Mutual Legal Assistance in Criminal Matters in the Western Balkan

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Abstract

The central focus of the study is what obstacles might exist in national legislation and practice of the Western Balkan states that might hinder or complicate the efficiency of international cooperation, according to European standards. The states that are included in the study are all states that have expressed their wish to accede to the European Union (Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, Serbia) and Croatia that already has become a Member State. The question “What could amount to impediments to international cooperation?” has been leading throughout the study. The study is therefore to be considered as problem-focused. The study analyses various forms of international cooperation, such as exchange of information, mutual legal assistance, extradition, transfer of proceedings, joint investigation teams, confiscation, as well as the transfer of judgements and prisoners.

Keywords
accession – combating crime – international cooperation – mutual legal assistance in criminal matters – western Balkan

1 Introduction

The Western Balkan states (Albania, Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Serbia) indicated at different points in time their wish to become a member of the European Union. In order to qualify as a Member State, states must demonstrate a certain level of EU-readiness. This encompasses many things, but one area is international cooperation in
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to test this, the following research were raised for this study: To which international agreements must the states included in the study be a party in order to create the circumstances for swift mutual assistance? and what obstacles exist in the national legislation or practice and how can these be taken away?

The author was provided with the up to date legislation of all states in cooperation in criminal matters relating to all modalities of cooperation both in the original language, as well as in a translation into English. It was problematic that, in general, the translations were not of very good quality. The author obtained a detailed description of the organizational infrastructure with regard to each modality of cooperation for each state included in the study. This has been partly provided by the authorities of the states involved, was partly deducted from various materials provided or was discussed during the on-site visits to the states, which took place between January and March 2014. The author composed a list of Council of Europe treaties relevant for international cooperation in criminal matters and verified whether the states were a party to those treaties and if so under which conditions (reservations and declarations) and state practice. In addition, the states provided the author with further treaties they had concluded outside the framework of the Council of Europe, especially treaties among the Western Balkan states. Since Croatia became an EU Member State already, the study with regard to Croatia was limited to the relationship Croatia – third state and Croatia – Western Balkan state.

In order to determine the status of the legislation and international agreements of the Western Balkan states in international cooperation in criminal matters, the network of conventions of the Council of Europe in criminal matters was taken as the frame of reference. This network, to which 47 European states (including all EU Member States) adhere to, provides mutual assistance in all stages of the criminal proceedings and consists of the foundations on the basis of which the European Union has further legislated.

The Council of Europe network offers an appropriate test as that network is the basis on which the EU has developed further legislation. It thus places the Western Balkan states in the same position as the EU Member States were, just before acceding to the EU. The following Council of Europe conventions,

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1 A more extensive report was written by the author in 2014 for the Centre for International Legal Cooperation, Facilitating Mutual Legal Assistance in the Western Balkan, Towards removing obstacles in international cooperation in criminal matters, in the context of IPA 2010 Project: Fight Against Corruption and Organized Crime; Strengthening Prosecutors Network. See http://pn.datheca.com/publications.wbsp. The current article updates the main findings with the current developments.
referring to their European Treaty Series number: 24, 30, 51, 52, 73, 86, 90, 98, 99, 112, 141, 167, 172, 173, 182, 185, 190, 191, 196, 197, 198, 201, 209, 212 have been taken into consideration.\(^2\) In addition, the United Nations Convention on Transnational Organized Crime has been taken into consideration.\(^3\) The analysis should also provide a clear picture of the infrastructure for each form of cooperation per state. Does the state have a central authority, are direct contacts possible or are diplomatic channels used?

2 Albania

Albania provides a rather troublesome co-existence of two sets of mutual legal assistance rules. Title X of the Code of Criminal Procedure (CCP), Articles 488–523 “Jurisdictional relations with foreign authorities” deal with cooperation with other states in the world. In addition, there is a specific piece of legislation: Law of 3 December 2009 On jurisdictional relations with foreign authorities in criminal matters,\(^4\) (hereinafter MLAAlbania). It goes without saying that the ambiguity with regard to the applicable legislation is a matter of the utmost urgency and should be solved as soon as possible.\(^5\)

The matter ought to be legislated, either in the CCP or in a specific act on international cooperation in criminal matters. Confusion is reported in practice among Albanian authorities as answers differ as to which document (CCP or MLAAlbania) they resort to when working on international cooperation. It is also reported that the hierarchy of norms (convention, CCP and MLAAlbania) is not clear to all practitioners. It was stated that some may apply the best of both.\(^6\) Practitioners are aware of a number of contradictory provisions.\(^7\) Often the meaning of the provisions was not clear to those that had to work with it.

