EFFECTIVENESS OF LEGAL AID IN CRIMINAL PROCEEDINGS IN ALBANIA

HOW FAR ARE WE FROM THE INTERNATIONAL STANDARDS?

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RESPUBLICA

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The working group for this study consisted of:

Lawyer Dorian Matlija
Lawyer Theodoros Alexandridis
Lawyer Irena Dule
Lawyer Arbesa Kurti
Lawyer Elida Elezi
Lawyer Brunilda Qershori
Lawyer Andras Kadar
Dr. Ervin Pupe
Dr. Besnik Çerekja

Author: Centre "Res Publica"
English translation and editing: Kathleen Imholz, Theodoros Alexandridis
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ABBREVIATIONS

ALL	Lek, Albanian currency
CCBE	Council of Bars and Law Societies of Europe
CCP	Code of Criminal Procedure
CCT	Constitutional Court
ECHR	European Convention on Human Rights
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
NCA	National Chamber of Advocacy
OAJB	Office of Administration of the Judicial Budget
OSCE	Organization for Security and Cooperation in Europe
SCLA	State Commission for Legal Aid
UPR	Universal Periodic Review
UN	United Nations
(UN) HRC	United Nations Human Rights Committee
(UN) SPT	United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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I. EXECUTIVE SUMMARY

In the context of a project supported by Open Society Foundation's Human Rights Initiative, *Res Publica* carried out research and prepared the present study on the effectiveness of the state-funded criminal legal aid scheme in Albania and its compliance with the relevant international standards.

The study provides an analysis and evaluation of the current legal aid scheme in criminal proceedings. It is informed by a review of 5,152 criminal decisions of the Tirana District Court issued during the years 2013 - 2014, a more in-depth study of the case files of 100 decisions regarding five different offences (50 cases where the defendant was represented by an ex officio or state appointed lawyer and 50 where a private lawyer was retained), the holding of interviews with three focus groups (consisting of 10 criminal legal aid lawyers, judges and prosecutors each) and the monitoring of 200 criminal court sessions (in 68 of which the defendant was represented by lawyers appointed ex officio and in the remaining 132 by privately retained lawyers).

The findings from the data and information analysis show that the criminal law legal aid scheme of Albania is in dire need of a drastic and complete overhaul. In particular, the study identified a series of grave shortcomings in both the relevant regulatory framework as well as in its implementation in practice.

In terms of the **regulatory framework**, the main causes of concern are the failure to guarantee access to a lawyer from the very outset of a person's deprivation of liberty; the appointment of the ex officio legal aid lawyer by the prosecutor or the court and not by an independent body; the lack of any criteria for the inclusion of a lawyer in the legal aid lawyers appointment list and the failure to provide continuing / specialized training.

The quality of service provided by legal aid lawyers is also adversely affected by their very low and often belatedly paid remuneration. In general, the level of funding allocated to criminal legal aid is very low and not remotely in proportion with that allocated to the courts or the prosecutors office. Further compounding the problem is the administration of the funds destined for criminal legal aid by different institutions, each with its own rules, leading to a lack of coordination and differentiated treatment among legal aid lawyers.

Turning to the shortcomings of the criminal legal aid scheme **in practice**, an overview of the implementation of the criminal legal aid framework indicates that defendants are not always informed of their right to free legal aid upon arrest; that legal aid lawyers usually hold perfunctory consultations with their principals, shortly before the hearing and at times within earshot of the judge and prosecutor. The study also found that legal aid lawyers in almost all cases remain totally passive during the course of the proceedings, with only 18% submitting their arguments in writing at the closing session.

Furthermore, in less than 10% of the cases reviewed was the defendant represented by the same ex officio lawyer in both court instances; in no case from among those reviewed was the defendant represented by the same legal aid lawyer during the preliminary investigation phase and before the two judicial instances, thereby creating concerns about the existence and pursuit of a consistent legal strategy on the part of the legal aid lawyer. The method of appointment of ex officio lawyers is

opaque, with three out of 87 legal aid lawyers representing defendants in half of the cases where free legal representation was granted.

Additionally, prosecutors are more likely to ask for the imposition of higher penalties, and courts are more likely than not to grant such requests, in cases where the lawyer of the defendant is an ex officio or state-appointed one; in their interviews, both prosecutors and judicial officials were highly critical of the quality and legal skills of state -appointed lawyers.

No cases where a legal aid lawyer had filed challenges against his principal's conviction before the High Court or the Constitutional Court were identified; this was because a full 77% of the legal aid lawyers do not meet the criteria for bringing a case before these two courts (namely, being practicing lawyers with more than 10 years of experience). No difference was recorded in the numbers of appeals filed by privately-retained and ex officio lawyers.

The above findings inexorably lead to the conclusion that the criminal legal aid scheme is clearly failing its intended beneficiaries. Although aware that a higher level of funding is necessary but not forthcoming in light of the ongoing economic stagnation, the study concludes with a number of practical and easy to implement recommendations that if adopted would go a long way to address the most acute problems observed. To this end, the 2012 United Nations' *Guidelines and Principles on Access to Legal Aid in Criminal Justice Systems* can serve as a source of guidance and inspiration.

It is imperative that the competence for the selection, appointment and remuneration of legal aid lawyers be entrusted to an independent body such as the National Chamber of Advocacy. The criminal legal aid scheme of Kosovo, where the legal aid lawyer is appointed by the Bar Association following a request by the prosecutor or the police could serve an example in this respect.

Furthermore, the right of access to a lawyer should be expressly guaranteed from the beginning of a person's deprivation of liberty and should also extend to the post-trial stage. Attendance of continuing legal education classes should be mandatory for legal aid lawyers, while pools of lawyers specialized in different areas (children's rights, domestic abuse) should be established. The quality of their work should be rigorously monitored.

Last, the state should examine other ways of providing quality criminal law legal aid, including by means of the introduction of paralegals in the criminal justice system as well the seamless incorporation of civil society organizations and other stakeholders (such as university legal clinics) in the scheme of legal aid in criminal cases.

II. INTRODUCTION

This study was prepared by the "Res Publica" Centre with the support of the Open Society Human Rights Initiative in the framework of the project entitled "Evaluating the effectiveness of legal aid in Albania". The project is implemented at an opportune moment, when discussions are being held on carrying out a comprehensive reform of the justice system, a reform that will also affect the entire legal framework. Res Publica is an active participant in the public consultations being held in the context of this reform.

The purpose of the study is to assess the compliance of the Albanian legislation and practice with the international standards on legal aid provided by lawyers (hereinafter "ex officio", "criminal legal aid" or "state-appointed" lawyers) appointed to represent those individuals who cannot afford to retain legal counsel. In addition, the study aims at raising the awareness of all relevant stakeholders such as lawyers, prosecutors, judges, executive officials and particularly of the National Chamber of Advocacy, and advocating for the adoption of the relevant international standards in the domestic legal order.

The main part of study is divided into four chapters:

- Chapter V contains an overview of the relevant international principles and standards, including the principles stemming from the jurisprudence of the European Court of Human Rights (ECtHR) and the United Nations Human Rights Committee (UN HRC).

- Chapter VI sets out the domestic legislation on the appointment of legal aid lawyers and his responsibilities. The consolidated practice of the Albanian High Court and the Constitutional Court on the issue of legal aid is also presented, together with a critical review of the current regulatory and administrative framework of the legal aid scheme.
- Chapter VII contains a presentation and analysis of the data collected from the study of criminal court decisions, the findings of a survey among the actors in the criminal justice system and the findings from trial monitoring, with a view to presenting the legal aid situation in practice, focusing in particular on the quality of legal assistance provided by legal aid lawyers.
- Last, Chapter VII contains a set of conclusions and recommendations that call for an overhaul of the legal framework and practice in the field of criminal legal aid, a crucial element of due process of law.

The study was prepared by:

Dorian Matlija – Lawyer, Project Director
Arbesa Kurti – Lawyer, Project Coordinator
Theodoros Alexandridis – International Human Rights Law expert
Irena Dule – Lawyer, local expert (doctoral candidate)
Elida Elezi – Lawyer, trial monitor
Brunilda Qershori - Lawyer, trial monitor

with the contribution of:

Andras Kadar - Lawyer, Executive Director of the Hungarian Helsinki Committee, Hungary
Dr. Ervin Pupe – Director of the Albanian School of Advocacy
Dr. Besnik Çerekja – Deputy Dean, Faculty of Law, University of Tirana

III. BACKGROUND

The right to have a defence lawyer appointed by the state when a person does not have sufficient financial means to retain one himself is a constitutional right that lies at the foundation of the Albanian legal order. This right is also recognized and strongly protected by different international human rights instruments that oblige states to take all necessary measures so that effective and professional legal aid will be provided to defendants lacking financial means, in all the phases of the criminal proceedings.

Although it is a right firmly entrenched in the Albanian legal order, Res Publica has observed in its work over the years that it is not fully respected in practice in most, if not all, cases. The deficiencies in the domestic legal framework, combined with the lack of interest shown by all the actors of the criminal justice system, have detrimental consequences to the interests of persons who find themselves facing criminal charges, particularly if they relate to a serious crime.

Among the individuals that are mostly affected by the lack of an effective criminal legal aid scheme are vulnerable groups such as the Roma, victims of trafficking, juveniles, disabled persons and others. Civil society organizations have often stressed the need to improve the quality of legal aid not only in criminal but also in civil and administrative proceedings.

The purpose of the present study by Res Publica is to paint a clearer picture not only of the legal framework regarding access to criminal

legal aid but of its implementation and respect in practice. In order to do so, the study will endeavour to compare the level of quality of legal assistance provided by ex officio lawyers with that provided by privately retained lawyers.

It should be noted that this issue has not escaped the international organisation's attention. Albania was recently subjected to an intensive critique of its legal aid scheme. In the July 2014 report of the Work Group for the Universal Periodic Review (UPR) for Albania, three recommendations were made related to the need to improve the legal aid scheme and to assure that potential plaintiffs and defendants would have effective access to justice.

The study concludes by setting out a series of recommendations based on the relevant international standards. The empirical data will be made available to the competent authorities in order to highlight the concrete needs that have to be addressed in the context of the much-needed reform of the existing criminal legal aid scheme in Albania.

IV. RESEARCH HYPOTHESIS & METHODOLOGY

The present study's research hypothesis is that the Albanian legislation and its implementation in practice by the police organs, the prosecutors and the courts do not guarantee the provision of effective legal aid in the criminal process, as required by international standards. This failure not only undermines the compliance of the criminal proceedings with the due process requirement but also entails the noneffective expenditure of public funds, to the detriment of the interests of individuals, justice, and society as a whole.

In conducting research for and drafting this study, the following methodological approach was adopted.

First, the international law standards on criminal legal aid were identified and reviewed, with a particular focus on the standards established by United Nations and Council of Europe bodies, in order to examine whether they are adequately reflected in the Albanian legislation and practice.

Second, the domestic legislation in this field was thoroughly analysed, with a view to identifying potential problems and deficiencies that should be addressed in order to bring the legal framework into conformity with the above mentioned standards.

Third, official information was collected from the different authorities active in the field of criminal legal aid, with a view to identifying problems in connection with the competencies, planning and administration of public funds allocated to criminal legal aid, problems which undermine the effectiveness of the state-funded criminal legal aid scheme.

Fourth, statistical information was collected following the preliminary review of 5,152 criminal case files in the district court of Tirana in the years 2013 - 2014; 100 criminal cases files were then selected for more in-depth analysis, according to a selection method explained in more detail in Chapter VI of this study. The statistical information serves to highlight the significant differences in the quality of legal assistance provided in criminal proceedings by state-appointed lawyers, compared to those chosen by the individuals themselves.

Fifth, three focus groups each representing the three main actors in the criminal justice system, namely judges, prosecutors and state-appointed lawyers, were designed and conducted, with ten persons from each group being interviewed and asked to fill in a questionnaire. The results of these interviews serve to interpret more accurately the quantitative data obtained from the study of the criminal case files.

Sixth, 200 judicial sessions with privately retained lawyers and state-appointed lawyers were monitored, in order to form a first-hand impression of the concrete behaviour of all the actors in the criminal justice system. The data from those observations should serve to better orient the analysis of data obtained from the statistics and the surveys.

V. INTERNATIONAL STANDARDS ON CRIMINAL LEGAL AID

1. Introduction

> *"The Court reiterates that the three relevant rights – the right of a detained person to inform a third part of his/her choice as to his/her detention, the right of access to a lawyer and the right to ask for a medical examination – have to be respected from the outset of the deprivation of liberty, regardless of how it may be described under the legal system concerned"* [1]

Although the importance of all three rights is self-evident and hardly warrants discussion, it should be noted that in some ways, the right of access to a lawyer takes precedence over the other two and should be accorded the status of "first among equals". This is because in practice arrested persons, even if aware or informed of their rights, might not be in a position to ensure that those rights will be respected. It is, for example, difficult to expect from, let alone demand of, a person who has been already ill-treated by the police during his arrest and faced with a rejection of the request to visit a doctor, to insist that he be examined by a medical professional.

1 European Court of Human Rights, Lykova c. Russie, no. 68736/11, 22 December 2015, § 125. Unofficial translation.

Ensuring that the person in question has the right to access a lawyer from the beginning of his detention might not only shield that person from ill-treatment (the mere presence of a lawyer during a person's interrogation might act as a deterrent for the police to ill-treat a person) but is also instrumental towards the promotion of the arrested person's criminal law procedural defence rights. Thus the European Court for Human Rights has held that the absence of a lawyer from a police interrogation where incriminating statements subsequently used for a conviction are made will irretrievably prejudice the accused's right to a fair trial,[2] even if other procedural rights (such as the right to remain silent) have been respected.[3]

Yet what happens if the person does not have enough means to retain a lawyer? Should that person's lack of means justify a dilution of his defence rights? As the various international standards below make it clear, states are under the obligation (subject to some qualifications which are however being increasingly narrowed) to ensure that indigent accused persons have access to free legal aid, including the appointment of ex officio lawyers at the state's expense.

This should in no way be seen as a form of state charity towards its indigent citizens: money invested in an effective civil and criminal legal aid system is money well spent. An effective criminal legal aid system, conceived as an organic part of a country's criminal justice system, can contribute towards reducing pretrial detention and prison populations, the number of wrongful convictions, prison overcrowding, and the courts' workload. Indeed, according to the Johannesburg Declaration on the Implementation of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems:

2 Among the many authorities, see *Turbylev v. Russia*, no. 4722/09, 6 October 2015, § 94..

3 *Dayanan v. Turkey*, no. 7377/03, 13 October 2009, §§ 32-33

> *"The cost of not providing free legal assistance supersedes the cost of its provision and has significance for individual pretrial detainees, their households, and communities - and for states processing large numbers of pretrial detainees. Legal aid and early assistance programs reduce excessive and arbitrary pretrial detention, which improves the administration of justice, increases public trust in justice and can boost socioeconomic development at the family and community level"*[4]

The objective of the present section is to set out the relevant international law standards in the field of appointment of ex officio lawyers as well as map out their scope and content. Importance will be paid primarily to the most important "hard" international law instruments that are either already binding on Albania (such as the United Nation's International Covenant on Civil and Political Rights and particularly the European Convention of Human Rights) or might be in the future (such as the European Union's Fundamental Rights Charter and a potential future directive on criminal legal aid).

At the same time, however, an effort shall be made to present all recent developments in the field of criminal legal aid, including those contained in a number of nonbinding instruments. A more extensive description of the international minimum standards and principles on legal aid can be found in the December 2014 document prepared by the Open Society Justice Initiative, attached as **Annex 1** to the present report.

Finally, more emphasis will be placed on the relevant case-law of the European Court of Human Rights, in light of its rich and diverse jurisprudence as well as because of the higher standing it enjoys before Albanian courts in relation to the International Covenant on Civil and Political Rights which constitutes "uncharted territory" for most Albanian judges.

4 Adopted on Johannesburg, South Africa June 24-26, 2014, at page 1. The Declaration is available in English at: https://www.unodc.org/pdf/criminal_justice/2014_Johannesburg_Declaration_on_Implementation_of_UNPGLA.pdf

2. United Nations standards

International Covenant on Civil and Political Rights
Article 14

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right, and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

Article 14 (3) d lays down essentially two conditions for a person to benefit from the appointment of an ex officio lawyer: first, the interests of justice must so require (the ***merits test***) and second, it must be established that the person does not have enough means to retain private counsel (the ***means test***).

In its authoritative General Comment No 32 on *Article 14: Right to equality before courts and tribunals and to a fair trial*, the Committee elaborated on the merits test: thus it noted that the gravity of the defence, together with the prospects of success, should be taken into consideration when ascertaining whether the interests of justice require the appointment of an ex officio lawyer.[5] The Committee also stressed that the ex officio lawyer assigned should have all the requisite skills and experience that would allow him to effectively defend their client's interests effectively, with state liability being engaged in cases where the ex officio lawyer blatantly fails to carry out his duties.[6]

5 General Comment No. 32, CCPR/C/GC/32, 23 August 2007, paragraph 38. The General Comment is available at http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx

6 Ibid.

Rather interestingly, the General Comment does not address the issue of lack of means – in other words, when an accused seeking the appointment of an ex officio legal lawyer will be considered as having satisfied the means test. Guidance on this issue can be found at the ground-breaking 2012 United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (hereinafter the 2012 UN Principles).[7] Building on a number of earlier United Nationals soft law instruments)[8] the 2012 UN Principles contain generous criteria for legal aid eligibility, with Principle 3 calling upon states to provide legal aid regardless of the person's means, if the case is particularly urgent or complex, or if the penalty the person faces is very severe. The same principle places squarely on the shoulders of judges, prosecutors and the police the obligation to ensure that those that appear before them without a lawyer because they cannot afford one should be provided with free legal aid.

