal resource centers used to do a lot of public interest impact litigation. Now they are in partnership with the Legal Aid Board, and when there are socioeconomic, constitutional cases, the Legal Aid Board refers cases to them. Different NGOs specialize in different areas.

Zaza Namoradze: I have two questions:
1. Do you see any role for the judge in controlling the quality of the representation by *ex officio* lawyers? David, could you talk about the checking system in relation to quality control?
2. Are you aware of any data about the possibility of receiving legal advice before going to court?

Moshe Hacohen: 1. The control by judges is very poor. Most judges are interested in moving the case along—bargaining, and guilty pleas—more than articulate, vigorous, creative lawyers. But they give feedback, and we use it in the monitoring process.
2. Legal advice is more applicable in civil cases. There are half-hour consultations, sometimes involving law students.

David McQuoid-Mason: 1. The assigned lawyers have to submit a report stating what they have done, and the court checks it.
2. The South African Constitution says that legal advice before going to court is a constitutional right. The Legal Aid Board provides twenty-four-hour telephone services, and there are other mechanisms set up to allow for consultation with lawyers.

Peter van den Biggelaar: 1. Most judges express opinions in newspapers and the magazines, which has real effect; otherwise there could be a problem with the independence of the legal aid lawyers.
2. In the legal advice centers, you get free thirty minutes for initial advice. Also, the centers distribute leaflets providing information about people's rights and the procedures. Eighty percent of Legal Advice Centers' cases get resolved at this stage, and then if they continue there are extended consultations. Fifteen percent of all cases go to the extended consultation, and only 5 percent of all cases go to court.

Rodney Warren: 1. In the U. K. there is a move toward the judges having more input in the managing of cases in order to speed up the process, but this had the consequence of forcing the lawyers to address the quality issue, because the quality of work is being examined as well. This is happening in the civil procedure. There is a proposal before the Parliament now that a similar system be established in the criminal law, and a proposal that there will be independent case managers.

2. Provision of legal advice in the police station does lead to cases not proceeding to indictment and then to the court because

the defendant is forced to express himself better, and the police are looking more thoroughly at the evidence.

ACCESS TO JUSTICE: THE WAY AHEAD

Moderator: Edwin Rekosh, Public Interest Law Initiative, Columbia University

- Lithuanian Legal Aid Reform
 - Rimvidas Kugis, Secretary, Ministry of Justice, Lithuania
 - Linas Sesickas, Legal Advisor, Open Society Justice Initiative
- Ferenc Kőszeg, President, Hungarian Helsinki Committee
- Solutions for improving the legal aid systems in CEE: discussion

At the beginning of the session, **Edwin Rekosh** introduced the participants of the panel and emphasized that the session would focus on the future of legal aid systems in Central and Eastern Europe.

Rimvidas Kugis's presentation reflected the current status of affairs of the legal aid system in Lithuania in terms of its regulatory framework, institutional arrangements, and administrative practices. The legal aid system in Lithuania remained unchanged in the first ten years of independence. Historically, legal aid was associated only with the criminal process, in which the state formally assumed the responsibility to guarantee mandatory legal representation in some cases. Mr. Kugis also mentioned that prior to the establishment of public attorneys offices, legal representation of criminal defendants in the country relied solely on *ex officio* attorneys, appointed from a pool of practicing lawyers in each district for services at stages

of criminal prosecution requiring the presence of a lawyer. Although attorneys receive pay for *ex officio* cases, the work is erratic and difficult for attorneys to plan for in advance; the pay is minimal, and it is often delayed for several months due to government budget shortfalls.

There are other considerable obstacles, in Mr. Kugis's opinion, to the improvement of the legal aid system: attorneys receive reimbursement for *ex officio* cases but the caseload is difficult to anticipate in advance; many private lawyers are busy and would prefer not to be burdened with such cases. He said the non-existence of an administrative body to monitor the legal aid system is another important problem.

Mr. Kugis emphasized that in the past few years Lithuania has made a marked improvement in reforming its access to justice system. The establishment of public attorneys offices produced a substantial change. In 2000 the country adopted and implemented the Law on State Guaranteed

Legal Aid, which significantly broadens the scope of cases eligible for legal aid and set up clear procedures for receiving legal aid. This made Lithuania the first country in the region to set up a comprehensive regulatory framework to guarantee free legal aid for indigent people regardless of their nationality in criminal, civil, and administrative cases. In accordance with this law and in cooperation with private foundations (the Open Society Justice Initiative and Open Society Fund–Lithuania), pilot public attorneys offices were set up in the cities of Vilnius and Siauliai.