The background of the co-existence of the CCP and the MLAAlbania is partly political, and has partly its origins in Constitutional requirements.\(^8\) I understand that the CCP is an act that has a constitutional status requiring that it can only be amended with a majority in Parliament of 3/5 of the votes. Whereas the

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\(^3\) This convention is ratified by all states, except Kosovo.

\(^4\) Observations received on 24 February 2014 mention an amendment Law no 100/2013, dated 18 March 2013. The expert did not see this amendment.

\(^5\) No changes took place since 2014. Correspondence with Manuela Imeraj, 31 August 2016.

\(^6\) Meeting at the General Prosecutor’s Office, 7 February 2014.

\(^7\) Meeting at the Ministry of Justice, 6 February 2014.

\(^8\) Meeting with former Minister of Justice 5 February 2014.
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MLAAlbania is a regular act that requires simple majority only. When the majority wanted to change the CCP in 2010, it did not have the required 3/5 to do so and therefore adopted the MLAAlbania be simple majority. It was intended to lay down the applicable concepts and principles in the MLAAlbania.\(^9\)

Article 1, paragraph 1 MLAAlbania expresses the hierarchy and states that the act shall be supplementary. This means supplementary to the CCP. In addition, Article 1, paragraph 2 MLAAlbania expresses that conventions prevail. In short, it is first the applicable convention, then the CCP and then the MLAAlbania. Article 1, paragraph 2 makes clear that treaties prevail over the national legislation. The MLAAlbania regulates all forms of international cooperation. For all forms of cooperation Albania will provide cooperation on the basis of a treaty, or by lack of such an international agreement, when reciprocity is provided. On the basis of Article 122, paragraph 2 of the Constitution, international treaties and agreements have direct effect and can be applied without implementation into the national legislation.

3 Bosnia and Herzegovina

Bosnia and Herzegovina have adopted a Law on Mutual Legal Assistance in Criminal Matters on 15 June 2009 (53/09)\(^10\) (hereinafter MLABiH), in which all rules concerning international cooperation are compiled.\(^11\) In Article 1 of MLABiH it is expressed that the act is applicable both in treaty situations, as well as in relationships for which there is no treaty applicable.\(^12\) In the case of treaty relationships, the act stipulates that treaty provisions shall prevail over national law (Article 1 paragraph 1). The Act has all the elements of a modern

\(^9\) Meeting with former Minister of Justice 5 February 2014.
\(^10\) Including the amendments of 15.7.2013, Pursuant to Article IV 4a) of the Bosnia and Herzegovina Constitution, the Parliamentary Assembly of Bosnia and Herzegovina has at its 49th session of the House of Representatives, held on 6 June and 8 July 2013, and at the 30th session of the House of Peoples, Act No. 01,01-02-1-40/12. I was informed in 2016 that no changes at all took place since 2014. Correspondence with Ms. Maja Pećanac, National Legal Officer on 6 July 2016 and Amra Mehmedić on 31 August 2016.
\(^11\) See for an impression of this legislation M. Pogačnik, Mutual legal Assistance in Bosnia and Herzegovina, August 2013, 11 p.
\(^12\) An amendment to Article 1 exists in which the words “if not international treaty exists” were deleted. See Amendment of Article 1 MLABiH, Pursuant to Article IV 4a) of the Bosnia and Herzegovina Constitution, the Parliamentary Assembly of Bosnia and Herzegovina has at its 49th session of the House of Representatives, held on 6 June and 8 July 2013, and at the 30th session of the House of Peoples, held on 15 July 2013 adopted.
piece of legislation. The first appearance is that the BiH legislator carefully followed the provisions of the 1959 Council of Europe Convention on Cooperation in Criminal Matters as well as the 2000 EU Convention on Mutual Assistance. It combines all modalities of international cooperation, it takes into consideration both incoming and outgoing requests, it provides assistance on the basis of a treaty and without such a basis, including misdemeanour proceedings.13 In providing transfer of proceedings and being a party to the relevant Council of Europe conventions the national legislation of Bosnia and Herzegovina has all forms of cooperation at its disposal and is even in a better position than some EU Member States. It allows for assistance to international criminal tribunals. The Bosnian authorities deal with some 8000–10 000 requests for international assistance per year.

The practice of Bosnia and Herzegovina with regard to the ratification of Council of Europe conventions stands out for not having made a single reservation. The declarations of Bosnia and Herzegovina merely relate to practical information concerning the addresses of the central authority or the individual civil servants to whom requests should be sent to. The Ministry of Justice reports that this relates to the idea that reservations might scare off requesting authorities, as well as have a boomerang effect on requests from Bosnia and Herzegovina. Some states take reciprocity very precise and do not wish to render assistance that the other state does not wish to give itself. On evaluation, requests that are really alien to the national system, or otherwise not desirable can be refused on the basis of existing treaty provision and the MLABiH.14 In addition, the requirement of reciprocity has a function in reducing refusals.