A truly ground-breaking aspect of the 2012 UN Principles is the widening and deepening of the scope of application and content of legal aid. As Guidelines 4 to 6 make clear, the right to legal aid is a multifaceted one that encompasses different forms of activities, ranging from legal representation to legal education and access to legal information. Legal aid should be made available to beneficiaries during all stages of court proceedings – indeed, free legal aid should

7 The Principles are attached as an annex to General Assembly Resolution 67/187, A/RES/67/187, available in English at https://www.unodc.org/documents/justice-and-prison-reform/GA_67.187_English.pdf

8 Such as the Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its Resolution 663 C (XXIV) of July 31, 1957, and 2076 (LXII) of May 13, 1977, available in English at: http://www.unhchr.ch/html/menu3/b/h_comp34.htm and the Body of Principles for the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27 to September 7, 1990, available in English at: http://www.unhchr.ch/html/menu3/b/h_comp44.htm

be available throughout the spectrum of one's dealings with the criminal justice system, namely from the time a person is summoned to a police station as suspect or even as a victim or a witness[9] and even after their conclusion: Guideline 6 calls upon states to take all necessary measures to inform newly incarcerated persons as to their rights in prison, as well as ensure that lawyers and paralegals visit prisons with a view to providing legal advice and assistance to prisoners on a diverse range of issues, such as disciplinary proceedings against them or detention conditions.

The 2012 UN Principles also place particular emphasis on the need to promote the quality of free legal representation. Under Guideline 15, states are called upon to establish criteria for accreditation of legal aid providers and ensure that they are subject to professional codes of conduct. Moreover, states should also set up effective complaints and oversight mechanisms.

Under Guideline 16, states should, following consultations with relevant stakeholders, promote the adoption of quality standards and ensure that free legal aid is available in all parts of the country and is accessible to all communities, whereas under Guideline 17, states should carry out research and data collection about the criminal legal aid system, sharing good practice and improving coordination between all relevant stakeholders.

The 2012 UN Principles undoubtedly constituted a source of inspiration for the draft *United National Basic Principles and Guidelines on remedies*

9 According to paragraph 8 of the UN 2012 Principles: "For the purpose of the Principles and Guidelines, the term "legal aid" includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. Furthermore, "legal aid" is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes".

and procedures on the right of anyone deprived of their liberty to bring proceedings before a court.[10] Under Guideline 8 of the draft Principles, effective legal aid should be provided from the moment of arrest, for free if the person in question cannot afford it, in order to ensure that the arrested person's right of challenging his detention before a court is not restricted in any way. Guideline 18 contains specific measures for children and provides among other things that legal and other assistance should be made available for free to all children deprived of their liberty, during all stages of the proceedings.

3. Council of Europe standards

European Convention on Human Rights
Article 6

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

[...]

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 free when the interests of justice so require;

10 General Assembly, Report of the Working Group on Arbitrary Detention, A/HRC/30/ June 2015, available in English at: http://www.ohchr.org/Documents/Issues/DetentionDraftPrinciplesAndGuidelinesRightCourtReview.pdf

State's obligations under Article 6(3) in the field of criminal legal aid

A. Setting up an effective legal aid scheme

Article 6(3) of the Convention enjoins states to set up a criminal legal aid scheme that will first examine if a person is entitled to free legal aid and if yes, what form the legal aid should take.[11] The obligation to provide free legal aid is not absolute but will depend on the circumstances of each case. In terms of the test to be employed when examining if a person is entitled to free legal aid, Article 6(3) of the European Convention largely echoes Article 14(3)(d) of the International Covenant on Civil and Political Rights, while both condition the assignment of an ex officio lawyer to the satisfaction of a means test (…"not sufficient means to pay for legal assistance") and a merits test ("the interests of the justice").

The means test under the Convention

Under Article 6.3 of the Convention an accused who seeks to have an ex officio lawyer appointed ought to first establish the lack of sufficient means to pay for legal assistance. The standard employed by the Court is not that of "beyond all doubt" – rather, it will be sufficient if the accused presents "some indications" that he cannot afford to retain private counsel. In the words of the Court, evidence that the accused does not have enough means together with a "lack of clear indications to the contrary" should be enough to meet the requirements of the means test.[12]

11 *Mikhaylova v. Russia,* no. 46998/08, 19 November 2015, § 101.

12 *Pakelli v. Germany* [Grand Chamber], no. 8398/78, 25 April 1983, § 34. In that case, the applicant presented among other evidence from the Turkish tax authorities that his previous year's income was modest while he also argued that his incarceration in Germany for two years meant that during that period he could not have any income.

The merits test under the Convention

In determining whether the interests of justice require an accused to be provided with free legal representation the Court will review various criteria in order to ascertain whether the interests of justice call for the appointment of ex officio lawyer. When applying the "interests of justice" criterion the Court is not examining whether the absence of legal aid has caused "actual damage" to the accused but a less stringent one, namely whether it appears "plausible in the particular circumstances" of the case that the lawyer would be able to offer meaningful assistance to the accused.[13]

In terms of the criteria the Court has employed, the most easily reviewable is that of the **gravity of the potential sentence**. Thus, at a minimum, free legal aid should always be provided when an accused is facing a prison sentence.[14] Free legal aid should also be available when the accused is facing severe non-custodial criminal or administrative sanctions.[15] Indeed, the Court has held the authorities are under an obligation to provide a defendant with an ex officio lawyer, even if he has not expressly and explicitly requested one, with the Court highlighting that the failure on the part of the defendant to so request cannot be construed as a waiver.[16]

The Court has also held that free legal aid is called for on grounds of the **complexity of the case** – defendants should be provided with legal aid in proceedings that raise complicated factual and domestic law issues.[17] Nevertheless, this element is usually reviewed together with the accused's personal circumstances / situation such as his level of education and relevant experience: thus for example the

13 *Artico v. Italy,* no. 6694/74, 13 May 1980, §§ 34-35; *Alimena v. Italy*, no. 11910/85, 19 February 1991, § 20..

14 See e.g. *Quaranta v. Switzerland*, no. 12744/87, 24 May 1991, § 33.

15 *Pham Hoang v. France*, no. 13191/87, 25 September 1991, § 40.

16 *Padalov. c. Bulgaria*, no. 54784/00, 10 August 2006, §§ 47, 55.

17 *Quaranta v. Switzerland*, op. cit., § 34..

Court has held that the fact that a defendant has a university degree does not mean that he is able to defend his case before a court.[18] On the other hand, the Court considered that a well-educated and experienced journalist who faced civil defamation charges was not entitled to free legal aid since he had taken part in similar proceedings in the past and was in a position to adequately defend himself;[19] moreover, the Court noted that his defence ultimately rested on his ability to prove the veracity of his allegations (the defendant had claimed that his statements were true), something that he, as an experienced journalist, should be able to do.[20]

By implication, it follows that foreign nationals who do not speak the official language or are not familiar with the country's legal system should in principle benefit from the appointment of an ex officio lawyer,[21] as they cannot, for purely objective reasons, present their case before the courts themselves. The Court has also been critical in its review of ex officio legal aid (or lack thereof) provided to juveniles[22] and persons with disabilities,[23] with the Court noting that in relation to such cases, the authorities should not remain passive and wait for the accused to ask for the assignment of an ex officio lawyer but rather pro actively assign one to them.[24] In a recent case the Court also took into consideration the fact that

18 *Zdravko Stanev v. Bulgaria*, no. 32238/04, 6 November 2012, § 40..

19 *McVicar v. the United Kingdom*, no. 46311/99, 7 May 2002, § 51..

20 Ibid .§ 53.

21 *Quaranta v. Switzerland*, op. cit., § 35; Twalib v. Greece, no. 24294/94, 9 June 1998, § 53..

22 *Salduz v Turkey* [Grand Chamber], no. 36391/02, 27 November 2008, § 60: "Having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody […] the Court stresses the fundamental importance of providing access to a lawyer where the person in custody is a minor."

23 *M.S. v. Croatia* (No.2), no. 75450/12, 19 February 2015, § 153..

24 Ibid., § 153: "). Moreover, this does not mean that persons committed to care under the head of "unsound mind" should themselves take the initiative in obtaining legal representation before having recourse to a court."

the proceedings against the defendant (a pensioner with no legal training or knowledge who faced an administrative fine or even administrative detention for taking part in an unauthorized public gathering) related directly to the **exercise of fundamental freedoms** protected under Articles 10 (right to freedom of expression) and 11 (right to freedom of assembly) of the European Convention; the Court reached this conclusion even though the applicant did present some well-thought out legal arguments before the courts – evidence that informally she did benefit from legal assistance).[25]

Legal assistance by an ex officio lawyer can take different forms and does not necessarily entail that the defendant should at all times be represented by one; the Court has been willing to examine whether other forms of legal assistance by an ex officio lawyer (such as legal advice as to how to plead a case or assistance in drafting legal submissions) were effective.[26] Admittedly however, it would appear that only in instances of very simple and straightforward cases will the Court hold that mere legal assistance (as opposed to representation by lawyer) will meet the requirements of Article 6(3)(c).[27]

The Court will also examine the stage of the proceedings in which a request for legal aid is rejected; in principle, the Court will be more circumspect in its assessment of whether legal aid should be granted regarding the initial stages of criminal proceedings; this is because failure to ensure effective legal representation at the outset of a case can have a very prejudicial effect on the development of the case and irretrievably prejudice its outcome, even if some of these shortcomings can subsequently be remedied.[28] Indeed, the Court has held that individuals summoned for interrogation as suspects are entitled to free legal aid, even if they have not been arraigned and are not technically

25 *Mikhaylova v. Russia*, op. cit., § 91, 99..
26 *Benham v. the United Kingdom*, 10 June 1996, § 61..
27 See *Mikhaylova v. Russia*, op.cit, § 100..
28 *Salduz v Turkey*, op. cit., § 55.

accused of a crime.[29] On the other hand, rejection by the domestic authorities of a request for the appointment of an ex officio lawyer at proceedings pending before the last instance court (and provided that legal aid has been provided in proceedings at various instances) will not necessarily entail a violation of Article 6(3)(c) if the rejection is well reasoned (e.g. if the challenge before the last instance court does not stand any prospect of success), with the Court noting that in such cases the defendant's interests should be balanced against the need to ensure a fair allocation of scarce legal aid resources.[30] In such cases, the Court will pay particular attention to the existence of an internal judicial review mechanism that would allow a person to challenge the refusal to grant him legal aid and whether such proceedings comply with the requirements of a fair trial.[31]

B. Ensuring the provision of effective and adequate legal aid

Effective legal representation

The Court has consistently held that the mere appointment of an ex officio lawyer to an accused does not entail compliance with Article 6(3)(c); as the Court has noted, the provision in question speaks of "assistance" and not "nomination".[32] This in turn means that the state authorities should not limit themselves to merely appointing an ex officio lawyer but should also ensure that the assigned lawyer discharges his duty efficiently. This does not mean that the authorities should scrutinize each and every action of the legal aid (or privately retained, for that matter) lawyer; such oversight would amount to a violation of the legal profession's independence whereas the clients

29 *Shamardakov c. Russia*, no 13810/04, 30 April 2015, § 163.

30 *N.J.D.B. v. the United Kingdom*, no. 76760/12, 27 October 2015, § 77. Though a civil case, the Court noted that similar considerations would also be applicable in the context of criminal cases. For an older case, see *Monnell and Morris v. the United Kingdom*, nos. 9562/81 9818/82, 2 March 1987, § 67.

31 *Tsonyo Tsonev v. Bulgaria* (No. 3), no, 21124/04, 16 October 2012, § 51.

32 *Gafgaz Mammadov v. Azerbaijan*, no. 60259/11, 15 October 2015, § 93.

of a lawyer also have other means at their disposal with a view to voicing their concerns over the quality of assistance afforded to them by their lawyers.[33]

The state's responsibility for the behaviour of an ex officio lawyer can be engaged in two circumstances:

First, if the authorities knew or ought to have known that an ex officio assigned lawyer manifestly failed to provide effective representation to his principal. Thus domestic courts should propio motu examine if the court-assigned lawyer conferred with his client and whether he took steps towards discharging his duty,[34] whether he showed up for the trial[35] or whether he was present at various investigative acts (e.g. in situ inspections, reenactments and so on).[36] The Court has also held that the appointment "on the spot" and at the hearing of an ex officio lawyer who was not acquainted beforehand with either the defendant or the case-file and was granted only a short period of time (in fact, during the hearing) to conceptualize and mount his client's defence, could not be considered to constitute effective representation.[37]

Similarly, the failure of ex officio lawyers to submit any motions or challenges on their principal's behalf and the mere repetition of material already included in the case-file should alert domestic courts to the possibility that their presence is a mere formality

33 *Ananyev v. Russia*, no. 20292/04, 30 July 2009, § 52.

34 Ibid, §§ 53 – 55. See a contrario *Gabrielyan v. Armenia*, no. 8088/05, 10 April 2012 where despite the existence of serious indications that the ex officio lawyer had remained passive throughout the proceedings and that his closing arguments were devoid of any substance, the Court held that these indications did not amount to a "manifest failure" to provide effective legal assistance; as a result, it was incumbent on the applicant to raise his concerns about the quality of his legal representation with the domestic courts. Ibid., §§ 66-67, 69.

35 *Slashchev c. Russie*, no. 24996/05, 31 January 2012, § 56. .

36 *Galip Doğru c. Turquie*, no. 36001/06, 28 April 2015, § 84. .

37 *Şandru v. Romania*, no. 33882/05, 15 October 2015, § 51. While an Article 5(4) case, it is believed that the considerations would have been the same under Article 6(3)(c).

and that they are not acting in their principal's best interests.[38] It is important to note here that the Court does not require of domestic courts to examine whether the ex officio lawyer was right in choosing a particular line of argumentation over another.[39]

Second, domestic courts should ensure that formal mistakes committed by the ex officio lawyer or mistakes that can easily be remedied should not be used as a reason to reject the accused's requests. Thus for example the failure of the ex officio lawyer to file a submission in due time should not lead to the submission's rejection as this would effectively penalize his principal;[40] rather, the domestic courts should allow the applicant to file again the submission in question.[41] Similarly, if an ex officio lawyer does not attend a trial without good reason, then the court should examine whether the trial should be postponed.[42] Moreover, should the domestic court have any concerns regarding the legal aid lawyer's knowledge of and familiarization with the contents of the case-file (because e.g. he was assigned shortly before the trial and the case-file is voluminous), then it should order an adjournment.[43]

C. Respecting one's choice as to the lawyer to be assigned

The right to be defended by counsel "of one's own choosing" is by necessity subject to certain limitations in cases where legal aid is provided ex officio. Thus, whereas when appointing ex officio lawyers the relevant authorities must have regard to the accused's wishes and try to grant them as much as possible, these should not be required to when there are relevant and sufficient grounds for

38 *Gafgaz Mammadov v. Azerbaijan*, op. cit., § 93.
39 *Czekalla v. Portugal*, no. 38830/97, 10 October 2002, § 65.
40 *Anghel v. Italy*, no. 5968/09, 5 June 2013, §§ 62, 64.
41 Ibid, § 68.
42 *Vamvakas v. Grece* (No.2), no. 2870/11, 9 April 2015, § 42.
43 *Huseyn and Others v. Azerbaijan*, nos. 35485/05, 45553/05, 35680/05 and 36085/05, 26 July 2011, § 180.

deciding otherwise.[44] Similarly, Article 6(3)(c) cannot be interpreted as securing a right to have public defence counsel replaced without good reason[45] - though the defendant is under a duty to report to the appropriate authority any concerns he might have about the performance of the ex officio appointed lawyer.[46] Domestic courts have the right to appoint an ex officio lawyer in cases where the defendant's privately retained lawyer states that he will be unable to attend the trial for a considerable period of time.[47] Similarly, the frequent replacement of the defendant's ex officio lawyers does not amount, in and of itself, to a violation of Article 6(3)(c).[48]

The Court has been critical of unjustified acts on the part of defendants or lawyers when these acts do not serve any legitimate purpose: thus when a defendant refused at an advanced stage of the criminal proceedings to be represented by his privately retained lawyer (who did not refuse to continue representing his client) without adducing any reasons and asked for the assignment of an ex officio lawyer, the Court found that the domestic court's refusal to assign him on was not unreasonable.[49]

In another case, where the defendant refused to attend his trial in protest over the unjustified non-attendance of his (privately retained) lawyer (who refused to leave his cell phone and other belongings at the entrance of the prison where the trial was to be held, a restriction that the Court found to be reasonable), the Court considered this as a waiver of the defendant's right to a fair trial.[50] At the same time however, the Court considered that the refusal of ex officio to take

44 *Lagerblom v. Sweden*, no. 26891/95, 14 January 2003, § 54.
45 Ibid, § 55.
46 *Karpuyk and Others v. Ukraine*, no. 30582/04 and 32152/04, § 149. *Gabrielyan v. Armenia*, op. cit., § 67.
47 Ibid, §§ 145 – 146.
48 Ibid., § 149.
49 *Korostylyov v. Ukraine*, no. 33643/03, 13 June 2013, § 42.
50 *Razvyazkin v. Russia* no. 13579/09, 2 July 2012, § 148.

part in the closing session, in protest over the refusal of the court to allow then adequate time to familiarize themselves with the case-file, did not amount to a failure to discharge their duty. On the contrary, the Court held that in light of the specific and detailed allegations on the part of the ex officio lawyers, the authorities should have examined these allegations in depth and, if proven to be true, should have granted them time to prepare themselves.[51]

Last, the defendant is expected to comply with any relevant requirements concerning the appointment of an ex officio lawyer: the Court has held that the requirement to a defendant to withdraw his power of attorney to a private lawyer before providing the defendant with an ex officio one is not unreasonable and failure to do so is not in violation of Article 6(3)(c).[52]

D. Refusal by the appointed lawyer to discharge his duties

The European Court has been highly critical of ex officio lawyers who, once assigned to represent a client, refuse to discharge their duties due to lack of adequate remuneration. In no uncertain terms, the Court held that the interests of ensuring the smooth functioning of a justice system and the holding of court proceedings unhindered by unjustified delays take precedence over the lawyer's concerns about the level of his remuneration. In the words of the Court:

> *"Any dispute about the remuneration of the applicant as an ex officio counsel could not have been expected to take precedence over the proper conduct of the judicial proceedings and those judicial proceedings could not have been expected to be the forum where such a dispute should be resolved."*[53]

51 *Huseyn and Others v. Azerbaijan*, op. cit., § 183.
52 *Zelenka v. la République tchèque* (dec), no. 27501/10, 25 November 2014.
53 *Konstantin Stefanov v. Bulgaria*, no. 35399/05, 27 October 2015, § 62.