The Lithuanian Constitution establishes that a person suspected of a crime and the formally accused are guaranteed the right to defense from the moment of their detention or the first examination, as well as the right to have a defender. At the same time, Article 56 of the Criminal Procedure Code (CPC) establishes that when the interrogator, the investigator, the prosecutor, the judge, or the court relieves the suspect, the accused, or the defendant of payment for legal assistance, the fees for the lawyer’s services are reimbursed by the state. Mr. Kugis provided the audience with an overview of the *ex officio* attorney system, the guarantees for the right to defense, and the grounds for mandatory defense under the CPC.

Further, Mr. Kugis explained that under the Law on State-Guaranteed Legal Aid, an individual is now eligible for state-provided legal aid if his or her income is below the minimum established by the government. The law defines the guaranteed legal

assistance as legal information, legal advice, defense, and representation in proceedings. The law also provides a list of documents attesting to a person’s eligibility to receive state-guaranteed legal aid. The expenses of state-guaranteed legal aid under the law is covered by the state according to the level of the person’s property and income—from 50 percent to 100 percent coverage. The conditions under which legal aid could be terminated or ceased and the relevant procedure are explicitly listed in the law.

Concluding his speech, Mr. Kugis noted that much remains to be done, as the new framework requires further changes. The state and the other institutions involved should enhance the capacity of the administration to manage the legal aid system through the establishment of a legal aid board. This legal aid board could establish clear standards of quality related to legal aid rendered by lawyers and introduce quality control procedures.

According to Mr. Kugis, the following measures should be implemented in Lithuania:

- Set up an administrative body (tentatively called the Legal Aid Board), which would pay legal aid lawyers, select legal aid practitioners, set up monitoring systems, draft annual reports for the legal aid system, and develop performance standards.
- Establish a new payment system for legal aid lawyers. The system should be based on fixed lump-sum rates

based on the complexity of the case and other factors.

- Ensure the financial sustainability and operational viability of public attorneys offices in Vilnius and Siauliai, as well as replicate public attorneys officers in other regions, such as Kaunas, Klaipeda, and Panevezys, in order to guarantee adequate geographic coverage.
- Improve the rendering of primary legal aid in cooperation with municipalities.

Linus Sesickas noted that the discussions during the Forum had been very helpful in establishing the best principles and practices of the legal aid systems.

He stated that Lithuania has not yet completed the process of reforming its legal aid system, and it is still a work in progress—there is a new law and pilot public attorneys offices, but much remains to be done. As Mr. Kugis mentioned, it is critical not only to make the public attorneys offices as cost-effective as possible, Mr. Sesickas said, but to ensure their financial sustainability and to build up a coherent unified system of legal aid to which all will have access.

Mr. Sesickas noted that the founders of the Lithuanian legal aid project are the Lithuanian Bar Association, the Ministry of Justice, the Open Society Justice Initiative, and the Open Society Fund–Lithuania. He argued that there was no need to make a preparatory study of all the deficiencies in the then-existing system and to lobby the government on the topic of legal aid,

because of the already existing willingness of the government to conduct the reform. The Ministry of Justice already had a group working on the topic of legal aid and developing proposals for reform. In addition, the Bar associations, which should be active participants, were very willing and open to discuss the project.

Mr. Sesickas pointed out that in the course of three years, two public attorneys offices have been developed. He argued that in three years the reformers managed to convince those people who were hesitant or skeptical that these pilot projects could be a part of the Lithuanian legal system. But it is not enough just to have the offices. He insisted that there is a need for a separate administrative body that will determine eligibility and administer the payments to lawyers. But even when this institution with clear competence is established and the system is in place, there will still be a lot of work to be done.

One thing that Lithuanian reform has not addressed, in his opinion, is the issue of primary legal aid. A primary legal aid system is functioning in the Netherlands—and is very expensive—but it is important to ensure that indigent people receive it. As far as the public attorneys offices are concerned, Linus Sesickas mentioned that the project has focused on legal aid in criminal cases, but the reformers have considered the possibility of carrying it out in civil and administrative cases as well.