In 2003, Bosnia and Herzegovina changed its system of criminal procedure from an inquisitorial system to a mixed system that also includes elements of an adversarial criminal procedure. This has had some impact with regard to the role of the Examining Magistrate in international cooperation, who has been replaced by the prosecutor. As a result of this, the risks of any formal impediment to cooperation with other states are reduced to the minimum. There are very few treaties of the Council of Europe to which the country is not a party to. A prominent example is Additional Protocol to the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters (ETS 99). Apparently, becoming a party is under consideration at the Ministry of Justice. It is to be recommended that it becomes a party to this Protocol. The general feeling reported is that BiH offers more and faster international cooperation

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13 In practice, this basically relate to traffic offences and concerns in majority Italian nationals. Ministry of Justice, 23 January 2014.
then it receives. There are indications that the fact that the country is neither yet an EU Member State, nor is in the process of accession makes other states less eager to assist the authorities of Bosnia and Herzegovina when they need assistance. The fact that other states in the region are further on the track (and may enjoy the benefits of that) is felt as an injustice. It is reported that some states (including EU Member States) are not cooperative. Not all EU Member States have ratified the second Protocol to the 1959 Council of Europe Mutual Assistance Convention, this complicates matters tremendously.

Despite the fact that the Federation of Bosnia and Herzegovina, the Republika Srpska and the Distrikt Brcko have (partly) different legislation, such as the Penal Code and the Code of Criminal Procedure, the MLABiH is applicable in these entities as well. The fact that these entities have different legislation has no impact on the applicability of the BiH legislation and treaties in international cooperation in criminal matters. However, it is reported by many interviewees that the complicated structure of Bosnia and Herzegovina is a real stand in the way to international cooperation. The central level does not have any competence to order other entities to do or not do something. It affects cooperation in a sense that it leads to disputes about competences and it undermines building up of expertise as the units dealing with international cooperation in the various parts of the country structure may be very small and may not have to deal with international cooperation very often.

4 Croatia

The Act on International Legal Assistance in Criminal Matters of 3 December 2004 (hereinafter MLACroatia) regulates the mutual assistance from and to Croatia. This appears to be a modern act, bringing together all modalities of cooperation within one general act. However, when studying the act in depth three serious problems emerge, which relate to the fact that no clear distinction has been made between rules applicable to incoming requests relating to foreign criminal proceedings and rules applicable to outgoing requests for

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15 This concerns as of 17 September 2016 the following Member States: Austria, Greece, Hungary, Italy, Luxembourg and Spain.

16 I understand that Bosnia and Herzegovina (the state) consists of the Republic of Srpska, the Federation of BiH and the Brčko District. Observations received on 7 February 2014. In this article with “Bosnia and Herzegovina” it is referred to the state of Bosnia and Herzegovina. With “entities” I refer to any of the four structures mentioned in the first sentence of this footnote.
Croatian criminal proceedings. The first problem is that there are many provisions in which it is simply unclear whether it applies to incoming requests, outgoing or to both. The second is that the structure of the act, starting with general provisions (articles 1–5), that from their wording seem to have a meaning predominantly for mutual assistance to be given by Croatia, have formally been given application with regard to the other modalities of cooperation (extradition, transfer of proceedings and transfer of judgements) and to assistance requested by Croatia, where it does not make sense. The third problem is that the act wrongly refers in a situation in which Croatia is asked to give assistance to provisions applicable to assistance Croatia may request. It is therefore recommended that Croatia will, with the utmost urgency, amend its legislation and redraft the MLACroatia in a manner in which incoming requests and outgoing requests are clearly separated.17

The ratification degree of the relevant treaties of the Council of Europe is very high. Some minor amendments to the national legislation or with regard to reservations to conventions need to be made. Croatia became a Member State of the EU on 1 July 2013. It has implemented all relevant EU legislation in criminal matters in relation to other EU Member States in the Act on Judicial C-operation in Criminal Matters with Member States of the European Union. This act has been left out of the scope of the project. I will concentrate on the legislation of Croatia in cooperation in criminal matters with regard to non-EU Member States. The MLACroatia deals with assistance with and without treaty basis. Croatia applies a monistic rule, stipulating that international conventions to which the country is a party, are directly applicable in the national legal order. The main scope of application is with criminal matters, however, it may be applied concerning administrative matters, provided that the procedure may lead to a procedure before a criminal court (Article 1 sub 3), it also explicitly provides for assistance with regard to criminal proceedings against legal entities.