4. European Union

European Union Charter of Fundamental Rights

Article 48

Presumption of innocence and the right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Although shorter than either Article 6(3) of the European Convention which largely echoes Article 14(3)(d) of the International Covenant on Civil and Political Rights, Article 48 of the European Charter has for all intents and purposes the same meaning and scope as both of them and in particular with Article 6(3) of the European Convention, as in accordance with Article 52(3) of the European Charter:

> *"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."*[54]

Even though the scope and content are the same, however, it should be noted that the European Charter's field of application is narrower than that of the European Convention since the former is applicable to EU institutions and EU Member States only when they are implementing EU law.[55]

54 The European Charter, together with its Explanatory Memorandum, is available in all European Union official languages at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:C:2007:303:TOC

55 Ibid, European Charter, Article 51.

Stockholm Programme and beyond

The **Stockholm Programme** was a five-year plan (2000-2014) that contained the EU's priorities in the area of justice, freedom and security.[56] One of the priorities related to the adoption of common EU-wide minimum standards on the rights of suspects and accused persons in criminal proceedings. These were set out in the so-called Swedish Roadmap which is effectively the Stockholm Programme's action plan in the field of procedural defence rights in the field of criminal law. The Roadmap contained six Measures (Measure A, Measure B, Measure C1, Measure C2, Measure E and Measure F) which aim at promoting the protection of the rights of suspected and accused persons in criminal proceedings.

Each Measure addressed a different crucial aspect of procedural criminal defence rights: thus Measure A addressed the suspect/accused's right to interpretation and translation, Measure B addressed the aspect of access to information, Measure C1 related to access to a lawyer, Measure C2 concerned legal aid reform, Measure E concerned the rights of vulnerable accused and suspected persons and Measure F concerned pretrial detention.

Measure A of the Roadmap resulted in a Directive on the right to interpretation and translation in criminal proceedings,[57] while under Measure B of the Roadmap, a directive on the right to information in criminal proceedings.[58] Nevertheless, during the Programme's

56 In 2014 and following the conclusion of the Stockholm Programme the European Council adopted a set of conclusions regarding, among others, criminal defence rights. The conclusions, together with relevant documentation, are available at http://eujusticia.net/index.php/proceduralrights/category/future-eu-justice-reform

57 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, available in all EU official languages at: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1420626533290&uri=URISERV:jl0047

58 Directive 2012/13/EU of the European Parliament and of the Council of 22

duration, it was not possible to adopt a directive under Measure C2 (legal aid reform); instead, on 27 November 2013 the European Commission adopted a nonbinding Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings.[59]

While highly supportive of and largely in agreement with the content of the recommendation, the Council of Bars and Law Societies in Europe (CCBE) lamented the failure of the European Commission to adopt a binding Directive (as opposed to a non-binding Recommendation) and the postponement of any further review of the issue for four years following the adoption of the Recommendation.[60]

Despite the above justified critical remarks, the Recommendation is a very advanced standard-setting (albeit soft-law) instrument and is informed, among others, of the 2012 United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. As its title suggests, it is applicable not only to persons who have been formally indicted but also to those merely suspected of having committed a crime –the recommendation makes clear that the right is applicable "from the time they are suspected of having committed a criminal offence" until "the conclusion of the criminal proceedings".[61]

May 2012 on the right to information in criminal proceedings, available in all EU official languages at: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1420626533290&uri=URISERV:jl0069

59 C(2013) 8179 final, available in all EU official languages at: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32013H1224(03)

60 CCBE, Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings, 4 April 2014, available in English at: http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_04042014_CCBE_Rec1_1399541977.pdf Under Recital 17 of the Recommendation, Commission is enjoined to review the state of play within four years from the notification of the Recommendation and assess if its objectives are met; if that is not the case, then the Commission should examine if further measures (including legislative, i.e. the adoption of a directive) are necessary. As of the date of writing (December 2015) the European Commission has not made public its findings in this respect.

61 Ibid, Section 1, Article 2.

The Recommendation seeks to ensure that suspected / accused persons are provided with "effective" and not pro-forma legal aid, legal aid that should available to them if they lack sufficient financial resources to meet some of all the costs of procedure (the "means test") and / or when the provision of legal aid is required in the interests of justice (the "merits test"). The Recommendation sets out pretty detailed guidelines that the authorities have to observe when deciding whether to grant free legal aid or not, while the relevant decisions should be amenable to judicial review; in this respect, it should be noted that whereas the Recommendation does not prohibit Member States from defining a threshold above which a person should be considered as able to meet the relevant costs, authorities are still under the obligation to examine if that person can in fact meet all or part of the costs.[62]

Moreover, the Recommendation makes it clear that persons should not be asked to prove "beyond any reasonable doubt" (a very high threshold that would require individuals to prove conclusively that they qualify for legal aid) that they are not able to meet the costs of the criminal proceedings.[63] The Recommendation also calls upon Member States to take all necessary steps in accrediting, training and appointing legal aid lawyers with a view to ensuring that they are able to provide quality legal aid.[64] An interesting provision is to be found in Section 3, Article 23 which provides that: "The accreditation of legal aid lawyers should as far as possible be linked with an obligation to undergo continuous professional training". Another interesting provision is to be found in Section 3, Article 24 which provides that the preference of a suspected / accused person to a particular legal aid lawyer should, as far as possible, be taken into account by the authorities when appointing that person with a legal aid lawyer.

62 Ibid, Section 2, Article 9.
63 Ibid, Section 2, Article 10.
64 Ibid, Section 3.

Overall, the Recommendation reflects many of the recent developments in the field of free legal aid. It will be therefore interesting to see the Commission's next steps in this field and whether the recommendation will form the basis of a fully-fledged directive on legal aid in criminal proceedings.

5. Findings by international bodies regarding Albania on the right to access to a lawyer in criminal proceedings

The right to access to a lawyer (whether privately retained or appointed ex officio, that is, by the state) of persons placed in detention in Albania has been in the spotlight of numerous international bodies, all of which seem to agree that the situation is particularly problematic. The brunt of the criticism is directed at the Albanian authorities' failure to ensure that persons placed under arrest can benefit as soon as possible from legal advice and representation.

United Nations

In its Concluding Observations on Albania adopted in 2013, the **UN Human Rights Committee** (the body entrusted with supervising the implementation of the United Nations International Covenant on Civil and Political Rights) expressed its concern that the right of access to lawyer after arrest is not always respected and that criminal legal aid is not effective; the Committee also expressed its concern regarding bribe-taking in order to release arrested persons. The Committee called upon Albania to ensure that detained persons could access a lawyer immediately after their arrest, as well as to combat corruption in this field.[65]

Similar were the earlier (2012) findings of the **UN Committee on the Rights of the Child** (the body entrusted with supervising the

65 UN Human Rights Committee, Concluding observations on the second periodic report of Albania, CCPR/C/ALB/CO/2, 22 August 2013, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Downloadaspx?symbolno=CCPR/C/ALB/CO/2&Lang=En , paragraph 17.

implementation of the United Nations Convention on the Rights of the Child), which noted that there had been cases of children detained for up to 48 hours in police stations, in cells together with adults, without being provided with access to a lawyer. The Committee urged Albania to "Ensure that children are no longer detained in police stations together with adults and without access to a lawyer."[66]

In the same vein, the **UN Committee Against Torture** (the body entrusted with supervising the implementation of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) also noted in 2012 that the right of detainees to timely access to a lawyer has often not been respected; the Committee called upon Albania to regularly train police officers on the legal obligation to grant detainees with access to a lawyer from the outset of their detention.[67]

Organization for Security and Cooperation in Europe (OSCE)

In a 2006 Report, the OSCE noted that, on the basis of surveys among both lawyers and detainees, it would appear that ex officio appointed defence counsels consign themselves to a largely passive role during the conduct of the criminal proceedings. It was reported that in many cases, the ex officio lawyer would accompany the prosecutor and sit silent during the interrogation, following which he would not visit his client again. Ex officio lawyers tended to consult less regularly with

66 UN Committee on the Rights of the Child, Concluding observations the combined second to fourth periodic reports of Albania, CRC/C/ALB/CO/2-4, 7 December 2012, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/ALB/CO/2-4&Lang=En , Section entitled "Administration of juvenile justice".

67 UN Committee Against Torture, Concluding observations of the Committee against Torture: Albania, CAT/C/ALB/CO/2, 26 June 2012, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Downloadaspx?symbolno=CAT/C/ALB/CO/2&Lang=En , paragraph 13.

their clients and would merely show up at the hearings, without having agreed with their clients on a defence strategy first.[68]

Regarding the method of appointment of ex officio lawyers, interviewed lawyers noted that judges and prosecutors often did not observe the relevant framework and made appointments on the basis of their preferences. In other cases, it was reported that an ex officio lawyer appointed at the beginning of a case might subsequently find out that he has been replaced by another lawyer. According to one of the interviewees:

> *"Sometimes the judge decides to change counsel during the trial. If the judge does not know you, you don't get any cases; the list provided by the Chamber of Advocates depends completely on friendships."*[69]

Appointed lawyers also reported delays in receiving their low remuneration, with some noting that they frequently were not paid at all.[70]

Council of Europe

Committee for the Prevention of Torture

In its 2014 Report following its visit to Albania, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") reiterated its previous (in 2010) findings to the effect that while there was some progress in respecting arrested persons' rights and that more detainees reported that their

68 Analysis of the Criminal Justice System of Albania, Report by the Fair Trial Development Project, OSCE 2006, available in English at: http://www.osce.org/albania/22211?download=true , page 72.

69 Ibid, page 80.

70 Ibid, page 83.

right of access to a lawyer was being respected, significant problems were still observed. Thus the CPT noted that it again received complaints that police often delayed granting the detainee's request to meet with his lawyer (privately retained or legal aid lawyer) at the initial stages of custody, while other detainees reported to the CPT that despite requesting the appointment of an ex officio lawyer upon arrest, they would meet with their lawyers for the first time at the first court hearing. The CPT reiterated its recommendation that the Albanian authorities should:

> *"[...] Remind all police officers of the legal obligation to grant access to a lawyer* ***from the very outset of a person's deprivation of liberty****. Further, steps should be taken in consultation with the Bar Association to ensure that ex officio lawyers appointed to represent persons in police custody perform their functions in a diligent and, more specifically, timely manner."*[71]

Regarding the rights of juveniles in particular, the CPT noted it received numerous allegations that arrested minors were questioned by the police without a parent / guardian or a lawyer being present, whereas in a few cases they were also forced to sign statements. The ECPT called upon the Albanian authorities to take measures to ensure that juveniles placed under arrest are not allowed to make any statement or sign any document without benefitting first from a consultation with a lawyer and another adult in whom the juvenile has confidence.[72]

In its Response to the CPT, the Albanian Government maintained that the police fully respect the arrested persons' right to contact a lawyer, whereas regarding minors, the Government noted that legal

71 Report to the Albanian Government on the visit to Albania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 14 May 2010, CPT/Inf (2016)6, available in English at: http://www.cpt.coe.int/documents/alb/2016-06-inf-eng.pdf , paragraph 24. Bold and underlining in the original.

72 Ibid, paragraph 25.

representation is mandatory even if they (the minors) waive their right to it. The Government also noted that during investigative measures regarding minors, a psychologist is always present.[73]

Commissioner for Human Rights

In a 2014 Report following his visit to Albania, the Commissioner for Human Rights of the Council of Europe expressed his concern over allegations that detainees' access to a lawyer is delayed or even denied, and referred to the ECPT's 2010 report findings and UN Human Rights Committee's findings set out above.[74] The Commissioner called upon the authorities to give effect to the relevant recommendations of the CPT.

European Court of Human Rights

The issue of access to quality ex officio legal aid has been raised in a series of cases brought against Albania before the European Court of Human Rights (the Court or the ECtHR). Thus in the *Balliu v. Albania* case, the applicant, following the persistent failure (without any good reason) of his privately retained counsel to attend the trial, refused to defend himself in person. He also refused to be defended by an ex officio lawyer, even though one was assigned to defend him. Faced with this double refusal, the domestic court proceeded to hold the trial, in the applicant's presence. When the latter complained before the ECtHR that he did not benefit from legal assistance, the

73 Response of the Albanian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 4 to 14 February 2014, CPT/Inf (2016)7, available in English http://www.cpt.coe.int/documents/alb/2016-07-inf-eng.pdf , page 9.

74 Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following a visit to Albania from 23 to 27 September 2013, CommDH (2014)1, 16 January 2014, available in Albanian at: https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH(2014)1&Language=lanAlbanian&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864 , paragraphs 143 – 145.

Court held that by refusing the appointment of an ex officio lawyer without good reason, he had waived his right to be defended by a lawyer, while the authorities had taken all reasonable measures in the circumstances to afford him a fair trial.[75]

Similarly, in the case of *Haxhia v. Albania*, the Court found no violation of Article 6(3)(c), noting that the applicant had effectively waived his rights by voluntarily leaving the hearing room and refusing to allow anyone to defend him.[76] In the case of *Caka v. Albania*, the Court held that the applicant's right to be provided with an ex officio lawyer had not been breached since he had retained five lawyers in the course of the proceedings and as a result there was no indication that he could not afford legal assistance.[77]

A very important case that amply demonstrates the importance of legal assistance upon arrest is that of *Kaçiu and Kotorri v. Albania*. In that case, the first applicant alleged that he had been ill-treated by the police at the police station with a view to extorting a confession and that he had been refused access to his own lawyer. He was fortunate enough, however, to be represented by an ex officio lawyer assigned to him who, upon meeting him for the first time before at the hearing and witnessing his visible injuries, insisted that an entry be made in the minutes of the hearing that his client had been beaten up in police custody.[78] Considering that there was no other piece of evidence (e.g. a medical certificate) attesting his injuries, it was precisely because of the entry of this statement thanks to the ex officio lawyer that the Court found that the first applicant had been tortured with a view to self-incrimination, in violation of Article 3. The subsequent use of his confession in the criminal proceedings against him and the second applicant rendered them unfair and in violation of Article 6(1).[79] In addition to the

75 *Balliu v. Albania*, no. 74727/01, 16 June 2005, §§ 35 - 37.
76 No. 29861/03, 8 October 2013, at § 133.
77 No. 44023/02, 8 December 2009, § 87.
78 Nos. 33192/07 and 33194/07, 25 June 2013, § 14.
79 Ibid, §§ 99, 118. The Court also found a violation of Article 6(3)(c) noting that,

awarding of compensation, the Court also noted that both applicants could request the reopening of the criminal proceedings against them.[80] According to information subsequently provided by the Albanian Government to the Council of Europe's Committee of Ministers that supervises the execution of ECtHR judgments, Mr. Kotorri had filed a request for the reopening of the criminal proceedings against him; the Criminal College of the Supreme Court admitted his request and remitted the case for a fresh consideration; as of April 2015, the case was pending before the Tirana District Court.[81]

Last, another interesting case that as of the date of writing (December 2015) is pending before the ECtHR is that of *Fatmir Cupi v. Albania*. In that case the applicant, who was 18 at the time of the events in question, was arrested and questioned in connection with a double murder and the wounding of two other persons. According to the minutes of the interrogation, the applicant stated that: "*I do not have a lawyer ... later, I will speak to my father to see whether he could secure me one. I agree to give explanations*." Subsequently seized by a constitutional complaint in which the applicant claimed that he had not been provided legal assistance, the Albanian Constitutional Court held that the applicant had freely waived his right to a lawyer. Nevertheless, the ECtHR seems to consider that the failure to ensure that the applicant was provided with an ex officio lawyer was in violation of Articles 6(1) and 6(3) of the Convention.[82]

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in light of his torture in the hands of the police , his alleged refusal to contact his lawyer when signing his confession (as the Government alleged) was more likely due to his desire to end his suffering.

80 Ibid, § 167.

81 Secretariat of the Committee of Ministers, Albanian Ministry of Justice - Office of the General State Advocate letter on the Caka v. Albania group of cases, DH-DD(2015)481, 6 May 2015, available in English at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2741062&SecMode=1&DocId=2266098&Usage=2 , page 3.

82 No. 27187/08, communicated to the Albanian Government on 19 February 2014.

Of interest also is another question addressed by the ECtHR to the Albanian Government: it appears that two minors also implicated in the incident and who made statements incriminating the applicant were questioned by the police in the absence of a lawyer. Whereas the applicant challenged their testimonies on that ground (as well as on the ground of physical duress), the domestic courts dismissed his objections. Nevertheless the ECtHR in its question appears to consider that the questioning of the two minors in the absence of a lawyer was in violation of the relevant provision of the Criminal Procedure Code.

6. Summary of international standards

In summary, international standards require that:

1. Every person who does not have the necessary financial means and is facing charges that have serious repercussions (the means and merits test) should be entitled to criminal legal aid. In cases of doubt as to whether the defendant meets the means test, legal aid should be provided if the interests of justice so require.