Mr. Sesickas pointed out that this model has been chosen because of its sustainability—upon the completion of the funding

from the Justice Initiative, the Ministry of Justice would have the flexibility to ensure the continuing funding of the offices, as under the new legislation, they are entitled to receive funding from the government to carry out their duties.

Mr. Sesickas announced that the Justice Initiative and the other founders of the public attorneys office in Lithuania are continuing to work on providing the internal procedures of the public defender's offices, which hopefully will help to ensure high-quality legal aid services.

He concluded by saying he hopes that the positive experience of Lithuania in introducing an effective regulatory framework and setting up well-functioning institutional arrangements and administrative mechanisms related to free legal aid serves as a good example and gives impetus to other governments of Central and Eastern Europe to launch reforms of the legal aid system in their countries.

Ferenc Kőszeg stated that the Hungarian Helsinki Committee has been seeking ways to extend its legal aid activity, oriented toward asylum seekers, to criminal cases as well. The roots of the project go back to 1996, when the ombudsman published a report looking into the deficiencies of the criminal legal aid system based on *ex officio* appointment. The report's conclusion, that "within the Hungarian justice system the activity of *ex officio* defense counsels fails to provide protection against the violations and errors of the authorities," was also supported by the findings of the Hungarian Helsin-

ki Committee's Police Cell Monitoring Program, which provided statistical evidence that the efficiency of the work by appointed defense counsels does not even come close to that of authorized counsels. The committee was also involved for years in the work of the Budapest University's criminal legal clinic program, providing free legal assistance to detainees.

The present project, aiming to set up a Model Legal Aid Board overseeing the provision of free defense for indigent defendants in 120 cases, has started with the analysis of the deficiencies that exist in the present system. The main conclusion of the research was that besides the low budget for *ex officio* lawyers and the entire system, the greatest problem is the lack of a central legal authority to manage the entire legal aid system. Mr. Kőszeg noted that in her 1996 report the ombudsman made a suggestion for the creation of a public defender's office in Hungary—a proposal criticized and rejected by professional circles at the time. The Hungarian Helsinki Committee still feared that criminal defendants would never consider public defenders as genuinely working for their defense. Nevertheless, the committee believes that—to be truly efficient—the system must be managed by a center, which is budgeted by the state. This center of legal aid offices would not just provide legal aid but would also monitor the individual and overall performance of legal aid. Mr. Kőszeg suggested a system of permanent consultations, instead of control, and argued that in order to model the operations of such a future organ, the Hungarian

Helsinki Committee would like to be able to monitor the performance of the lawyers participating in the project.

Concluding, Mr. Kőszeg summarized that the goals of the project are to set up standards for legal aid: what can be expected from a legal aid lawyer; development of the mechanisms for selecting lawyers; elaboration of performance criteria and monitoring methods; and estimation of the costs of a good legal aid lawyer. He emphasized that this system would possibly be more expensive than the present ineffective system, but that the budget would enable to committee to estimate the budgetary surplus required for high-quality defense for the indigent.

DISCUSSION

An interesting topic for discussion arose around the issue of independence. Participants from Russia and Ukraine expressed doubts that public defender's offices could be independent from the state when deciding criminal cases, in which individual interests contradict the interests of the government. They asked whether it is possible to have real independence (of public defender's offices) when such an organization is being paid by the state. They also argued that Bar Associations might be more suitable for this role and have more guarantees of independence.



A participant poses a question from the floor during the closing discussion.

The opposite view was also articulated, stating that just because a certain organization is paid by the government does not mean that it is controlled by the government. The point was made that in the current *ex officio* system, private lawyers are also paid by the government and are much more dependent on it. The lawyers are members of the bar—they are not employees of the state—and they are bound by all ethical obligations of lawyers. The judges are also paid from the state budget, but somehow no one questions whether they are independent. From the South African perspective, David McQuoid-Mason added that creation of an independent body is essential for the successful functioning of the legal aid system. He argued that bribery and corruption in the system continued in that country until the independent body had been created.