5 Kosovero

In the assessment of the Kosovo legislation I will resort to the version that I received of Law No. 04/L-213 on International Legal Cooperation in Criminal Matters (hereinafter MLAKosovo).18 There is no other act that regulates forms

17 I was informed that a working group for making a new MLA Act has been established. Correspondence with Ms Tamara Mišerda of 18 July 2016.
18 Official Gazette of the Republic of Kosovo, No. 33/ 2 September 2013, Pristina.
of cooperation in criminal matters. Additionally, international agreements may apply. I understand that Kosovo applies a monist system with regard to the effect of treaties into the national legal order. Once ratified, treaties can be applied directly. The MLAKosovo is an example of a modern piece of legislation combining all modalities of international cooperation in criminal matters, taking into consideration treaty relations as well as relationship not based on a binding treaty and dealing with incoming and outgoing requests. The act also creates the legal basis for cooperation with international criminal courts. Articles 1–5 consist of general provisions.

Article 1, paragraph 3 MLAKosovo stipulates a condition of reciprocity for situations in which no treaty is applicable. This relates to the fact that Kosovo is not a member to the Council of Europe and is not a party to its conventions. Since 2003, it has established relations with other states on the basis of reciprocity. Normally this would imply that there must be a general assurance from the other state. However, in practice the reciprocity is often dropped and assistance is also given when knowing that the other side will not reply to Kosovar requests.19 Serbia is mentioned as a one way contact. Serbia does request assistance and receives it, but does never answer, it is reported.20 As one interviewee stated: “Reciprocity must start somewhere.”21 In principle all requests are taken as an obligation regardless of the status of the requesting state.22 The ILECU Director stated that his office could offer much more assistance to other states than they were asked.23

The MLAKosovo combines all modalities of international cooperation, it takes into consideration both incoming and outgoing requests, it provides assistance on the basis of a treaty and without such a basis. In providing transfer of proceedings the national legislation of Kosovo has all forms of cooperation at its disposal and is even in a better position than some EU Member States. Refusals of cooperation hardly take place.24

19 Meeting 4 February 2014, Kosovo State Prosecutor Office. It was stated that 3000 cases were received back from Serbia without completion, whereas Kosovo does answer Serbian requests. It was stated that in 2013, 74 Serbian requests were received, of which 59 were complied with.
20 Observations received on 24 February 2014 state: “Things changed recently. A couple of weeks ago, Serbia sent around 20–30 responses to Kosovo requests and more are expected.”
21 Meeting 5 February 2014, International Law Enforcement Cooperation Unit.
22 Meeting 4 February 2014, Kosovo State Prosecutor Office.
23 Meeting 5 February 2014, International Law Enforcement Cooperation Unit.
24 Meeting 5 February 2014, Ministry of Justice, Department for International Cooperation.
In urgent cases direct assistance may be given through Interpol, on condition that formal requests will be send within 30 days. Par. 4 gives the Minister for Justice the mandate to allow direct cooperation. A general Ministerial Decree on this is in preparation (Nov. 2013). Kosovo is not a member of Interpol. There is an Interpol Liaison Office in Pristina, and all communication between Kosovo and Interpol should go through this office. Kosovo has no authority through this office. Such office exercises its functions under the United Nations mission in Kosovo (UNMIK). For non-urgent cases UNMIK or EULEX can be used as an intermediate. Direct communication relates to specific acts (provisional arrest, interrogations of individuals, search or other measure which should be taken urgently). There has thus far not been a single case in which the urgency, as assessed by the Kosovar authorities to make use of Interpol channels, has been questioned. The fact that Kosovo is not an end user of Interpol communications and can only act via intermediates means that is not directly connected to, for instance, the red notice alerts of Interpol.

An imbalance is reported with regard to requests from EU Member States. When requesting they push Kosovar authorities to answer as soon as possible. If requests are sent to EU Member States, often no response follows, or great delays take place. In its answer the Kosovo contact point stated: “While, foreign countries benefited through years based on this practice, Kosovo still is experiencing difficulties, having in mind that some countries do not provide in the same manner cooperation and execution of the request for MLA originating from Kosovo, as they are not binding for them.”