2. Criminal legal aid must be made available in each of these situations: a) when the person is detained or summoned as a suspect b) upon arrest and / or upon being charged with a criminal offence c) during court proceedings and d) after the trial and during the execution of the judicial decision. Thus legal aid should also be provided to prisoners who might require legal aid in order to challenge different aspects of their prison conditions.

3. The criminal legal aid provided should be effective (in theory and in practice); this entails among others the granting of adequate time to the legal aid lawyer to consult with his / her client, the exemption from court and other expenses but also the timely payment of legal aid lawyers.

4. Persons should be informed of their right to seek and obtain criminal legal aid from their very first contact with the police or the prosecutor.

5. Special measures should be taken for vulnerable groups (such as juveniles and persons with disabilities), providing not only for the ex officio assignment of a legal aid lawyer but also that of a psychologist, social worker or any other kind of expert, depending on the defendant's needs.

6. Criminal legal aid should be available nationwide.

7. Criminal legal aid should be of an adequate quality standard. Legal aid lawyers should be professionally competent and hold the necessary qualifications, while they should also be required to attend continuing education / specialised training programmes. Furthermore, their work should be subject to monitoring and evaluation, and complaints submitted against them should be promptly investigated and adjudicated.

8. Every suspect / defendant should be afforded the possibility of expressing his preference as to the legal aid lawyer to be assigned to represent him / her.[83]

9. The appointment of a criminal legal aid lawyer should be carried out by an authority independent of the police or the prosecutor, in order to avoid arbitrariness, potential political influence or other forms of conflict of interest.

10. The level of financing of the criminal legal aid scheme should be such as to ensure that the funds allocated correspond to the needs. The funds should be distributed in a fair and proportional

83 It should be noted that under international law there is no right to choose one's state appointed lawyer. Nevertheless states are encouraged, to the extent possible, to take into consideration the defendant's choice as to the lawyer who will represent him / her.

manner among all the state agencies / independent bodies that have a role in the criminal justice system, such as the police, prosecutors, courts or special legal aid commissions.

11. Practical measures should be taken with a view to promoting access to criminal legal aid, such as encouraging partnerships between the state legal aid bodies and Chambers of Advocates / Bar Associations, universities or other stakeholders (e.g. NGOs) that have established legal clinics or offer free legal aid; establishing an appropriate system of remuneration and taxation of lawyers, and also encouraging (by means of e.g. tax discounts) lawyers to work in economically disadvantaged areas and so forth.

VI. LEGAL AID IN THE CRIMINAL PROCESS IN ALBANIA: THE DOMESTIC LEGAL FRAMEWORK

The right to have a lawyer appointed by the state when a person does not have sufficient financial means to retain one is enshrined in different instruments of the Albanian legal order.

1. The right to legal aid in the criminal process in Albania: an overview

Constitution of the Republic of Albania

Article 42.2 of the Constitution provides that:

> *"Everyone, for the protection of his constitutional and legal rights, freedoms, and interests, or in the case of an accusation raised against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law."*

The constitutionally protected right to due process of law comprises a series of guarantees that aim to make this right effective, one of which is the right to have access to legal assistance and legal representation. Article 42.2 of the Constitution echoes similar provisions of international law set out with in Chapter V above such as for example Article 6 of the European Convention on Human Rights.

This right is recognized to everyone, regardless of his or her economic status, in order to preserve the principle of equality of citizens before the law, as prescribed by Article 18 of the Constitution, according to which no one may be discriminated against not only on grounds of race or religion but also grounds of economic conditions, education or social status.

The state does not have the obligation to assign a legal aid lawyer if no justified and objective reason exists, as is the case when the persons have the possibility to retain a lawyer themselves or have the appropriate educational and social level to guarantee that they can defend themselves, provided that their case is not particularly complex.

Defence by a legal aid lawyer is guaranteed more concretely by Article 31 of the Constitution, which provides that during the criminal process, everyone has the right:

> *"… ç) to be defended by himself or with the assistance of a legal defender chosen by him; to communicate freely and privately with him, and also to be assured of defence for free, when he does not have sufficient means; "*

By virtue of this constitutional provision, the right of access to legal aid is entrenched, and the state is enjoined to provide a legal aid lawyer to those persons who are unable to pay for a lawyer themselves. It is to be noted that Article 31 does not speak of "appointing" but of "assuring"

a defence lawyer, which can be understood to mean that the state has the obligation to take measures so that the various procedural actions in the context the criminal process will not take place without the participation of a defence lawyer, and the concomitant obligation to remunerate him for his services. Rather interestingly, the provision does not require that the authority charged with appointing criminal legal aid lawyers by a state one, thereby leaving room for the appointment to be done by another body, such as e.g. the National Chamber of Advocacy.

The Constitution also provides that access to legal counsel should be secured when a person's liberty is restricted, whether by means of detention, arrest or imprisonment. Thus according to Article 28.1 of the Constitution:

> *"Everyone who has been deprived of liberty has the right to be notified immediately in a language that he understands of the reasons for this measure, as well as of the charge made against him. The person who has been deprived of liberty should be notified that he has no obligation to make a declaration and has the right to communicate immediately with and he shall be the given the possibility to realize his rights…"*

From a combined reading of the constitutional provisions cited above, it transpires that the Albanian State is under the positive obligation to not merely formally recognise the right to legal representation in criminal proceedings but also to undertake all necessary measures with a view to promoting and implementing it in practice.

Code of Criminal Procedure

The constitutional right to legal representation, as one of the constituent elements of the right to a fair trial, is reflected in a series

of provisions of the Code of Criminal Procedure (CCP), which regulate different aspects of the right to free legal representation, such as the bodies competent for appointing a defence lawyer, the appointment criteria, the lawyer's rights and obligations, and his professional liability during the exercise of his duties.

The right to free legal representation is set out in one of the very first articles of the CCP. Thus Article 6 of the CCP provides that:

> *"The defendant shall be entitled to be defended either personally, or by assistance of a defence counsel. In case he cannot afford one, he shall be provided with free defence counsel."*[84]

The cases when a lawyer is appointed ex officio are regulated in principle by Article 49.1 of the CCP, which provides that:

> *"The defendant, who has not chosen a defence counsel or who has remained without one, shall be assisted by a defence counsel appointed by the proceeding authority, if he asks for one."*

The article sets out three situations in which a lawyer should be appointed ex officio: a) when the defendant has not retained a lawyer; b) when the defendant appointed a lawyer at the beginning, but later revoked his power of attorney, and c) when the lawyer has withdrawn from representing the defendant and consequently the defendant has been left without a defence lawyer. Nevertheless the article is problematic in two respects. First, it provides that the appointment of a legal aid lawyer will take place only after the defendant makes an express request to that effect - this presupposes that the defendant has been informed in due time of his right to have

84 All references to articles of the Albanian CCP pertain to the CCP version in force before the numerous amendments introduced by means of Law 35/2017 and are reproduced from the English translation of the CCP available at: http://www.seepag.info/download/albania/Criminal%20Procedure%20Code.pdf

a legal aid lawyer appointed, which is not always the case. Second, the appointment is made by the proceeding organ (namely the judicial police, the prosecutor or the court - depending on the phase of the proceedings in which the defendant requests the appointment of a legal aid lawyer) which, as it will be further presented in more detail below, finds itself in a situation of conflict of interest, particularly so if the proceeding organ is the prosecutor, whose decisions the defence attorney has to challenge.

Equality of arms and the adversarial principle

One of the important principles of due process of law is the equality of arms, namely that the parties in the proceeding should be given equal means and opportunities to present their claims, This principle assumes special importance in criminal proceedings where the defendant is facing the accusatory organ, namely the prosecutor, which represents the interests of the state in the criminal process.

The principle of equality of arms is closely linked to the adversarial principle, according to which the parties should be given an equal opportunity to present their views about the evidence, the acts, the different claims and so forth. Considering that the state is represented by the prosecutor, a legal professional, the principle of equality of arms dictates that the defendant should benefit from the services of a defence lawyer, a legal professional, throughout the duration of the legal proceedings.

In connection with this principle, the Constitutional Court held in Decision No. 5/2003 that:

> *"In order to guarantee a fair criminal process, it is of fundamental importance that the accused takes part in and is legally defended at trial; if he does not appear, he cannot be tried without first having*

defence by a lawyer secured. A contrary position would conflict with Article 42 of the Constitution and with the requirements of Article 6 of the European Convention on Human Rights. For the right to defence by a lawyer to be real and effective and not merely theoretical, its exercise should not be hindered, but on the contrary, the court should take all legal measures in the service of a fair proceeding not only to assure the presence of a defence counsel at the trial, but also to make it possible for him to have a real defence, respecting the equality of arms."

In this decision, the Constitutional Court placed particular emphasis on the issue of the quality of legal defence, which should not be equated to a mere formality. Thus the mere presence of a lawyer is not, according to the Constitutional Court, a sufficient guarantee that the defendant's right to a fair trial will not be violated. Rather, the court should take all these operational measures that are necessary with a view to enabling the lawyer to carry out his duty, namely to protect the defendant's substantive and procedural rights. Thus for example, a court should request propio motu that a state-appointed lawyer be replaced if he remains passive during the hearing, does not appear to possess an adequate level of professional knowledge and skills or is not familiar with the contents of the case file.

In another decision, the Constitutional Court noted that:

"...Especially in a criminal proceeding, the equality of arms and the adversarial principle, and closely linked to them, the protection of the defendant's rights, as expressly guaranteed in Article 31 of the Constitution and Article 6 of the European Convention on Human Rights, constitute in themselves the most vital and fundamental elements of due process of law. In order to respect those elements, the courts should rigorously fulfil a series of obligations, among which and depending on the facts of each

case, particular diligence should be shown in the serving of the notice of the accusation to the defendant or his defence counsel, the serving of the appeal or the appeal in law, and the notification of the day and place of the trial of the case. The principal aim is to have a real debate between the prosecution and the defence, which directly and positively affects the uncovering of the truth and the rendering of justice by the court, with objectivity and impartiality. These constitutional and legal requirements are in the service of the most effective defence possible for the defendant, because it is the state itself that stands against him, represented in the criminal proceeding by the prosecutor, who presents and defends the accusation against him. It is the duty of the state to take the appropriate measures to guarantee the participation of the accused person or his legal defender, whether chosen or appointed ex officio, in the criminal proceeding (see Constitutional Court Decision No. 19/2003).

For the reasons above, a privately retained or ex officio appointed lawyer should have the right to object, to debate, to introduce evidence and documents to realize fully the protection of the rights of the defendant. A violation of this principle means that the proceeding does not comply with the due process of law principle"[85].

In the above-cited decision, the Constitutional Court further elaborated on its understanding of an effective criminal defence, according to which the role of the lawyer, together with the behaviour of the proceeding organ, jointly affect the quality of the defence. If the conditions for an effective defence are not respected, the judicial proceeding can be characterized as lacking due process and running contrary to the constitutionally entrenched fair trial guarantees.

In practice however, in order for a proceeding to be considered as lacking due process, a complaint to that effect must be brought

85 Constitutional Court Decision No. 19/2008.

before the trial court and, if not successful, relevant legal remedies before higher judicial instances, including the High Court, must be pursued. As it will be explained in more detail in Chapter VII, very few or hardly any cases in which legal defence is provided ex officio go as far as the High Court, which is a precondition for the filing of complaint with the Constitutional Court. As a result, many cases in which there are strong grounds to consider that the quality of legal defence provided ex officio was inadequate never reach the Constitutional Court.

2. The reflection of international standards in domestic legislation

2.1. The right to obtain legal aid in a case of economic inability or for the interests of justice

International standards suggest that the right to obtain legal aid should be recognized to everyone who does not have the financial means and the interests of justice require the provision of legal aid (the "means and merits" test). Mere doubts as to whether a person meets the means test should not prevent the authorities for appointing a legal aid lawyer, at least on a provisional basis, as long as the merits test is satisfied.

Under domestic legislation, a criminal legal aid lawyer should be appointed to represent a defendant in all cases when first, he does not have one and second, the presence and assistance of a lawyer is mandatory (Article 49 CCP).

At first glance, the impression is created that the international standard has been met if not exceeded, since the proceeding organs are not required to perform the means test with a view to ascertaining whether the individual has enough financial means and consequently is ineligible for legal aid, while -and with some important qualifications-, the merits test is usually easy to satisfy.

Under this approach, the appointment of an ex officio lawyer takes place almost by default, unless the defendant has already retained private counsel. Although the recognition of such a wide-ranging and almost automatic right to legal assistance is positive, the manner in which Article 49 of the CCP is formulated and interpreted in the judicial practice allows for cases where a legal aid lawyer is appointed by the state even in cases when the defendant has enough financial means, thereby entailing the unfair expenditure of public funds. Considering that those funds are limited, they would be more fairly expended if oriented toward a more qualitative protection of those individuals who truly are unable to retain private counsel.

2.2. Phases of the criminal proceeding in which legal aid is provided

According to international standards, legal aid should be provided in each of these phases of the criminal proceeding:

1. When the person is detained or summoned as a suspect;
2. During the preliminary investigation stage;
3. During trial; and
4. After the trial phase, during execution of the judicial decision. This includes the possibility of providing legal aid to prisoners with a view to e.g. challenge different aspects of their detention or, in case of release, seek damages for unjust imprisonment.

We will see below how this principle is reflected in Albanian legislation.

A general provision about the obligation of the state to provide legal aid is provided in Article 49 CCP, according to which free legal assistance is provided in respect of all procedural actions for which the presence of a lawyer is required (for example, when deciding on the imposition of a measure restrictive of liberty or questioning by

the judicial police). In this context, as the Constitutional Court has observed in Decision No. 25/2011:

> *"For the right of defence to be real and effective, and not merely theoretical, its exercise should not be impeded, but on the contrary, the court should take all legal measures in the service of due process not only to assure the presence of a defence lawyer at trial but also to give him the possibility to mount a real defence, in conformity with the principle of equality of arms (see Constitutional Court Decisions No. 5 dated 17.02.2003 and No. 33 dated 24.11.2003). The right of everyone who has been criminally accused to be effectively defended by a lawyer, when necessary, even one appointed ex officio, is one of the fundamental characteristics of a fair trial."*

According to the CCP, the right to be represented by a lawyer appointed by the state is guaranteed from the moment when the person is under investigation as a defendant and up to the time the decision in the proceedings have become final. This however means that a person who has not been formally indicted (and is not therefore formally a defendant) does not enjoy the right to free legal aid in cases where he is detained by the police or interrogated as a suspect by the judicial police.

The Joint Benches of the High Court have broadened the definition of the term "defendant", considering that even persons that are under investigation by the police (and not formally indicted) should be considered as defendants for the purposes of the CCP. Thus in its Unifying Decision 3 dated 27.09.2002, the High Court held as follows:

> *"Summarizing the above, it is concluded that the legal status of the alleged perpetrator of a criminal offense from the moment the prosecution is notified of it up to the moment of the end of the investigation (Article 327) evolves from that of a "person to whom the*

criminal offense is attributed" to that of the "person against whom an investigations is being conducted" and finally to "defendant", notwithstanding whether the charges are eventually dismissed (Article 328) or the defendant is committed to trial (Article 331). As a rule, the status of defendant is formally granted at the end of the criminal investigation and before the case file is deposited for trial, but it can also be granted at any previous moment. Granting or not the status of the defendant to a person before the conclusion of the investigation lies entirely in the judgement of the prosecutor, and it is something the prosecutor can do at any phase of the investigation, up to its conclusion. Nevertheless the prosecutor can decide to do so only after securing sufficient evidence to that end (Article 34/1 of the Code of Criminal Procedure).

...In addition to the provisions cited and analysed above, this also flows from Article 5 of the Code of Criminal Procedure, which provides that: "A person's liberty may be restricted only following the adoption of a restrictive measure, in the cases and in the manner provided by law". The rule set out in Article 5 is further elaborated upon and amply clarified by point 4 of Article 34 of the Code of Criminal Procedure, where it is stipulated that: "the provisions that are applicable to a defendant are also applicable to a person under investigation, except for the cases when this code provides otherwise. The rights and guarantees that have been provided for the defendant also extend to this person [that is, the person under investigation]".

A similar problem concerning the applicability or not of the right to legal aid also appears at the other end of the spectrum, namely after the final decision has been issued by the appellate jurisdiction. Thus it appears that legal aid is not in principle available at the post-trial phase, and convicted defendants cannot benefit from it in order to file an appeal on points of law before the High Court or a complaint

before the Constitutional Court, as well as launch any other action concerning for example their prison conditions or seek damages for unjust imprisonment if their conviction is ultimately quashed.

Apparently aware of this legal vacuum, the Constitutional Court addressed the issue of access to legal aid with a view to filing an appeal on points of law. In its Decision No. 9, the Constitutional Court noted the following:

> *"The Court emphasizes again that especially in a criminal proceeding, the twin and closely interlinked principles of equality of arms and of adversarial proceedings that should underpin the defendant's defence, principles expressly guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, constitute in and by themselves the most fundamental elements of due process of law in the constitutional meaning. Those fundamental elements of due process of law should be respected at all judicial instances, including that before the High Court. Unlike the strict trial procedures conducted before the ordinary courts [first and second instance], a trial before the High Court has as its special feature the fact that only legal arguments are submitted. The complexity of the trial proceedings before the High Court is also confirmed by the provisions that oblige the parties to be represented by their legal counsels. Therefore, the examination in the High Court mainly of issues of law not only completely justifies in the hearing session the representation of the parties by their lawyers but additionally it is essential with a view to guaranteeing an effective and professional defence to the benefit of the defendant (see Constitutional Court decisions no. 28 dated 02.10.2009, no. 37 dated 24.12.3010)[...] The Court has emphasized that the interests of justice require the mandatory representation by a lawyer, including where applicable by a lawyer appointed ex officio, of the defendant in cases brought before the Criminal*

College of the High Court following the filing of an appeal on points of law by the prosecutor by which, among other things, the prosecutor seeks the review of the final decision rendered by the appellate court, to the detriment of the defendant".