Another participant noted that the question of state funding for salaried position has been debated everywhere in the world where a public defender system has been introduced. There are successful models in the United States and Latin America that show that the public defend-

er programs can continue to provide high-quality services and remain insulated from the state. Since the government must fund defense, there are two choices: to do this through the Bar or through the public defender's office. It was emphasized that both options have their strengths and weaknesses. But as the systems grow, the costs are driven upward and cannot be borne by the Bar, so one solution is to establish public defender's offices, which can provide the services at a lower cost.

Another view was that in a public defender system, the defenders inevitably become independent. Lawyers work together and become more effective than most single practitioners who are doing defense work. It is important to ensure that the clients *believe* that the lawyer is independent, and this is where many systems succeed or fail.

In conclusion, it was pointed out that there are many different models: the Bar Association could play a central role, or there could be a public defender's office, but either way, there should be some system to monitor the provision of legal aid.

Appendix I

AGENDA

ACCESS TO JUSTICE IN CENTRAL AND EASTERN EUROPE

European Forum on Access to Justice

5-7 December 2002

Budapest, Hungary

Thursday, 5 December 2002

Location: *Aula Room* of the Office of the National Council of Justice

- 18:00 – 19:00 Registration of participants
19:00 Keynote address by Ferenc Mádl, President of Hungary
19:30 Reception

Friday, 6 December 2002

Location: *Conference Room* of the Budapest Bar Association

- 9:00—10:30 **Part I: Welcoming remarks**
 András Szecskay, Vice-President of Budapest Bar Association
 Miklós Hankó Faragó, State Secretary, Ministry of Justice, Hungary
 Jürgen Köppen, Ambassador, Delegation of the EC to Hungary
 Diana Wallis, Member of the European Parliament
 Hans Jurgen Gruss, Chief Counsel, Europe and Central Asia, the World Bank
 James Goldston, Executive Director, Open Society Justice Initiative, USA
 Edwin Rekosh, Executive Director, Public Interest Law Initiative, Columbia University, on behalf of the Promoting Access to Justice Project
- 10:30—11:00 Coffee break

- 11:00—13:00 **Part II: Access to Justice in Central and Eastern Europe**
Moderator: Edwin Rekosh, Executive Director, Public Interest Law Initiative
Presenter: Wiktor Osiatynski, Professor, Central European University
Discussants:
 Krassimir Kanev, Chairperson, Bulgarian Helsinki Committee
 Lukasz Bojarski, Access to Justice Program Coordinator, Helsinki
 Foundation for Human Rights in Poland
Discussion
- 13:00—14:30 Lunch
- 14:30—16:30 **Part III: International Standards on Access to Justice**
Moderator: Borislav Petranov, Senior Legal Officer, INTERIGHTS
Access to Justice under International Human Rights Treaties, Jeremy McBride, Uni-
versity of Birmingham
Discussants:
 Angel Galgo, Directorate General of Legal Affairs, Council of
 Europe
 Caroline Morgan, European Commission, Justice and Home Affairs
 Department, Judicial Cooperation in Criminal Matters
 Robert Bray, Senior Legal Advisor to the Legal Affairs and Inter-
 nal Market Committee of the European Parliament
Discussion
- 17:00 Reception
Club, Budapest Bar Association

Saturday, 7 December 2002

Location: *Conference Room* of the Budapest Bar Association

- 9:30—11:30 **Part IV: Organizing the Legal Aid System: Comparative Experiences**
Moderator: Zaza Namoradze, Director, Open Society Justice Initiative
Models of Organization of the System for Provision of Legal Aid, Roger Smith,
Director, JUSTICE, United Kingdom
Discussants:
 Peter van den Biggelaar, Executive Director, the Legal Aid Board,
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 Moshe Hacohen, District Public Defender of Jerusalem, Ministry
 of Justice, Office of the Public Defender, Israel

Daniel Greenberg, Executive Director, the New York Legal Aid Society, USA

David McQuoid-Mason, Professor of Law, University of Natal, Durban, South Africa

Rodney Warren, Chair, Access to Justice Committee, Law Society, U. K.