Unlike all other Western Balkan states, Kosovo is not a party to the Council of Europe conventions on cooperation in criminal matters. This is certainly the result of the unclear status of Kosovo under international law. The country is recognized by some and not by other states. This article is not the place to deal with the origins of that fact. However, the status as a non-recognized state has an unprecedented impact. The possibilities for Kosovo to cooperation in

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25 For 2013 some 3608 arrest warrants were reported, 46 % went through Interpol and 21 extradition cases. Meeting 5 February 2014, International Law Enforcement Cooperation Unit.
26 Observations received on 24 February 2014.
27 The involvement of UNMIK is necessary because they have the secure channels needed in some cases. Meeting 5 February 2014, International Law Enforcement Cooperation Unit.
28 Meeting 5 February 2014, International Law Enforcement Cooperation Unit.
29 Meeting 5 February 2014, Ministry of Justice, Department for International Cooperation.
30 As of 1 September 2016, 109 states recognized the country, but not the EU Member States Cyprus, Greece, Romania, Slovakia and Spain.
criminal matters are seriously handicapped given the fact that it is not a party to multilateral conventions on international cooperation.\textsuperscript{31}

In essence, the relationships with other states can be divided into three groups: states with which Kosovo has concluded bilateral treaties on international cooperation in criminal matters; states that are willing to cooperate with Kosovo on an ad hoc basis; states that do not recognize Kosovo and do not wish to cooperate with it.\textsuperscript{32} With regard to the states that are willing to cooperate with Kosovo, the absence of a treaty means that requests take a lot of time, because the old traditional way has to be followed: from the Kosovo Ministry of Justice to the Ministry of Foreign Affairs to the representation of Kosovo in the other state to the foreign state’s Ministry of Foreign Affairs to the Ministry of Justice and after completion of the request vice versa.

\textsc{eulex} plays a role in alleviating problems in cooperation in two manners. The first is in the investigation and bringing to court of Kosovar cases relating to war crimes, money laundering, organized crime and corruption. The second relates to its role as an intermediate between Kosovo and the non-recognizing countries. To this extent a Technical Arrangement has been concluded between \textsc{eulex} and Kosovo.\textsuperscript{33}

Although practitioners would rather see the intermediate \textsc{eulex} removed, in the given circumstances of non-recognition, its role is appreciated as a second best option. The role of \textsc{eulex} and \textsc{unmiK} as an intermediate is criticized, as it is rather time-consuming. It requires translations in cases were both Kosovo and the other state may make use of the same language, but the officials working at \textsc{eulex} do not have command of those languages. \textsc{unmiK} is considered to be over-bureaucratic.\textsuperscript{34} In addition, it means that the Kosovo police is not the owner of the information. \textsc{eulex} may pass it on to others.

\textsuperscript{31} To some extent this will be alleviated once the recently concluded Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part (\textsc{oj} 2016, L 71/3) becomes operational.

\textsuperscript{32} There are also \textsc{eu} Member States that do not recognize Kosovo. Slovenia, Spain, Cyprus, Greece and Romania are mentioned.

\textsuperscript{33} Technical Arrangement between the Kosovo Ministry of Justice and \textsc{eulex}, the European Union Rule of Law Mission in Kosovo on Mutual Legal Assistance. Concluded on 12 August 2011, Pristina. The text of the Technical Arrangement does not specifically refer to the role of \textsc{eulex} in war crimes and corruption cases. However, all interviewees referred to it while the expert was visiting Kosovo. Council Decision 2016/947 amends Joint Action 2008/124 on the European union Rule of Law Mission in Kosovo and stipulates that its mandate shall expire on 14 June 2018. See \textsc{oj} 2016, L 157/26.

\textsuperscript{34} Meeting 5 February 2014, International Law Enforcement Cooperation Unit.
without Kosovo knowing.\textsuperscript{35} Apparently \textsc{eulex} has concluded agreements with non-recognizing states on cooperation. However, they have not been made available to the Ministry of Justice of Kosovo.\textsuperscript{36}

\textsc{eulex} reports that not much use is being made of it as an intermediate and that some practicalities stand in the way of more efficiency. There is no appropriate registration system of citizens in Kosovo and not all streets have official names.\textsuperscript{37} This makes it hard to find persons. \textsc{eulex} has a specific role in sensitive cases. These may relate to war crimes, corruption and other investigations into politicians. It is reported that the internal cooperation between the various authorities within Kosovo is problematic and that too many authorities are involved.\textsuperscript{38}

6\quad \textbf{Macedonia}

Macedonia enacted a Law on International Cooperation in Criminal Matters on 14 September 2010 (hereinafter MLAMacedonia).\textsuperscript{39} The act combines the various forms of international cooperation into one piece of legislation. It relates to both incoming and outgoing requests. It provides rules for requests based on a treaty and requests that do not relate to a treaty situation. The first chapter of the act deals with general provisions (Articles 1–14), which apply to all modalities of cooperation that are being dealt with subsequently. In December 2013, Macedonia changed its system of criminal procedure from an inquisitorial system to an adversarial criminal procedure. The changes, that affect the whole Code of Criminal Procedure, have had some impact with regard to the role of the Investigating Magistrate in international cooperation, who has been replaced by the judge of freedoms. Both the amendments of the \textsc{ccp} and the new MLAMacedonia were drafted at the same time.\textsuperscript{40} Macedonia has ratified widely the relevant conventions of the Council of Europe.