Concluding, it is asserted that Albanian law guarantees the right to state-provided legal assistance during a number of procedural actions throughout the criminal proceedings. Nevertheless due to the wording of the relevant legal provisions - and notwithstanding the existence of authoritative jurisprudence that could fill in those gaps-, criminal legal aid is not guaranteed at the phase of police investigation (namely before the filing of charges by the prosecutor) and at the post-trial phase, namely the phase after the rendering of a final decision by the criminal appellate court.

2.3. Meeting between the lawyer and the suspect or defendant in criminal proceedings

International standards require that a lawyer appointed ex officio shall have the possibility to meet with his client from the first moment the latter is detained or summoned by the police. The meeting between them should also be conducted in appropriate conditions, in terms of facilities, time and phase of the criminal proceedings.

One of the rights that Albanian legislation recognizes to the defendant is that of unhindered and confidential communication with his lawyer. Article 50.2 CCP provides that:

"The defence counsel has the right to communicate freely and in private with the person who has been detained, arrested or convicted [...] "

Article 52 CCP sets out a number of professional privileges enjoyed by the defence lawyer, privileges that are indirectly enjoyed by the

defendant as well. Thus according to that article, the consultation between the detained or arrested person or the defendant and his defence lawyer is confidential and eavesdropping is prohibited. It is also prohibited to search correspondence between a lawyer and his client.[86] Evidence obtained in violation of Article 52 CCP cannot be invoked in court.

Moreover, providing for appropriate conditions for meetings between the lawyer and the client to take place is also implicitly required by Article 16 of the Albanian Attorney Ethics Code[87], according to which the lawyer has the obligation to explain to the client the relevant legal framework and the legal strategy that he will pursue, and present the potential legal outcomes.

Despite the existence of provisions in the legislative framework safeguarding a person's right to a lawyer from the outset of his detention / arrest, there are persistent doubts as to whether they are respected in practice, doubts that are also espoused by international organizations and institutions. As the Council of Europe's Commissioner for Human Rights observed in his report on Albania:

> *"The Commissioner has noted with concern that cases continue to be reported where access to a lawyer by persons charged with criminal offences and deprived of liberty is denied or delayed. This problem has been noted by the CPT since 1997. In its 2012 report on Albania the CPT stressed that, even though it had noted a significant increase in the number of persons enjoying access to a lawyer while in police custody, it heard allegations to the effect that police officers delayed access to a lawyer, in order to informally question the person concerned without the*

86 See Article 52.4 and 52.5 CCP.

87 Available in English at: http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Albania_Attorney_Ethics_Code.pdf

presence of a lawyer, prior to the taking of a formal statement (in the presence of a lawyer). It also noted that a number of detainees indicated that, despite having asked for an ex officio lawyer immediately after apprehension, their first contact with the lawyer took place only at the initial court appearance."[88]

Finally, Article 53 CCP contains a special provision concerning the rights of persons arrested on the spot (in flagrante). According to that provision:

"1. The person arrested on the spot or detained has the right to speak to his defence counsel immediately after his/her arrest or detention. 2. The defendant under jail remand order has the right to speak to his defence counsel from moment the remand order is executed."

Concluding, it can be said that although the right to consult with one's lawyer (whether privately retained or state-appointed) upon arrest is recognized by domestic legislation, in practice, serious problems are encountered in the realization of this right, problems that undermine the effectiveness and quality of legal defence and prevent lawyers from discharging their obligations under the Attorney Ethics Code.

2.4. The remuneration of legal aid lawyers and the allocation of state funds to the legal aid budget

International standards suggest that in order for state-appointed lawyers to provide quality service, they should be motivated, by means of incentives, to perform their duties effectively. Legal aid lawyers' fees should be set at a reasonable level while their disbursal should be timely and not subject to lengthy administrative

88 See the Report on Albania of the Commissioner for Human Rights, CommDM(2014)1, 16 January 2014, op. cit., paragraph 143, p, 27.

procedures. Moreover, the legal aid budget should also provide for the payment of other defence expenses (such as payments of fees for expert witnesses or forensic experts).

In terms of the level of funding to be allocated to the legal aid budget, it should be such as to ensure that it is commensurate with the existing needs. The funds should be distributed in a fair and proportional manner among all the state actors involved in the criminal justice system and, in the Albanian context, primarily the prosecution and the Special Legal Aid Commission.

Turning to the issue of remuneration of legal aid lawyers, it is recalled that a lawyer exercises a liberal profession and has the right to request payment for his services on the basis of his contract with the client or on the basis of the fees scale set out in a Joint Order of the Ministry of Justice with the National Chamber of Advocacy.[89] Rather surprisingly however, the Order does not contain any provision on the payment of state-appointed lawyers. Such provisions are to be found scattered over the entire legislative and regulatory framework.

Thus Article 11 of Law 9101/2003 *On the profession of advocate in the Republic of Albania* provides as follows:

> *"The remuneration of an advocate for the work performed shall be defined in one of the following ways:*
> *a) By agreement between him/her and the party counselled or represented by him/her;*
> *b) By the court or prosecution office, when she/he is assigned ex officio or, when the counselled or represented person has no financial means and the legal aid is granted free of charge to him/her."*

More information as to establishment of the rate of state appointed lawyers' fees is to be found in Article 10 of Law 10039/2008 *On legal*

89 See Order no. 1284/3 dated 16.3.2005 of the Minister of Justice and the National Chamber of Advocacy.

aid[90], which provides that the State Commission on Legal Aid is responsible for establishing:

> *"…dh) [...] the remuneration amount which shall be paid to the lawyers for the provision of legal aid, after the prior written opinion of the Minister of Finance and the Minister of Justice, but in any case, not less that the fees approved for the advocacy service;"*

Further, Instruction no. 3 of the General Prosecutor's Office *On procedural expenses*, dated 13.11.2006, provides in point 1.4 that:

> *"Documented expenses incurred by lawyers appointed ex officio shall be included in list of expenses for ex officio lawyers, according to the tariffs in force regarding the compensation ceiling for legal aid given by lawyers"*

Nevertheless these two provisions are rather general in nature and simply refer to the Joint Order of the Minister of Justice and the National Chamber of Advocacy, which as it was noted above, does not contain any provision referring explicitly to the issue of remuneration of state-appointed lawyers.

The presence of this regulatory gap did not escape the attention of the Judicial Budget Administration Office which in its 2014 Annual Report noted that:

> *"The remuneration of lawyers appointed ex officio, pursuant to Order no. 1284/3 dated 16.3.2005 of the Minister of Justice and the Chairman of the National Chamber of Advocacy, encounters many problems in practice due to the lack of clarity and consistency. This is because of the limitations regarding determination of the object of representation and the amount of payment; at the same time,*

90 Availabe in English at: http://www.euralius.eu/pdf/13.Law%20on%20Legal%20Aid,%20promulgated%20on%2012_01_2009_en.pdf

the Order does not specify if the payment will be made for one or more representation sessions.

"In several courts, it is observed that judicial panels award costs to an state-appointed lawyer higher that those set out in Order no. 1284/3. At the same time, it is found that a photocopy of the court decision, that might be seven or eight pages long, is submitted as evidence [of the work undertaken], a practise that appears irrational but one that also has financial implications. Also, in the majority of cases of payments to state-appointed lawyers, the phenomenon is observed of the lawyers' submitting a claim of expenses which is as much as one to two years overdue (unrelated to the conclusion of the trial), an action that is contrary to the Law "On Accounting and the guidelines for the implementation of the budget"".

From the above analysis on the legislative and regulatory frameworks regulating the provision of legal aid in criminal proceedings, it transpires that a number of stakeholders play an important role in the proper administration of the legal aid scheme. These are the Ministry of Justice, the National Chamber of Advocacy, the Prosecutor's Office, the Judicial Police, the State Commission on Legal Aid, as well as the lawyers themselves who provide legal aid.

In the framework of this study, Res Publica addressed requests for information to these institutions regarding their fields of competence, with a view to painting a clearer picture of the operation of the legal aid system in practice. On the basis of the responses received, the following conclusions can be drawn:

The role of the Ministry of Justice

The Ministry of Justice has an important role in the process of providing legal aid, which consists of proposing the budget in this

field. The setting of a low budget for providing legal aid has been identified as a problem by national and international organizations.

Thus in 2012, the legal aid budget amounted to 0,24% of the total budget allocated to the judicial system, that at the time stood at EUR 25,5 million[91]. This is an almost insignificant figure, and as a consequence, state-appointed lawyers receive very low remuneration that, as it has been observed, is often paid with considerable delay.

Another important aspect that is in the competence of the Ministry of Justice is the determination of the lawyers' fees in cases when there is no agreement between the lawyer and the client - as noted above, at present these fees are set out in a Joint Order of the Ministry of Justice with the National Chamber of Advocacy.[92] Nevertheless, as this order regulates the fees of lawyers retained privately, it does not include any explicit reference to the fees payable to state-appointed lawyers. As a result, it is not relied upon by the proceeding organs when awarding fees to state-appointed lawyers, which (organs) use another system of evaluation and payment.

The reluctance of the proceeding organs to apply the above-mentioned Order has as a result the differential treatment between two categories of defence lawyers (privately retained and state-appointed) who in essence discharge the same functions and whose remuneration

91 European Commission for the Efficiency of Justice (CEPEJ), Report on European Judicial Systems – 5th Report, Edition 2014 (2012 data): Efficiency and Quality of justice, available in English at: http://rm.coe.int/cepej-report-on-european-judicial-systems-edition-2014-2012-data-effic/1680786ae9 , p. 62. It should be noted however that it appears that the report refers only to the SCLA's legal aid budget and does not take into account the relevant budgets of the prosecution offices and of the courts. The lack of transparency and comprehensive record-keeping makes it difficult to accurately estimate the total legal aid budget which, on the basis of the incomplete data available to Res Publica, is closed to 1 to 1,5% of the judicial system budget, i.e. approximately between EUR 250,000 - 400,000.

92 See Order no. 1284/3 of the Minister of Justice and the Chairman of the National Chamber of Advocacy dated 16.3.2005.

should therefore be regulated by the same provisions, without this however meaning that their remuneration should necessarily be set at the same level.

The role of the State Commission for Legal Aid

One of the institutions that, following recent changes in the law, has also been granted the competence to provide and administer legal aid in criminal proceedings is the State Commission for Legal Aid ("SCLA" or "Commission"). The Commission plays an important role in the selection of legal aid lawyers engaged under the *Law on Legal Aid,* the monitoring of their work and their remuneration.

Thus Article 10 of Law 10039/2008 *On legal aid* provides that the State Commission on Legal Aid shall be responsible among other for establishing:

> *"…dh) [...] the remuneration amount which shall be paid to the lawyers for the provision of legal aid, after the prior written opinion of the Minister of Finance and the Minister of Justice, but in any case, not less that the fees approved for the advocacy service;"*

Under this provision therefore, the Commission has the competence to set fees for the services rendered by the legal aid lawyers it appoints, fees which should not be lower than those approved for the advocacy service.

Nevertheless this provision gives rise to two problems: first, it effectively creates a second compensation mechanism for lawyers providing the same service (namely legal aid in criminal proceedings), and second, it discriminates against the legal aid lawyers appointed by the prosecution or the court, as the lawyers who are contracted by the Commission are subject to another, more

beneficial for them (in terms of the level of fees and the modalities for their payment), remuneration mechanism.

Furthermore, considering that Article 10 refers to the fees set out in the Joint Order of the Ministry of Justice and the National Chamber of Advocacy, it is important to recall that that Order merely sets out the level of fees for legal representation before each judicial instance but is silent as to whether legal aid lawyers should be paid by reference to the hours they work or the sessions they attended, the nature of the cases and so forth. Thus by way of example, under the Joint Order two lawyers representing defendants before the first instance criminal court will be entitled to the same level of compensation regardless of any difference in the complexity of the cases or the number of court sessions and the number of procedural actions they undertook. This in turn creates the risk that legal-aid lawyers might opt for concluding their cases as swiftly as possible (including by "advising" the defendant to agree to a summary / abbreviated trial), since any additional and more demanding work they might have to undertake will not be remunerated.

The role of the National Chamber of Advocacy

The National Chamber of Advocacy ("NCA") plays an important role in the provision of free legal aid in criminal proceedings, and concretely, in the selection of the lawyers, the monitoring their work, the holding of trainings and also determining the amount of their remuneration.

According to information received by the NCA, the ex officio lawyers are designated on an annual basis by means of a selection process that starts with a publication on the web page of the NCA of a call to lawyers to join the criminal legal aid scheme. All interested lawyers are required to visit their the local chamber of advocacy in order to fill out and sign the relevant form.

Following the conclusion of this process, a list containing the names of the lawyers selected is drawn up, and then approved by the chairman of the local advocacy chamber. The list is then forwarded to the courts and prosecutors' offices. According to the NCA the criteria for the inclusion of a lawyer in that list are that of seniority (namely the number of years of legal practice), whether there are no outstanding financial obligations towards the chamber (e.g. non-payment of membership dues) as well as registration with the tax office.

The NCA noted that it does not monitor the work of the lawyers who provide free legal aid. It contended that since the legal profession is a liberal one, the only form of accountability is the financial one, similar to that of any other person exercising a liberal profession. Nevertheless, the NCA confirmed that it takes into account feedback regarding the quality of ex officio lawyers provided by the proceeding organs (prosecution / courts) during the periodic contacts they have with the NCA.

Regarding professional misconduct complaints, the NCA responded that state-appointed lawyers, like all lawyers, are subject to the general regime of disciplinary liability of lawyers.

As discussed above, while according to international standards the NCA should monitor the quality of legal assistance provided by state-appointed lawyers with a view to ascertaining whether they discharge their duties in a professional manner, the applicable legislation does not require the NCA to proactively monitor the quality of the work of appointed lawyers but only to review disciplinary complaints that might be filed against them.

The role of the courts, the prosecution and the judicial police

The courts, the prosecution and the judicial police all play an extremely important role in framework of the criminal legal aid scheme, as it

is precisely these institutions that interact with the state-appointed lawyers in the course of their activities. Additionally, the prosecution and the courts are the two bodies responsible (depending on the stage of the proceedings in which the need arises) for appointing the legal aid lawyers, on the basis of the list transmitted by the NCA. Res Publica considers it particularly problematic that these two institutions enjoy an unfettered discretion in assigning a state-appointed lawyer to a defendant; there are no guidelines, let alone rules, regarding for example how often a particular lawyer may be appointed under the legal aid scheme. Indeed, as it will explained in more detail later on in this study, Res Publica's findings indicate that precisely due to the abuse of this discretion, a small group of lawyers in Tirana all but effectively monopolises the provision of legal aid.

In addition to appointing the legal aid lawyers, the prosecution and the courts are responsible for evaluating their professional conduct. If the legal aid lawyers demonstrate a lack of professionalism or violate their code of ethics during their functions, the prosecutor or the court is entitled to order that they be replaced by another state-appointed lawyer (something that however does not happen in practise, presumably because of the connivance of these institutions in appointing only certain lawyers) and report them to the disciplinary body of the NCA. Last, the finance offices of the prosecution and courts administrations are responsible for issuing the payment of the fees to the legal aid lawyers.

In its response to the Res Publica's request for information, the Judicial Budget Administration Office set out the procedure for the payment of the state-appointed lawyers and the problems that frequently arise in practice:

> *"The fees of state-appointed lawyers are set out in the Joint Order no. 1284/3 of the Minister of Justice and the Chairman of the National Chamber of Advocacy dated 16.03.2005. The procedure*

followed for the payment for the service provided is defined in the Managing Board of the Office of Administration of the Judicial Budget's Instruction no. 1 "On the unification of the practices for the payment of lawyers appointed ex officio by the court" dated 11.7.2014. According to this instruction, [state-appointed] lawyers are paid at the end of the judicial proceeding and following the delivery of the court's decision. The document that attests the performance of the service is the judicial decision or a certificate issued by the judge who heard the particular case. No later than 10 days from the delivery the judicial decision or the date of the issuing of the certificate by the judge, the lawyer should complete a tax invoice for the service provided, which he should then submit to the court within five days from the date of the invoice.

At the end of every month, and after calculating the amount of financial obligations due to the [state-appointed] lawyers and taking into account the available funds, the court prepares a list of payments, with the names of beneficiaries set out on the basis of the date submission of requests for payments accompanied by all the necessary documentation. In case of lack of funds for a particular period, which might bring about a delay in the reimbursement of fees, the court performs all financial and accounting actions, according to the relevant accounting guidelines concerning unpaid obligations and takes measures with a view to securing the necessary funds for the satisfaction of these obligations in a future budget period. In the past were delays in effecting payments to state-appointed lawyers, not only due to the lack of funds but also ton the filing of incomplete documentation by the lawyers.

The Tirana District Court is facing particular problems in this respect, as lawyers do not submit on time the financial documents (tax invoices) that are essential for effecting the payments . This has prevented the Court from complying with its obligations fully and timely. Since 2014, following the approval of the aforementioned

Instruction [Instruction no. 1 "On the unification of the practices for the payment of lawyers appointed ex officio by the court"] which was also brought to the attention of the Chamber of Advocacy, lawyers have become more diligent in collecting and furnishing the necessary documentation. The situation prevailing at the Tirana District Court came to the attention of the Managing Board of the Judicial Budget Administration Office which issued a decision by which it released the necessary funds in order to meet all outstanding obligations to lawyers appointed ex officio by that court. During 2015, the payment of their fees is taking place without any problems. The budget expended by the courts for the payment of the ex officio lawyers takes up about 8% of the annual budget approved for the judicial power in Article 602 "Operating expenses", the article under which those payments fall under."