Discussion

11:30 — 12:00 Coffee break

12:00 –14:00 **Part V: Access to Justice: The Way Ahead**

Moderator: Edwin Rekosh, Executive Director, Public Interest Law Initiative, Columbia University

Lithuanian Legal Aid Reform

Rimvidas Kugis, Secretary, Ministry of Justice, Lithuania

Linus Sesickas, Legal Advisor, Open Society Fund, Lithuania

Ferenc Kőszeg, President, Hungarian Helsinki Committee

Discussion: *Solutions for Improving the Legal Aid Systems in CEE*

Appendix II

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5-7 December 2002

Budapest, Hungary

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The Bulgarian Helsinki Committee (BHC) is an independent non-governmental organization for the protection of human rights, founded in July 1992. The BHC is a member of the International Helsinki Federation for Human Rights, based in Vienna, which represents forty-one independent human rights organizations in Europe, the former Soviet Union, and North America.

The objectives of the committee are to promote respect for the human rights of every individual, to stimulate legislative reform to bring Bulgarian legislation in line with international human rights standards, to trigger public debate on human rights issues, to carry out advocacy for the protection of human rights, and to popularize and make widely available human rights instruments.

The backbone of the committee's activities is systematic monitoring of the human rights situation in the country. It gives us information on the state and development of human rights in the country and supplies our legal defense program with cases of human rights violations for litigation before the domestic and international

courts. In addition, the committee reports on human rights violations, with a special emphasis on the rights of ethnic and religious minorities, refugees and asylum-seekers, rights of the child, protection from torture and ill-treatment, freedom of expression and association, problems of the criminal justice system, and mental disability rights. The BHC offers free legal help to the victims of human rights abuses. The committee also works in the sphere of human rights education and organizes conferences, workshops, public actions, and other forms of public activities aimed at bringing the concept of human rights to the attention of the general public.

The BHC activities are carried out in the framework of several programs, for example, the Legal Defence Programme, Closed Institutions Programme, Institutional Support Programme, Legal Protection of Refugees and Migrants Programme, and other projects and initiatives. The committee publishes two periodicals, *Obektiv* and *The Refugees Today and Tomorrow*, as well as specialized publications (books) with our findings.

HELSINKI FOUNDATION FOR HUMAN RIGHTS

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HFHR is an organization that is independent from the state, apolitical, and non-profit; it has been carrying out its activities since 1989, in continuance of the preceding seven-years-of work of the Polish Helsinki Committee in the conditions of the underground.

MISSION

To assist the building of rule of law and respect for human rights and freedoms, and to propagate the constitutional and human rights culture in Poland, in the post-communist world, in other regions, and in the global community.

AREAS

The target areas of our activities for the scheduled period will include Poland and the Community of Independent States, as well as regions new to the HFHR where pilot activities will be undertaken (Latin America, other regions of Asia, and Africa).

STRATEGIES AND GOALS

I. Empowering for Civil Movements Acting on Behalf of the Values Defined in Our Mission Statement

- a. Human resources development for civil society

- i. Training for leaders of the civil movements acting on behalf of the values defined in the HFHR mission statement;
- ii. Preparation of NGO activists involved in these movements.
- b. Support for summary (temporary) unions of national or international organizations and people organized toward the solutions to specific problems.
- c. Support for the emergence of local and topical human rights movements independent of the Foundation but based on graduates of the Foundation's Human Rights Schools.
- d. Exchange of experiences and information among people and organizations.
- e. Expert consulting for organizations or groups of organizations on their projects.
- f. Material assistance to non-governmental activities for human rights.

II. Adjustment of the Law and its Application to Human Rights Standards

- a. Theoretical and practical human rights education for public officials and members of rights-sensitive professions.
- b. Monitoring of national and local

legislation as it pertains to human rights; preparation of expert opinions to secure adequate protection for human rights in legislature.

c. Monitoring of human rights violations in selected areas within society.

d. Public Interest Law Actions

III. Public Education

a. Educating societies toward awareness of their rights and their options for protecting those rights.

b. Actions aimed at educating young populations toward living in a law-governed democracy.

SPONSORS

The funds for the Foundation's activities are raised from large foundations such as the Ford Foundation, Open Society Institute, Charles Stewart MOTT Foundation, Stefan Batory Foundation, German Marshall Fund, Friedrich Naumann Stiftung, Freedom House; from our NGO associates, such as the International Commission of Jurists, Swedish Section, and the Netherlands Helsinki Committee; from international institutions such as the Council of Europe, OSCE/ODHIR; from the European Union and the UN; and also from private sponsors.