\begin{itemize}
\item \textsuperscript{35} Meeting 5 February 2014, International Law Enforcement Cooperation Unit.
\item \textsuperscript{36} Meeting 5 February 2014, Ministry of Justice, Department for International Cooperation.
\item \textsuperscript{37} \textsc{eulex} meeting 5 February 2014.
\item \textsuperscript{38} \textsc{eulex} meeting 5 February 2014.
\item \textsuperscript{39} Official Gazette of the Republic of Macedonia, No. 124 from 20.09.2010. I understand that it only entered into force in December 2013 and thereby replaces Chapters xxxii and xxxiii of the \textsc{ccp} 2005. No further changes in the MLAMacedonia were adopted ever since. Correspondence with Gordana Buzarovska on 31 August 2016.
\item \textsuperscript{40} The Ministry of Justice appears to have received comments on the draft MLAMacedonia from Eurojust, Ministry of Justice, meeting 22 January 2014. These have not been made available to the expert.
\end{itemize}
There are no lacunae that raise pertinent questions as to its treaty relations with Europe. Macedonia applies a constitutional rule of monistic application of treaties into the national criminal justice system. In other words, ratified treaties have direct effect and national implementation is not necessary. Some minor amendments to the national legislation or with regard to reservations to conventions need to be made.\footnote{A study has been conducted by the Association for Development Initiatives “Zenith” and Prof. Dr. Gordana Lazhetikj Buzharovska, on request of the Ministry of Justice of the Republic of Macedonia with regard to a possible implementation of Framework Decisions in preparation of Macedonia’s EU membership. Judicial cooperation in criminal matters and alignment with the EU acquis- state of play and future steps assessment of Macedonia’s legal alignment with the European Union acquis. See http://www.kas.de/wf/doc/kas_36947-1522-2-30.pdf?140226133621.}

It is inevitable to address the problem that is euphemistically called “the name issue”, the question as to under which name Macedonia may present itself at the international platform. The use of Macedonia is opposed by Greece. It is reported that requests for international cooperation are returned if they have any reference to “Republic of Macedonia” in the documents. It is reported that this problem does not only affect the bilateral relationship with Greece, but also the relationship in cooperation matters with other states within the EU.\footnote{Meeting with Public Prosecutor, 21 January 2014.} There were also positive practices reported in the bilateral relationship with Greece, but only in cases of direct contacts. As soon as ministries get involved the name issue blocks all forms of cooperation. The name issue is a serious impediment for international cooperation.

7 Montenegro

Montenegro has enacted the Law on Mutual Legal Assistance in Criminal Matters (hereinafter MLAMontenegro),\footnote{Official Gazette of Montenegro, No. 04/2008 and 36/2013. The act has not been changed since 2014. Correspondence with Jelena Lučić on 8 July 2016.} which regulates the conditions and procedure of mutual legal assistance in criminal matters. It relates to both incoming and outgoing requests. It provides rules for requests based on a treaty and requests that do not relate to a treaty situation (Article 2, paragraph 2 MLAMontenegro). The first chapter of the act deals with general provisions (art. 1–9), which apply to all modalities of cooperation that are being dealt with subsequently. Article 3 MLAMontenegro stipulates that the act is one of a general character, dealing with extradition, transfer of proceedings, transfer
of judgements and other forms of mutual assistance. The ratification degree of the relevant treaties of the Council of Europe is high. A major issue is the obvious lack of capacity in combination with an involvement of both the Ministry of Justice and the court in almost all cases. Another is that despite direct applicability of treaties, further national legislation might still be necessary.

The communication will go through the Ministry responsible for the judiciary (Article 4, paragraph 1), this includes the prosecution, unless there is no international agreement or a lack of reciprocity, in which case it must go via diplomatic channels (Article 4, paragraph 2). Direct lines of communication exist on the basis of an agreement or reciprocity. In these case copies must be send to the Ministry (Article 4, paragraph 3). Interpol may be used in urgent cases. However, in practice, courts almost always use the lines of communication via the Ministry.

Montenegro is a party to the Police Cooperation Convention for South East Europe, which is a unique convention as it combines various law enforcement aspects on the police level. It relates to border control, security issues, as well as to regular investigation into ordinary crime. This convention creates the legal basis for cooperation (predominantly exchange of information) at a very early stage of the prevention and investigation into criminal offences and has therefore a great potential as to its impact on efficiency of police cooperation. It provides for short lines of communication, by fax or email (Article 4, paragraph 6).