The above are not the only problems undermining the quality and effectiveness of the criminal legal aid scheme. It is recalled that in its Annual Report for 2014 referred to above, the Judicial Budget Administration Office highlighted a series of other problems regarding the reimbursement of state-appointed lawyers. Thus it lamented the lack of explicit provisions regulating the calculation of the fees for state-appointed lawyers and the modalities for their payment in Instruction No. 1284/3 of the Minister of Justice and the National Chamber of Advocacy dated 16.3.2005. It similarly noted that many courts often award to state-appointed lawyers fees higher than those set out in Instruction No. 1284/3 and considered that the cumbersome reimbursement procedure often takes place with considerable delay due to the failure of the lawyers to present their reimbursement requests on time. The above shortcomings are clearly not conducive to the efficient planning and administration of the relevant budget.

Concluding, the overall framework on the appointment and reimbursement of state-appointed lawyers is palpably opaque and deficient; its effectiveness and consistency is further undermined by

the delays in the reimbursement of the lawyers and the existence of two different norms regarding the calculation of the fees and the modalities of their payment, depending on the authority that appointed the legal aid lawyer. The legal aid budget is extremely low and cannot address the existing needs; it is furthermore not distributed proportionately among the courts, the prosecution and the State Commission for Legal Aid. As a result of these deficiencies, experienced lawyers are reluctant to join the legal aid scheme which seems to appeal only to young lawyers who have yet to build their clientele.

2.5. Informing suspects or accused persons of their right to legal aid and notification of the criminal legal aid lawyer

According to international standards, suspects or accused persons should be informed of their right to legal aid, upon their deprivation of liberty or the launching of substantive investigatory actions by the police or the prosecution.

Albanian legislation protects the procedural rights of these persons indirectly, by means of a set of rights / privileges recognised to his lawyer. One of these rights is that of being informed as soon as possible of the various procedural actions or about the holding of court hearings, thereby allowing them to familiarise themselves with the content of the case-file and to have sufficient time to participate in these proceedings and mount their defence.

Article 49.4 CCP provides that:

> *"When the court, prosecutor and judicial police, must carry out an action for which the assistance of a defence lawyer is stipulated and the defendant has no defence counsel, they serve notice of the action to the [proceeding authority] appointed defence counsel."*

More specifically, following the launching of the investigative actions,

the proceeding organ has the obligation to apply Article 50.2 CCP, which provides that a lawyer has the right:

> *"[...] to have prior notice of the investigative actions [to be] conducted in the presence of the defendant and to participate in them, to pose questions to the defendant, witnesses and experts, to have access to all the materials of the case at the conclusion of the investigations."*

It is important to note that this provision in particular as well as Article 50 CCP in general are applicable only when criminal charges have been preferred against a person (who now has the status of defendant) or when that person is accorded a similar status - indeed, Article 50 is entitled "[Limits of] defence counsel's capacity to exercise the **defendant's** rights" (emphasis added); as a result, it cannot be invoked by persons suspected of having committed an offence and escorted to the police station for informal questioning. This legislative gap creates ample potential for the abuse, particularly by the judicial police, which can treat a person as a de facto defendant and question him without that person being entitled to legal aid, since he is not formally considered a defendant as no criminal charges have been preferred.

Returning to the right to be notified, the general rule is that any notification (e.g. summonses) is to be made to the defendant and his lawyer. An exception to this rule is when the defendant is at large. In this case an ex officio defender is appointed to represent the defendant, and all notifications are made to him, as provided by Article 141 CCP:

> *"1. In cases where notice cannot be served according to the rules on serving notification to the free defendant, the proceeding authority shall order the conduct of a search operation for the defendant. If the search does not give any positive result, a decision of failure to find shall then be issued, by which after appointing a defence counsel for the defendant, shall be ordered that a copy of the notification is*

delivered to such defence counsel. The person who cannot be found shall be represented by the defence counsel.
2. The decision of not being found shall cease to have effects when the preliminary investigations are concluded or a ruling has been issued by the court.
3. Notification addressed to the defendant who is hiding or a fugitive shall be served by delivering a copy of the procedural act/ document to his defence counsel and when he does not have one the proceeding authority shall ex-officio appoint a defence counsel, who shall represents the defendant."

The importance of designating a state-appointed lawyer and serving all notifications to him should the defendant be at large, was also highlighted by the Constitutional Court in its Decision No. 31/1998:

"In order to protect the rights of the defendant both when he is present and in his absence, the prosecutor, the judge and the defence lawyer have a series of legal obligations. The investigation and trial in absentia of persons who have committed criminal offenses is done only after a defence lawyer has been assigned with a view to discharging the paramount duty that the organs of justice have in the criminal field."

Regarding the manner of notifying the defence lawyer, Article 309.2 and 309.3 CCP provide that:

"The defence counsel elected or assigned ex-officio receives at least twenty-four hours prior notice when proceeding with interrogation, examination or confrontation. When delay may damage the proceedings, the notice to the defence counsel is served urgently [...] Records of the actions performed by the prosecutor and judicial police, which the defence counsel has the right to attend, are filed with the prosecution office secretariat within three days from performing the action, with the defence counsel having the right to examine and make copies of them."

The defence lawyer is also notified in the same way in of any appeals filed (e.g. by the prosecution) or court decisions issued as well as the date of the session before the Court of Appeal or the High Court. Ensuring the timely provision of such critical information to the lawyer is a further guarantee of due process, as also held by the Constitutional Court.

Thus in its Decision No. 21/2006, the Constitutional Court emphasized that it is essential for the trial court to take measures to give notice of an appeal on points of fact and / or of law when filed by the prosecutor. The constitutional guarantee to due process of law should also be respected when a case is heard before the High Court, due allowance being made for the particular characteristics of the proceedings before each judicial instance and the particular role of the High Court. Respect for the principles of the equality of arms and access to a lawyer are important aspects of due process of law, a fundamental constitutional norm. Consequently, the serving to the defendant as well as to his defence lawyer of relevant legal submissions and court documents, as well as of information such as the trial date, is important in ensuring compliance with these two principles.[93]

2.6. Special measures for vulnerable groups, especially juveniles

The international instruments referred to in Chapter IV above require that states undertake special measures for vulnerable groups (juveniles, persons with disabilities and others); precisely because of their vulnerability, they should not be provided only with a state-appointed lawyer but also any other kind of assistance (e.g. in the form of a psychologist or a social worker) they might need.

Albanian legislation provides for particular rights for vulnerable persons. Thus Article 49.2 CCP provides that:

> "*When the defendant is younger than eighteen years old or is mentally or physically handicapped as to hinder him from*

93 See Constitutional Court Decision no. 21/2006.

exercising himself the right to defence, the assistance by a defence counsel is mandatory."

In addition to their right to state-appointed lawyers regardless of whether they request one, juveniles have also the right to all the necessary legal and psychological assistance, to be furnished at every state of the proceedings, as provided under Article 35 CCP.[94] Similarly, persons with disabilities are entitled to the same kind of assistance (albeit attuned to their particular needs), provided that it is established that their disability is to such a degree and of such a nature that it prevents them from exercising their rights.

The treatment of persons with disabilities in the same way as juveniles is evidence of a rather paternalistic approach towards them, also encountered in other pieces of legislation such as the Family Code;[95] such an approach is at odds with the principle of personal autonomy of a person with disabilities, as provided in Article 12[96] of the UN Convention on the Rights of Persons with Disabilities.[97]

The obligation of the authorities to proceed *propio motu* to the

94 The relevant article as in force at the time provided as follows:
"1. A juvenile defendant shall be provided legal and psychological assistance at any stage and level of the proceeding in the presence of the parent or other persons requested by the juvenile and accepted by the proceeding authority.
2. The proceeding authority may conduct [certain] actions and draft documents, which require the participation of the juvenile, without the presence of the persons introduced in paragraph 1, only when doing so is in the interest of the juvenile or when a delay may seriously impair the proceeding, but at any case in the presence of the defence counsel"

95 See Articles 307 and 309 of the Family Code.

96 The Article provides as follows: "1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity".

97 Ratified by Albania by means of Law 108/2012.

appointment of a legal aid lawyer to represent a juvenile is incumbent not only on the investigative authorities (e.g. the police or the prosecution) but also on the courts, including the High Court. According to the Constitutional Court's Decision No. 13/2005:

> *"…in the trial of juveniles, defence is mandatory and its absence renders, on the basis of Article 128 CCP, all the procedural acts absolutely invalid, and consequently, the trial is unconstitutional. The provisions of the CCP mentioned above are guarantees for the implementation in this field of Article 54 of the Constitution, which provides for special state protection for children compared to other legal subjects. Turning to the case under review, the discussion and resolution of the issue whether the above procedural provisions are applicable also during the hearing of cases examination of before the High Court takes on a particular importance. The Constitutional Court reaches the conclusion that the High Court is obliged to respect, in addition to other principles, the adversarial principle and that of the equality of the parties to the trial. The application of these principles in a criminal trial requires that through his defence lawyer, a juvenile defendant shall be afforded the same rights with a view to participating in the proceedings as the prosecutor. The correct application of those principles would eliminate putting one party at a disadvantage compared to the other party. In the instant case, the High Court has violated the principle also because it upheld an appeal on points of law, which could have resulted in the quashing of the decisions already issued by the previous judicial instances and the worsening of the position of the juvenile defendant."*

As noted above (Chapter V, section 5), both the UN CRC and the Council of Europe's CPT have expressed their concerns regarding the failure of the authorities to uphold the domestic legal framework and ensure that juvenile defendants are provided with mandatory representation, while an application on this issue against Albania is

currently pending before the European Court of Human Rights.[98] Similar concerns have also been voiced by the Commissioner for Human Rights of the Council of Europe, who in his report on Albania noted that:

> *"The Commissioner is seriously concerned about allegations that juveniles are often subject to police interrogation without the presence of a lawyer or parent, while in a few reported cases they have also been made to sign statements. This problem was noted by the CPT which recommended in 2012 that the Albanian authorities take steps to ensure that juveniles deprived of their liberty by the police do not make any statement or sign any document without the benefit of a lawyer, and ideally another trusted adult being present to assist them."* [99]

Concluding, it appears that the current legal framework but primarily its implementation are deficient, not only in terms of the paternalistic approach towards persons with disabilities but also in terms of the non-respect by the authorities of the juveniles' procedural rights. Despite the clear domestic provisions and the persistent findings by international bodies, the competent authorities have failed to take the necessary measures with a view to ensuring that juvenile defendants have access to legal and any other form of assistance they might need.

2.7. Availability of criminal legal aid on a nationwide basis

International standards provide that legal aid should be available throughout the country. The Albanian legal framework does not contain particular references to limitations on the provision of this service in this respect, implicitly acknowledging that the service should be provided on a nationwide basis.

98 *Fatmir Cupi v. Albania*, No. 27187/08, communicated to the Albanian Government on 19 February 2014.

99 Op. cit. paragraph 144.

However, the availability of legal services in practice often depends on whether lawyers exercise their profession in a given locality, something which is often not the case, as lawyers tend to be concentrated in urban areas. In an effort to address this problem, the National Chamber of Advocacy (NCA) has dispensed with any kind of territorial limitation, thereby allowing lawyers to appear before courts throughout the entire country.

Every local advocacy chamber draws up a list of state-appointed lawyers. Even if for whatever reason such a list is not drawn up or should a lawyer on the list not be available when summoned, the proceeding organs retain the discretion to appoint any lawyer they see fit. Once again however, the complete lack of any guidelines or rules raises legitimate concerns as to the transparency of the appointment procedure.

The problem is particularly exacerbated by the fact that people in rural areas are more likely not to have enough means to retain private counsel and as a result will have to request from the prosecution or the courts the appointment of one under the legal aid scheme. A potential solution could be the filing of a request for legal aid with the State Commission for Legal Aid; nevertheless the latter is active exclusively in Tirana and despite the avowed aim of opening six legal aid offices under its auspices in other cities, this has not happened as of the time of writing.

In conclusion, it can be said that although in theory there is no geographical limitation as to the operation of the legal aid scheme, in practise legal aid is not available in distant and poor areas of the country. Furthermore, the already opaque legal aid lawyers' appointment criteria are almost fully dispensed with outside the major urban centres.

2.8. Monitoring the quality of services by state-appointed lawyers and implementing measures for its improvement

2.8.1. The quality of services rendered by state-appointed lawyers

International standards suggest that legal aid should meet certain standards and that the lawyers should be professionally qualified and competent in their work.

In order to ascertain to which extent these standards are met in practice, the following section will focus on setting out the rights and privileges that under Albanian law defence lawyers and therefore also state-appointed defence lawyers enjoy and should exercise with a view to mounting an effective criminal defence for their clients.

The rights and obligations of defence lawyers

The rights of the defence lawyer are set out in the Code of Criminal Procedure (CCP). More specifically, Article 50 CCP provides that the defence lawyer enjoys all the rights recognized by law to the defendant, except for those that are explicitly reserved to the latter, namely:

1. The right to confess to a crime.
2. The right to not participate in the proceedings.
3. The right to request an abbreviated (summary) trial, and
4. The right to file an appeal against a decision.

The legal means or remedies necessary for exercising there rights can be filed by a defence lawyer only if the defendant explicitly requests his lawyer to do so.

The obligations he has to discharge and the rights of the defence lawyer that he can exercise on his own initiative are provided in Chapter V of the CCP and are the following:

1. The right to communicate freely with a detained or arrested person, or the defendant;
2. The to be notified in due time of the carrying out of investigative actions in which the defendant will also be present, and to take part in them;
3. The right to address questions to the defendant, the witnesses and the experts;
4. The right to familiarise himself with the content of the case file at the conclusion of the investigation.
5. The right to request information and copies of documents from public institutions, in the name of and on behalf of the client;
6. The obligation to provide his services faithfully and honestly, and
7. The right to request payment for the services rendered.

On the basis of the above, it can be concluded that a defence attorney has sufficient means at his disposal to enable him to defend his client effectively.

The obligation to mount a competent and effective defence

The lawyer has a crucial role to play in judicial proceedings, particularly so in relation to criminal ones. Regardless of whether he was appointed by the state or retained the defendant himself or the latter's family, he should represent the interests of the defendant with professionalism, mount a competent defence, and respect professional ethics.

Turning to the way state-appointed lawyers discharge their duties, the following is a telling (though unfortunately also rather frequent) example. In one of the few cases in which domestic courts reviewed the quality of the legal representation provided by a state-appointed lawyer to a defendant tried in absentia, the Constitutional Court held in its Decision No. 6/2004 that:

"Considering the characteristics of this set of proceedings as well as the participation of the prosecutor in it, it becomes imperative to guarantee defence for the convicted person. A prisoner who is serving his sentence in a foreign country and therefore cannot appear before the court in Albania has the right to appoint a lawyer or, if he cannot afford to do so, the court is under the obligation to appoint one ex officio. As in every judicial case, and therefore also in the present proceedings, the lawyer is obliged to respect the law and the rules of professional ethics in the discharge of his duty, namely the defence of his client.

As it was established during the hearing [before the Constitutional Court], the complainant's lawyer, who was appointed by the court without the complainant's knowledge or approval, did not act diligently throughout the proceedings before the first instance court, before the appeals court and then the High Court, as he asked for the application of legal provisions and called for a sentence that went contrary to the interests of the complainant."

By its decision the Constitutional Court held, in line with the international standards, that the assignment of a state-appointed lawyer to a defendant should not be considered as a mere formality but rather that the competent organs should also review, on their own initiative, whether the lawyer discharges his duties diligently.

The right to appeal

The right to appeal a decision is, according to Albanian legislation, an exclusive right of the defendant, who may freely delegate its exercise to his defence lawyer. Article 410 CCP provides that:

"1. The defendant may appeal personally or through his defence lawyer. The guardian of the defendant may make any appeal that the defendant is entitled to.

2. The sentence rendered in absentia is subject to the appeal of the defence lawyer only in case he is provided with a power of attorney issued as provided by law.
3. The defendant may withdraw the appeal made by his defence lawyer, but when he is not legally capable the consent of the tutor must be taken."

The interpretation of this provision has been the object of divergent approaches by the two highest judicial instances (the High Court and the Constitutional Court) and this conflict was settled only recently. Problems have been met with in connection with the right of a defence attorney selected by the family or appointed ex officio to appeal the court decision, as the Constitutional Court and the High Court have taken contrary positions on this issue.

The High Court had initially taken the position that a defence lawyer retained by the defendant's family or appointed ex officio did not have the right to appeal but could do so only after securing the defendant's agreement. In their authoritative (and binding on lower courts[100]) Unifying Decisions No. 354 dated 29.07.1999 and No. 386 dated 28.07.1999,[101] the Joint Benches of the High Court held that the state-appointed or retained by the family lawyer of a defendant tried in absentia, had the right to appeal a decision only on the basis of a power of attorney duly signed by the defendant. According to the High Court Joint Benches,

"This act [the filing of the appeal] can be done only by the defendant and, exceptionally, by his relatives, when the defendant has been arrested, detained or sentenced to imprisonment (Article 48, point 3 of the Code of Criminal Procedure)."

100 Under Articles 32 and 33 of Law 9877 dated 18 February 2008 O*n the Organization of the Judicial Power in the Republic of Albania,* failure by a judge to observe a Unifying Decision is considered a very serious disciplinary offence that carries the penalty of dismissal.

101 Repealed by Constitutional Court Decision No.17 dated 17.04.2000.

In both decisions, the High Court repeatedly emphasised that, on the basis of Article 50.1 CCP, the exercise of the right to appeal was reserved explicitly to the defendant, and therefore only he could exercise this right, after weighing if this would be in his interests. The defence lawyer could not file an appeal if the defendant did not agree with that course of action:

> *"A defence lawyer appointed ex officio by the court or retained by the relatives of the defendant with a view to taking part in the trial being held in the defendant's absence in order to protect his interests, is not a person who is entitled under the criminal procedure law provisions in force to appeal against a decision rendered in the defendant's absence. He is entitled only if he has a special power of attorney issued by the defendant himself and is duly certified according to law."*[102]

The High Court also took into consideration that such an interpretative approach would not unduly limit the defendant's right to appeal: according to Article 147.2 CCP if a decision was delivered in the defendant's absence, the defendant has the right to request that the time limit for filing the appeal be restored, provided that he can establish that he was not informed of the decision. Furthermore, the High Court noted that:

> *"When the prosecutor or other defendants bring the case to the appellate body and the decision is notified in accordance with the requirements of Articles 140 and 141 of the Code of Criminal Procedure to a defendant tried in absentia, the court is obligated, during the examination of the case, to appoint again a defence lawyer to represent the defendant who continues to be tried in absentia".*

102 Unifying decision of the Joint Colleges of the High Court No. 354 dated 28.07.1999

The High Court's approach was overturned by the Constitutional Court, which took the position that the defence lawyer retained by the family or appointed ex officio, does have the right to appeal. In order to promote legal certainty the Constitutional Court, by means of Decision No. 15 dated 17.04.2003, ordered that the words *"by the defendant"* mentioned in paragraph 2 of Article 410 CCP, be stricken out. According to the Constitutional Court,

> *"The Constitutional Court deems the unconstitutionality in the second paragraph of Article 410 of the Code of Criminal Procedure to consist of several aspects, which emerge following a review of its conformity with the provisions of the Constitution and international instruments. The addition to this paragraph is contrary to the constitutional provision of defence in criminal proceedings. Before this amendment, point 2 of Article 410 had the following wording: "the defence lawyer may bring an appeal against a decision rendered in absentia only when he presents a power of attorney issued in the form provided by law. With the supplement made to this paragraph, adding after the word "issued" the words "by the defendant", the defence lawyer is denied the right to file an appeal and take part in a trial before a higher level if he has not obtained a power of attorney issued by the defendant. In this way, the right to appeal and the right to defence is violated for the defendant himself, which is contrary to Article 17 of the Constitution, because the limitation touches the core of the right and exceeds the limitations provided in the European Convention on Human Rights. Such a limitation affects the core of the right to appeal and it is in fact vitiating it, considering that the person who is tried in absentia and is hiding from justice is unable to give his defence lawyer a power of attorney issued by him in the form provided by law; in other words, the defendants is effectively deprived of the opportunity of exercising his right to appeal."*

By its decision No. 30, dated 17.06.2010, the Constitutional Court revisited its previous jurisprudence and accorded more importance

to whether there is evidence suggesting the family members of the defendant, who is tried in absentia and is aware of the trial held against him, have reasonably concluded that the defendant wants to file an appeal. According to the Constitutional Court:

> *"44. ... In other words, the defendant exercises this right only through his family members, who have the objective possibility to contact lawyers so that the latter can examine the possibility of undertaking the legal defence of the defendant. Under these conditions, if there is a discrepancy between the defendant's will and that of his family members, who have misinterpreted the will of the defendant or have had a different will about the defence lawyer, it is the defendant's will that should prevail, who in any case may refuse or discharge the defence lawyer retained by his family.*
>
> *45. ...That is, the appointment of a lawyer by family members is permitted only if it [the appointment] agrees with the will of the defendant to waive his participation in the proceedings; family members should not be allowed to appoint a lawyer in the absence of contact with the defendant who is at large. Ascertaining whether this is the case is, according to the European Court for Human Rights, a duty incumbent on the competent state organs. The same situation arises also concerning the filing of an appeal. The defendant's family members may submit an appeal only if they are fulfilling the desire of the defendant and only if the defendant is aware that a criminal proceeding has begun or is being conducted against him. In this way, the implementation of the notification procedures is rigorous.*
>
> *46. ... The court should accept the defence lawyer chosen by the defendant's family members only if he proves that they are acting on the basis of an order received by the defendant. The same reasoning should also be followed in the case when it is a lawyer chosen by family members of the defendant who seeks restoration of the time*

period to appeal the decision of a lower judicial instance. In this case, the court should investigate whether the defendant truly did not have knowledge of the trial held against him and whether the defence lawyer retained by his family members was chosen in the defendant's knowledge."

Following the Constitutional Court's decision, the Joint Benches of the High Court adopted Unifying Decision No. 1 dated 10.03.2014, which among others provided that:

"66. For the above reasons, the Joint Benches reach the unifying conclusion that:

- *A defence lawyer appointed by the court or selected by a relative of a defendant tried in absentia, according to the determination made by the legislator in point 3 of Article 48 of the Code of Criminal Procedure, is not entitled to submit an appeal against a guilty verdict rendered by the Court of First Instance.*
- *In any case, a person sentenced in absentia has the right to seek restoration of the time period for submitting an appeal or for submitting an appeal on points of law to the High Court, except for the cases when there is sufficient evidence that (i) he had knowledge of the trial being held against him; (ii) he authorized his family members directly or indirectly to appeal; or (iii) he explicitly waived his right to be present in the trial against him, by hiding from justice."*

The issue treated above, namely whether and under which conditions a lawyer not retained by the defendant directly has the standing to file an appeal, assumes a particular importance in the situation where the defendant is a juvenile. It is recalled that under Albanian law, juveniles benefit from mandatory legal representation and that the proceedings organs are therefore under a strict obligation to ensure that a juvenile is provided with a state-appointed lawyer if the juvenile has not retained one himself. In those or analogous

cases (e.g. when the defendant is a person with disabilities) cases, the reasoning of the above decisions does not hold.

Thus according to the High Court Joint Benches Unifying Decision No. 30 of the dated 28.01.1999:

> *"In the case being adjudicated, the proceeding organ and the court in all phases of the proceedings, decided to appoint ex officio defence attorney A. K. Since the lawyer was appointed as representative of the defendant by decision of the court, it is not necessary for him to be furnished with an additional power of attorney by the defendant himself or his relatives in order to appeal his conviction by the court of first instance.*
>
> *[For] juvenile defendants, and particular for those in absentia, the above guarantee derives from Articles 1 and 6 of the Code of Criminal Procedure and Articles 17, 28 and 31 of the Constitution, which are in compliance also with the European Convention on the Exercise of Children's Rights.*
>
> *The legal obligation foreseen by Article 410(2) of the Code of Criminal Procedure, namely that a defence lawyer may file an appeal against a conviction in absentia only when he has a power of attorney to that effect, should be understood for the defendant's absence and voluntary leaving, contemplated by Article 352 of the Code of Criminal Procedure."*

The High Court has thus laid down an exception in connection with juveniles, holding that the decision of the proceeding organ on appointing a defence attorney for the juvenile ex officio constitutes a procedural guarantee and it is not necessary for him to have a power of attorney. This is because a state-appointed lawyer is presumed to take on the role of a "guardian ad litem" in so far as concerns the protection of his client's interests in relation to the criminal case.

Res Publica's research also identified other important problems regarding proceedings against juvenile defendants, such as the routine absence of notification of the proceedings to the juvenile's legal guardian or the guardian of a person with disabilities, resulting in the loss of mandate of the state-appointed lawyer before the High and Constitutional Courts, as he cannot be issued with the requisite special power of attorney. These issues however are outside the scope of the present study.

Concluding, the legal framework provides state-appointed lawyers with sufficient rights to defend their client effectively except for a limitation related to the exercise of the right to appeal in a case of a defendant tried *in absentia*. This rule has an exception in the case of juvenile defendants or persons in a similar situation, where the state-appointed lawyer is fully mandated to mount an effective defence, including by means of filing an appeal.

Lawyers' qualifications

State-appointed lawyers are selected from a list made available to the proceeding organs by the National Chamber of Advocacy (NCA). The qualifying criteria they have to meet in order to join the free legal aid scheme are established by an internal act of the NCA, as foreseen by Article 49.3 CCP:

> *"The Steering Council of the Bar Association makes available to the proceeding authorities lists of defence lawyers and determines the criteria of their appointment"*

In its response to Res Publica's request for information, the NCA observed that the criteria that lawyers should meet to be part of the list are:

1. Possession of a lawyer's license.
2. Registration with the tax office, and
3. Willingness to join the list.

As it can be seen, there are no particularly stringent criteria or requirements (such as years of professional experience, specialisation in certain fields, a clean disciplinary record and so on) that lawyers should meet in order to join the legal aid scheme, making it possible for effectively any lawyer to do so.

It is worth however mentioning here that, in contrast to the selection procedure foreseen under the CCP, Law no. 10039/2008 *On legal aid* provides for a competitive procedure for lawyers who want to join the civil and criminal legal aid scheme administered by the State Commission for Legal Aid.

2.8.2. Disciplinary liability of state-appointed lawyers regarding their quality of their services and their professional conduct

According to international standards, the work of state-appointed lawyers should be subject to regular monitoring and evaluation, while disciplinary complaints against them should be reviewed by independent bodies. The authorities should take measures to ensure that the individual filing a complaint is adequately protected.

Under Albanian legislation, the competence to review and decide upon complaints against defence lawyers is vested with the National Chamber of Advocacy. Under Article 56.1 CCP, the proceeding organ (namely, the prosecution or the court) has the power to request that disciplinary measures be imposed on a state-appointed lawyer, by informing to that effect the Steering Council of the NCA; under the same provision, potential grounds for disciplinary liability are abandonment of (or refusal to take up) the defence, breaches of loyalty and failure on the part of a lawyer to perform his duties honestly.

Rather surprisingly however, Article 56.2 CCP explicitly provides that the Steering Council of the NCA is authorised to take disciplinary measures against state-appointed lawyers only when they abandon the case they are litigating or refuse to take up their appointment. The explicit reference to only these two grounds seems to suggest that the Steering Council will not prefer disciplinary changes against state-appointed lawyers on the other two grounds of professional misconduct mentioned in Article 56.1, namely breaches of loyalty and failure to perform one's duties honestly.

Furthermore, even the latter two grounds are intrinsically linked only to the lawyer's personal and professional integrity and not to his professional skills; thus for example it does not appear that the failure on the part of the state-appointed lawyer to plan and pursue an appropriate defence strategy would incur his disciplinary liability.

Nevertheless the absence of professionalism in the representation of the defendant benefitting from legal aid may constitute a violation of the defendant's right to a fair trial. In order to address this gap, both the legislator and the NCA should set out clear quality standards that state-appointed lawyers should meet in the discharge of their duty; furthermore, a new legislative and regulatory framework should lay down more stringent criteria for the eligibility of a lawyer to join the legal aid scheme. Last, appropriate and effective monitoring mechanisms should be set up with a view to supervising the state-appointed lawyer's work and propose measures for the improvement of its quality.

In is interesting in this respect to note that the Albanian legislator appears to be aware of the need to drastically overhaul different aspects of the criminal legal aid system. Thus Law no. 10039/2008 *On legal aid*, attempts to regulate in a more detailed way the eligibility and quality criteria for selecting and assessing the quality of the work of state-appointed lawyers; nevertheless, these provisions are only

applicable to lawyers who render their services in the context of the, in many ways, parallel legal aid scheme set up and administered by the State Commission for Legal Aid ("SCLA").

In its Article 5 entitled "Duties of the National Bar Association", the law provides that:

> *"The National Bar Association, in the area of legal aid service for individuals performs the following duties:*
> *a) participates in the setting of criteria for the selection of lawyers who shall deliver such aid;*
> *b) participates in the setting of criteria for the quality assessment of service provided by the lawyers;*
> *c) takes disciplinary sanctions against lawyers who provide legal aid, in compliance with the Law no. 9109 of 17 July 2003 "On the Profession of the Lawyer in the Republic of Albania", amended;"*

Articles 20.2 and 3 provide that:

> *"The National Bar Association and the State Commission for Legal Aid shall determine the list of lawyers, who, in conformity with this law, shall be authorized to provide legal aid and also the territorial jurisdiction of their activity. If deemed necessary, the Commission and National Bar Association may organize competitions for the determination of lawyers that shall provide legal aid. [...] The list of lawyers authorized to legal aid services shall be made public."*

It is interesting in this respect to note that whereas the criteria that lawyers who seek to join the "common" legal aid scheme as set out in the Code of Criminal Procedure (CCP) are minimal, SCLA can choose (and in practice so does) the lawyers who will offer legal aid following a competitive process. The differences however between the two parallel legal aid schemes do not end there.

Articles 21.1 and 2 set out the outline of the supervision mechanism of legal aid lawyers working for the SCLA:

> *"Quality assessment of the provided legal aid is performed by the State Commission for Legal Aid. Upon the request of the interested person, ex officio, or upon the request of the Minister of Justice, the Commission shall verify and check the quality in a specific case and based on the results it shall have the right to terminate the service contract with the lawyer authorized to provide legal aid. [...] The assessment form and standards are adopted by the decision of the State Commission for Legal Aid."*

On the basis of the above provisions, the SCLA has the mandate to carry out an in-depth assessment of the work of a legal aid lawyer in a specific case, on the basis of quality criteria it can freely establish. Moreover, any finding of breach of these criteria will have repercussions for the lawyer concerned, since his contract with the SCLA will be terminated while under Article 21.3, the SCLA will also forward its findings to the NCA's Disciplinary Commission which might, on the basis of these findings, prefer disciplinary charges against the lawyer in question.

Contrary therefore to the situation regarding state-appointed lawyers under the "common" legal aid scheme regulated by the Code of Criminal Procedure (CCP), their counterparts who have been contracted by the SCLA have to meet higher quality standards and are subject to a more stringent monitoring mechanism. Furthermore, should their services be found lacking, they will see their contracts with the SCLA terminated and might also be subject to disciplinary proceedings by the NCA. At the same time, it should be recalled that legal aid lawyers appointed by the SCLA enjoy a higher level of remuneration than their colleagues appointed by the prosecution or the courts.

It is interesting in this respect to note that Law no. 10039/2008 *On legal aid* was primarily meant to regulate the provision of legal aid in civil

and administrative proceedings and only in special cases in relation to criminal proceedings, partly because of the more cumbersome and time consuming procedure that needs to be followed. This is because in order for a potential legal aid beneficiary to be provided with legal aid from the SCLA, he should first file a request together with all supporting documentation. The SCLA will then have to meet and review the request, while if it is negative, the applicant can appeal it before the Plenary of the SCLA - though it should be noted that in cases of urgency legal aid can be granted immediately. This procedure is not conducive to protecting the interests of e.g. a suspect who is about to questioned by the police and requests the presence of a state-appointed lawyer. Yet at the same time one cannot fail to note that, on the basis of the applicable legal and regulatory frameworks, legal aid beneficiaries in civil and administrative cases are more likely to receive legal assistance meeting at least some minimal quality criteria by adequately paid lawyers appointed by the SCLA, whereas criminal legal aid beneficiaries have to make do with lowly and often with lowly paid lawyers, on who virtually no demands are placed.

The existence of two parallel legal aid tracks has also been brought up by NGOs active in the field of criminal legal aid that have noted the discrepancies between them:

> *"At present, the overlap observed, that is, the provision of legal aid in the criminal field partly by advocates who are appointed and paid by the prosecutor's office and the courts and partly by lawyers contracted by the SCLA, is not conducive to an effective legal aid system. This overlap creates confusion in the functioning of the legal aid scheme, while civil cases are virtually not covered at all by the SCLA, in relation to the actual demands."* [103]

103 See "Report on Legal Aid in Albania", Tirana Legal Aid Society (TLAS), Tirana 2012, on file with the authors.

Improving the skills of state-appointed lawyers

International standards suggest that state-appointed lawyers should receive continuing professional education. Currently, this service is performed by the National Chamber of Advocacy ("NCA") on the basis of Law no. 9109/2003 O*n the profession of advocate in the Republic of Albania*, in its Article 16/1.

On the basis of research undertaken for the purposes of this study, it transpired that although NCA regularly organizes and holds mandatory[104] general legal education trainings for lawyers, neither a comprehensive continuing legal education strategy exists nor specialised trainings on particular issues such as juveniles or persons with disabilities rights are held.

2.9. Freedom to choose a state-appointed lawyers and conflicts of interest in his appointment by the proceeding authority

A newly emerging principle among the well-established international standards of criminal legal aid suggests that, in light of the need to promote the defendant's confidence in his defence lawyer, a defendant should be afforded with the opportunity of expressing his preference as to the identity of the lawyer that will be appointed under a legal aid scheme to represent him and that, to the extent that this is practically possible, this preference should be satisfied.[105] For the same reasons

104 Thus under Article 46 of Law 9109/2003, persistent failure to attend such trainings might lead to disbarment.

105 Thus Article 24 of the non-binding European Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C378/03, 27 November 2013) provided that: "The preference and wishes of the suspects or accused persons and requested persons should as far as possible be taken into account by the national legal aid systems in the choice of the legal aid lawyer." Similarly, under international criminal law, defendants who lack the necessary means are called to choose the lawyer who will represent them from a list of eligible lawyers; see paragraph 7 of the Joint Concurring Opinion of Judges Kalaydjieva, Pinto de Albuquerque and Turkovic in *Dvorski v. Croatia* [GC], no. 25703/11, 20 October 2015.

(namely safeguarding the relationship of confidence that should exist between a layer and his client), a legal aid lawyer should be appointed by an independent authority, in order to avoid potential risks of political influence or other forms of conflict of interests.