The declarations and reservations valid for Montenegro at the Council of Europe conventions are partly outdated as some reservations/declarations were made on behalf of the Federal Republic of Yugoslavia/State Union with Serbia, referring to national law applicable at the time, but no longer in force. It is referred to ETS 30. In addition, the text of other reservations/declarations made on behalf of the Federal Republic of Yugoslavia/State Union with Serbia, raise the question whether Montenegro itself wishes to continue to be bound by it. It is referred to ETS 24 and 90.

44 Reciprocity is regarded as a broad concept. It does not cumulatively require that there is reciprocity both on direct communication as the modality of assistance. Meeting at the Ministry of Justice, 27 February 2014.
45 Meeting at the Ministry of Justice, 27 February 2014.
46 Concluded on 5 May 2006, other parties are Albania, Bosnia and Herzegovina, Macedonia, Moldova, Romania and Serbia. A Manual has been made to facilitate the practical implementation of the convention, 25 January 2012.
8 Serbia

The relevant national legislation is the Law on Mutual Assistance in Criminal Matters of 18 March 2009 (hereinafter MLASerbia). This act forms a modern act on international cooperation in criminal matters with a classical structure. It provides common provisions for various modalities of international cooperation (extradition, mutual assistance etc.) both in situations that a treaty applies and in situations that there is no international convention applicable. The MLASerbia also provides the rules both for requests addressed to Serbia, as well as requests emanating from Serbia. The MLASerbia determines its scope in a rather modern way in Article 3, which makes clear that the definition under the criminal law of the requesting state is leading. In addition, the application of the act is expanded to administrative offences for which there is an appeal to criminal courts.

Article 8 stipulates that mutual assistance shall be granted subject to the rule of reciprocity. In principle reciprocity is already guaranteed when a treaty is applicable. The question comes up whether the application of Article 8 could not be limited to cooperation without treaty basis, or be limited to modalities of a certain high degree (such as extradition or transfer of judgements) and not be applied for less infringing measures, such as requests for information or collection of evidence. It appears that reciprocity is rather assumed and that it does not lead to any difficulties in practice. The last sentence of Article 8 seems to be of rather practical utility in the sense that the presumption is that reciprocity is there, unless indicated otherwise.

A major issue is the adjustment of the law on international cooperation to the new roles of authorities (judges, prosecutors, courts and police) after the change from inquisitorial to accusatorial system in criminal procedure. Another is that despite direct applicability of treaties, further national legislation might still be necessary. Under Serbian law, the Code of Criminal Procedure (ccp) is regarded as the general act, whereas the MLASerbia is the lex specialis. The Constitution provides that treaties prevail over national law and that they are directly applicable. It is reported that as a result of that, conflicts between conventions and national law cannot emerge, as the conventions always

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47 No changes took place since 2014. Correspondence with Miodrag Majić on 7 September 2016.

48 It is reported that in practice not all practitioners understand the relationship and that the MLASerbia is applied, even in situations that the treaty would prevail. Courts have the tendency to be national law oriented (Judge, 24 February 2014).
prevail. However, treaties do not regulate everything, they focus on what is applicable between states, not on how states organise their authorities and their competences themselves in the national legal order.

The direct application of treaties is as such not problematic. However, it becomes problematic if the authentic texts of the conventions are not available to practitioners or if they cannot read them. Most treaties applicable to Serbia in the field are from the Council of Europe for which only French and English are legally binding. The practice to publish a translation into Serbian in the national Gazette is insufficient as these are translations and not the legally binding texts. The Ministry reports a preference for bilateral treaties as they allow for more tailor made provisions. 50 52 bilateral treaties are reportedly concluded. Serbia also ratified the fourth Protocol to the European Convention on Extradition which took effect on January 10th, 2014. Serbia has some 8000–10 000 requests per year of which about half come from EU Member States.

It is reported that cooperation with Kosovo is problematic and that especially war crime indictments are not followed up. Serbian prosecutors can only prosecute Serbian citizens, as the prosecutions of non-Serbs does not result in assistance. It is reported that in practice some cooperation exists, formally with EULEX and UNMIK as intermediate. 52 Far more requests come from Kosovo than that are sent to it. Informally direct contacts may exist. For Serbia, cooperation with Kosovo does not fall under international cooperation, as it is regarded as being part of Serbia. In this context it is recommended to contemplate and explore the possibilities to legislate on a special act on assistance with Kosovo, as there is now a legal vacuum on cooperation with Kosovo under Serbian law.

9 Conclusive Findings

One of the most striking conclusions is that all seven states included in the study have a particular problem that the other states do not have. It goes

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50 Ministry of Justice, Department for Mutual legal Assistance in Criminal Matters, 25 February 2014. In addition, by concluding bilateral treaties, Serbia evades to be bound by the accession of Kosovo to a common multilateral treaty.

51 Ministry of Justice, Department for Mutual legal Assistance in Criminal Matters, 25 February 2014.

52 Ministry of Justice, Department for Mutual legal Assistance in Criminal Matters, 25 February 2014.
without saying that the ambiguity with regard to the applicable legislation in Albania is a matter of the utmost urgency and should be solved as soon as possible. It is recommended to give absolute priority to bringing the provisions applicable to international cooperation in criminal matters into one piece of legislation. It is recommended to make the state structure of Bosnia and Herzegovina more transparent and easier accessible for foreign counterparts and to make the internal structure for requesting assistance from abroad more tailored to the practical needs. In that sense, given the small size of the country, and the high number of complicated legal questions that may relate to a request for assistance, consideration might be given to concentrating the competence of international cooperation to specialized units and courts. It is recommended that Croatia will, with the utmost urgency, amend its legislation and redraft the MLACroatia in a manner in which incoming requests and outgoing requests are clearly separated. In addition, it is recommended that verify that provisions presented as being of a general nature, are indeed intended to apply to every other provision that follows after.

The solution of the problem of Kosovo must come from outside. It is recommended to either recognize Kosovo as a mature state under international law or to establish relations on cooperation criminal matters that would not imply recognition. The current situation is most conducive to making Kosovo into a black hole or hiding place for those who wish to escape law enforcement. It is in the interest of combating crime in all states (also in non-recognizing states) that formal political reasons will not stand in the way to cooperation with a view to combat crime. It is recommended that formal agreements will be concluded with Interpol, Eurojust and Europol that would give the Kosovo law enforcement agencies access to closer cooperation, to have an Eurojust member, and a contact point at Europol, as well as to the necessary financial sources to perform these tasks.

For Macedonia, it is to be recommended that the name issue will be resolved. It seriously blocks international cooperation from and to Macedonia. For Montenegro, a general recommendation about the structure and division of roles in international cooperation must be made. The Court and the Ministry intervene in almost all cases and could be considered as the gatekeepers of international assistance. In this context and also given the limited capacity in Montenegro, it is advisable to contemplate about a national organization of international assistance that will severely reduce the number of authorities involved with regard to individual requests.

Concerning Serbia, it is recommended to look at the division of roles of the authorities involved in international cooperation, both with regard to assessing whether a request complies with the requirements under the law
or as with the actual execution of the request. It is recommended to reconsider the role of the three Ministries in incoming and outgoing requests for cooperation. The situation in practice takes away the positive effects of direct communication with foreign authorities by imposing new lines of internal communication.

The prohibition of extradition of nationals provided by most states should be reconsidered or made subject to the condition of transferring the execution of the sentence. The prohibition of the extradition of nationals is an old rule dating from the early years of the 19th century that is now rapidly losing its justification. It is grounded in the idea that nationals ought to be protected against foreign systems that might not have been built on the same concepts of the rule of law. With the supervision of the compliance with the ECHR and the possibility of transferring the execution of a judgement, the general prohibition can no longer be justified.

Many citizens of the former Yugoslavia have dual citizenship of several of the now independent states. The impression received is that nationality is given on the basis of the place of birth as well as can be derived from parents. The consequences are that for many people this adds up nationalities. All countries in the region prohibit the extradition of nationals. The result is that fugitives might fly to the other state whose nationality they have and are then safe from extradition. Bosnia did conclude some bilateral agreements on the transfer of judgements that partly alleviate this problem. In addition, it is reported that in a few cases in which Bosnia and Herzegovina was requested party, it renounced Bosnian citizenship if that was only accepted as a means to block extradition to another state. It is also reported that Serbia gave citizenship to indictees of war crimes in Bosnia and Herzegovina.

In order to enlarge the possibilities to cooperation on a international level, the states would do well to ratify more completely the conventions of the Council of Europe. Some need to ratify more than others, especially the Second Additional protocol to the European Convention on Mutual Assistance (ETS 182) requires attention. For all states, it is recommended to reconsider their reservations and declarations, as well as their practice to this Protocol. Especially direct service by regular post of procedural documents is essential to modern cooperation in criminal matters and ought not be excluded.

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53 A decision of this kind is currently reviewed by the Court of Appeal, source: Ministry of Justice, 23 January 2014.

54 Prosecutorial Office, meeting 24 January 2014.
Generally speaking, the Western Balkan states have modernised their legislation on international cooperation in criminal matters in an extraordinary short period. It is now time to further implement things in practice. The ratification degree of the relevant Council of Europe conventions is rather high in comparison to EU Member States. The study is proof of the fact that during the accession proceedings fast steps forward can be made, but also demonstrates that not much progress was visible in the years 2014–2016.