Selection of state-appointed lawyers

With the exception of the appointment procedure set out in Law no. 10039/2008 *On legal aid*, a defendant is all but certain to be provided with a legal aid lawyer who will have been appointed on the basis of the procedure set out in Article 49.3 CCP. According to that Article:

> *"The Steering Council of the Bar Association makes available to the proceeding authorities lists of defence lawyers and determines the criteria of their appointment."*

Under this provision, the Steering Council of the NCA is mandated with drawing up the list of state-appointed lawyers on the basis of the criteria it has the exclusive jurisdiction to determine. The list is then forwarded to the proceeding organs (prosecution, courts) which will proceed to appoint legal aid lawyers out of it. Nevertheless, neither organ has adopted internal rules as to the selection criteria; thus it can be possible (and as it will be seen below, it happens in practice) that the proceedings organs will show a marked preference towards, if not outright bias in favour of, some of the lawyers on the list, appointing them in the vast majority of cases when legal representation is requested.

Yet the rather porous legal framework provides for yet another legal aid lawyers appointment procedure, albeit one that is used seldom. Thus Article 22 of Law no. 9109/2003 O*n the profession of advocate in the Republic of Albania* provides that:

> *"The Steering Council of the advocacy chamber exercises the following powers:*
> *...dh) Assigns advocates to attend court cases, when requested by the court;"*

In other words, a court (but presumably not a prosecutor) can bypass the procedure set out in Article 49.3 CCP and ask directly the NCA to provide the defendant with a legal aid lawyer, thereby making the NCA the appointing authority. Despite the promise that this provision holds (in so far as the NCA can be trusted to be more independent and impartial than the prosecution when appointing a legal aid lawyer), it would appear that in practice this option could be available to courts only when, for whatever reason, the NCA has not forwarded the list of legal aid lawyers to the proceeding organs.

In addition to the problem arising from the unfettered discretion enjoyed by the proceeding organs in appointing a legal aid lawyer from the list, another one (and arguably more fundamental) relates to the potential conflict of interest that they, and particularly the prosecution, might be confronted with. Indeed, the Parliamentary Ad Hoc Committee on Justice Reform was critical of the present system of appointment of criminal legal aid lawyers by the prosecution, considering that it gives rise to a serious risk of conflict of interest.[106] This is all the more so since the defendant does not have the possibility of at least expressing his preference as to which legal aid lawyer should be appointed to represent him, a rather easy to implement measure which would go some way in countering the prosecution's and courts' discretion.[107]

106 See *Analysis of the Justice System in Albania*, Ad Hoc Parliamentary Committee on Justice Reform, Group of High Level Experts (Unofficial Translation), June 2015, at p. 243.

107 This is indeed the approach adopted in some other countries: thus under Article 177(5) of the Croatian Code of Criminal Procedure: " [...] At the request of the suspect, the police authorities shall allow him to hire a lawyer and for that purpose they shall stop interviewing the suspect until the lawyer appears or at the latest three hours from the moment the suspect asked to appoint the lawyer. ... If the circumstances indicate that the chosen lawyer will not be able to appear within this period of time, the police authorities shall allow the suspect to appoint a lawyer from the list of lawyers on duty provided to the competent police authority by the county branches of the Croatian Bar Association ..." See *Dvorski v. Croatia* [GC], op. cit., paragraph 60.

Concluding, it is imperative that the unfettered and virtually unreviewable discretion that the proceeding organs and particularly the prosecution enjoy in assigning state-appointed lawyers, gives rise to objective and legitimate concerns regarding its transparency and compliance with fair trial standards.

The defence of two or more defendants

Another conflict of interest situation is identified in the case when a defence lawyer undertakes the representation of two or more defendants. This is because the defendants might have different and competing interests, and as a result it might be impossible for the defence lawyer to mount an effective defence for both of them.

Albanian legislation has attempted to prevent this issue from arising by means of Article 54 CCP according to which one of the conditions that should be met in such cases is that there should be no conflict of interest among the defendants.

A more detailed interpretation of this provision is provided in Constitutional Court Decision No. 15/2004 according to which:

> *"The appointment of the lawyer is contrary to Article 54 of the Code of Criminal Procedure, because there was an incompatibility of interests between the defendants previously defended by him and the applicant. The incompatibility lies in the fact that while the applicant does not plead guilty as charged, those previously tried implicate him in the role of accomplice in the criminal offense of murder committed by them. Under those circumstances, the representation in the trial of the applicant by the same lawyer also violates the constitutional principle for due process of law, provided in Article 42 of the Constitution and Article 6 of the European Convention on Human Rights. According to the procedural rules,*

it is the duty of the proceeding organ to make it possible for the lawyer to perform his duties properly, to be able to give quality legal assistance, and to conduct a constructive debate before the court. For the above reasons, in the present case the court should have appointed another defence lawyer whose judgement would not be influenced by the defence of the other tried persons with whom the accused person had a contrary position in the same criminal proceedings. According to the provision of Article 6, letter "b" of the European Convention for Human Rights and Articles 49 and 54 of the Code of Criminal Procedure, the court should make it possible for the lawyer to mount the most effective defence possible. The legal assistance that is rendered to the accused and which is required in light of the interests of justice and the important role of due process of law in a democratic society should not only not be compromised, but should additionally be an effective one in practice and not merely an illusory one."

2.10. Promoting partnerships with local Chambers of Advocacy, universities and civil society bodies

International standards also indicate that all necessary and appropriate measures should be implemented with a view to promoting access to legal aid and ensuring the wide availability. This could entail the forming of partnerships between state bodies and a diverse range of non-state legal aid providers, such as bar associations / chambers of advocate or other institutions or organizations (e.g. universities or NGOs) that have set up and operate legal clinics. Furthermore, states should devise and implement bespoke measures (e.g. tax exemptions, travel / subsistence allowances) aimed at encouraging lawyers to work in economically and socially disadvantages areas of the country.

At present, Albanian legislation does not address any of the above issues. Nevertheless, at the same time, it does not contain any

provision that would preclude the state from undertaking such measures. Thus there is no obstacle in integrating the various Albanian universities (public and private) which operate legal aid clinics, of NGOs that offer free legal aid, into the legal aid scheme. In fact, it could be argued that in light of the systemic challenges that the legal aid scheme in Albania faces, such partnerships constitute a particularly cost-effective way of addressing them, at least partially.

VII. DATA FROM CASE FILES REVIEW, SURVEYS AND TRIAL MONITORING

1. Methodology

In order to evaluate the quality of the service rendered by the state-appointed lawyers under the criminal legal aid scheme, Res Publica carried out a survey of cases brought before the Tirana District Court. The main reason for choosing this particular court lies in the fact that Tirana is Albania's capital and largest city and as a result more representative samples of cases handled by state-appointed lawyers and privately retained ones could be gathered. Furthermore, it is to be expected that as the vast majority of lawyers is based in Tirana, it is more likely that most of them will not have joined the legal aid scheme but will have their own, private practices: this will in turn make it easier to compare and assess the work of state-appointed lawyer with that of purely privately retained lawyers with a view to among others ascertaining whether the widely held perception that the service offered by privately retained lawyers is of much higher quality than that by state-appointed ones holds true. In smaller cities, the limited number of lawyers means that privately retained lawyers also figure among those appointed by the state under the legal aid scheme, making an comparative evaluation of the work of the two groups (state-appointed / privately retained) of lawyers difficult.

Turning to the methodology and method selected in carrying out the evaluation of the quality of the service provided under the criminal legal aid scheme, Res Publica decided to study the contents of case-files of cases litigated by privately retained and state-appointed lawyers. In terms of indicators, emphasis was placed on the way defence lawyers presented the case and exercised the available procedural means (such as requests for an abbreviated trial or appeals on points of fact and of law), the conduct of the defence lawyers in respecting the principle of a trial in a reasonable time period, the manner of appointing legal aid lawyers and the time they effectively spent on familiarising themselves with the case-file with a view to preparing and conducting an effective defence. The selection of these elements was made for several reasons.

First, it is to be emphasized that while conceptualizing a list with the necessary qualities that a lawyer should have, both as a reference point and for comparative purposes, we found that there is no widely accepted, comprehensive and detailed definition of the quality standards that a lawyer's service should meet.[108] It is in general accepted that a lawyer should exercise due diligence in the exercise of his duties and maintain high standards of professional conduct.

It is difficult to evaluate in abstract terms whether these standards have been met. This is because the assessment of the work of the lawyer by the lay client tends to be (and understandably so) rather subjective, but it has to be admitted that even a client with a high level of knowledge of the legal framework would find it hard to evaluate objectively, let alone dispassionately, the work of his lawyer. At the same time, it would be rather impossible for a client to carry out an evaluation of the professional quality of the defence mounted by his lawyer, with a view to ascertaining whether it meets the relevant standards. With that in mind, Res Publica embarked on studying the criminal case file precisely in order to objectively assess, by reference

108 Moore, Matthew, 2001, Quality Management for Law Firms, Law Society Publishing.

to relevant domestic and international standards, the quality of the legal defence provided.

Secondly, as noted above, the provision and the effectiveness of the legal assistance provided under a criminal legal aid scheme primarily serves the interests of justice, since the presence or absence of an effective defence is a key element of the right to a fair trial. Particularly in criminal cases, an effective defence is a safeguard for the respect of the defendant's procedural rights, which are directly linked to the fundamental human right to a fair trial. This is an additional reason why the present survey focused on the procedural aspects of the criminal trial when comparing the work of the groups of defence lawyers.

Third, and considering that most of the members of the working group on this study are lawyers and members of the Tirana Chamber of Advocacy, it is difficult if not ethically reprehensible to give an opinion about and evaluate the work of colleagues, not only because of the difficulties in obtaining full access to all the files as well as other logistical issues, but also because such an evaluation would unavoidably be tainted by an element of subjectivity. Although the authors of the study can offer their own opinion about the quality of the work of a specific lawyer or make constructive comments as to how he could have better litigated a particular case, passing judgment on the professional skills of fellow lawyers would go against the Attorney's Ethics Code. Indeed, no conclusive assessment of the work of another lawyer can be made unless the person carrying out the assessment places himself if he is not under the same conditions in terms of work priorities, time pressure, concerns about remuneration, and the authorities' or the client's attitude towards him. For all these reasons, the present study focused not so much on assessing the content of the lawyer's work but on the use of the various applicable procedural means at the lawyer's disposal with a view to protecting the interests of the defendant or accused person in the best possible way.

It should be emphasized that the various elements on the basis of which the comparative findings were made should be viewed as indicators rather than conclusive factors; a more comprehensive and in-depth assessment would require the inclusion of experts on other scientific disciplines. It should also be noted that as each case presents its own unique set of factual and legal parameters, some of the data set out below might not be entirely precise. Nevertheless, they do paint a highly representative and accurate picture of the overall situation and identify the main issues of concern that should be addressed.

In addition to the above, part of the study has been devoted to assessing the outcome of the cases (namely the decision rendered by the court as well as the prosecutor's motion) reviewed under the present study. It should be noted in this respect that the final outcome of a trial does not depend entirely on the quality of the defendant's legal representation or whether his lawyer was privately retained or state-appointed, but also on other factors affecting the justice system in general, which does not constitute a "laboratory" allowing for the holding of a comprehensive and fully objective data collection exercise with a view to carrying out a critical assessment conforming to the most exacting scientific standards.

Taken jointly, the data collected from the study of the criminal case files, the findings from the interviews held, and the observations from the monitoring of court sessions, provided the working group with a wealth of information that enabled the working group to carry out a comprehensive evaluation the role and effectiveness of criminal defence provided by lawyers in general. At the same time, the same data set allowed the working group to identify issues and areas of concern in the field of administration of criminal justice, highlighting in particular the differences between the work of the privately retained lawyers with that of the state-appointed ones.

The in-depth study of the case files and the critical evaluation of the

data collected for the purpose of this study, combined with the "real life" insights from the answers given by three focus groups allowed the working group, albeit not without difficulty, to evaluate both qualitatively and quantitatively the quality of legal assistance provided under the criminal legal aid scheme.

In terms of qualitative analysis of the work of state-appointed lawyers, a three-pronged method was used, consisting of the following elements:

a. Study of a sample of 100 criminal case files

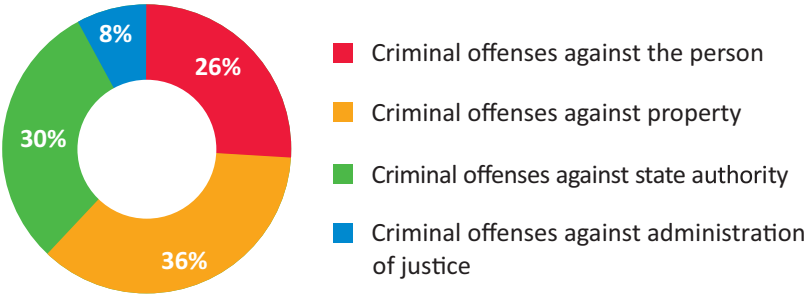
Following a preliminary examination of 5,152 criminal decisions from the Criminal Division of the Tirana District Court in the period 2013-2014, a number of 100 criminal case files in which the judgments had become final were selected with a view to further analysis. The cases selected concerned a variety of criminal offenses punishable under the Criminal Code (CC)[109], namely the following:

Article 76 CC – Murder
Article 89 CC – Non-serious intentional injury
Article 113 CC – Prostitution
Article 130/a CC – Domestic violence
Article 134 CC – Theft
Article 139 CC – Robbery
Article 143 CC – Deception / Fraud
Article 150 CC – Destroying property
Article 186 CC – Falsification of documents
Article 236 CC – Opposing the official of the public order police
Article 279 CC – Illegally manufacturing and keeping of weapons other than firearms

109 The English version of the Criminal Code in force at the time of the study and translated under the EURALIUS project is available at: http://www.euralius.eu/pdf/20.Criminal%20Code%20of%20Albania%20consolidated%20version%20of%2022_01_2015_en.pdf

Article 283 CC – Manufacturing and selling narcotics
Article 291 CC – Driving while inebriated or without a license
Article 305 CC – False report
Article 321 CC – Acts opposing court's decision

Cases involving these offences comprise a big part of the Tirana District Court's caseload thus allowing the selection of 100 cases involving the same offences and identifying 50 cases where the defendant was represented by a state-appointed lawyer and 50 where the defendant had a privately retained counsel. This manner of selection was done for the purpose of having the broadest possible study coverage in all types of trial. The sample of 100 cases was considered to be statistically significant under the terms of Fisher's exact test.



The objective of the case files study was to collect quantitative data as well as identify, on a case by case basis, any particular qualitative elements.

b. Structured interviews with three focus groups: judges, prosecutors and state-appointed lawyers

The conclusions and findings from the study of the case files were revisited and interpreted in the light of the tenor of the answers given by the members of three focus groups, namely judges, prosecutors

and state-appointed lawyers. 10 persons from each group were interviewed in private, on the basis of a standard questionnaire prepared in advance and containing questions pertaining to the particular role of each group in the criminal process.

c. Monitoring of criminal court sessions

In addition to the above, and with a view to forming a more realistic picture of the criminal proceedings and the way they are conducted in practice, a team of lawyers monitored 200 criminal court sessions during the period from 1 December 2015 to 29 February 2016. The monitoring lawyers were asked to fill in, on the basis of their monitoring, a questionnaire / check list containing entries on a number of issues such as how the lawyer was appointed, how much time they devoted on studying the case file, when and how the first meeting with the client took place, whether the lawyer filed any submissions in writing, whether he was cautioned by the court on any ground and so forth.

2. Research questions

The working group studied the criminal case files with a view to responding to a number of questions formulated at the beginning of the project, on the basis of the relevant international / domestic standards, the professional experience of the members of the working group, domestic and international NGO and INGO reports as well as feedback from outside experts. Most of these questions essentially seek to ascertain two distinct yet interrelated underlying issues: first, whether the legal assistance provided by state-appointed lawyers complies with the relevant domestic / international standards and second how effective is the performance of state-appointed lawyers compared to that of privately retained lawyers. With that in mind, the questions that the present survey sought to answer are the following:

1. How often are defendants in criminal cases represented by state-appointed lawyers?

2. Are state-appointed lawyers assigned to defendants on the basis of well-defined and competitive legal criteria or is their appointment left to the discretion of the judge/prosecutor? Is the preference of the defendant as to his defence counsel taken into account?

3. Do state-appointed lawyers have enough time at their disposal to familiarise themselves with the case file and consult with the client? Under what conditions are such consultation meetings held?

4. Are state-appointed lawyers more likely to advise their clients to request an abbreviated trial in comparison to privately retained lawyers? How does choosing this particular form of trial affect the final court decision?

5. How effective is the legal assistance rendered by state-appointed lawyers in proceedings against juvenile defendants?

6. How can the level of preparation of state-appointed lawyers, as well as their professional commitment, be measured? What are the objective indicators to be employed to that effect?

7. Is the performance of state-appointed and privately retained lawyers evaluated during the duration of the proceedings and if yes, how?

8. Is there a difference in the sentences proposed by the prosecutor and handed down by the court depending on whether the defendant is represented by a state-appointed lawyer or a privately retained one? Are judges likely to take more into consideration the closing arguments of privately retained lawyers as opposed to state-appointed ones? Has the court been affected by the final requests of chosen lawyers compared to those appointed ex officio, as to the amount of the sentence in the final decision?

9. How likely are state-appointed lawyers, compared to their privately retained colleagues, to exhaust all legal means available with a view to defending the interests of their client?

10. How successful are the appeals filed before the Tirana Court of Appeal by state appointed lawyers compared to those filed by privately retained lawyers?

11. Is criminal legal aid available in all phases of the criminal proceedings, including before the High Court and the Constitutional Court or during the phase of execution of the final decision?

12. How do the relevant authorities evaluate the work of state-appointed lawyers?

3. Study of the criminal case files combined with an analysis of data from the interviews and the findings from the court sessions monitoring

a. Percentage of criminal cases where a state-appointed lawyer was assigned

The number of cases in which the Tirana District Court proceeded to the designation of a state-appointed lawyer in 2013 - 2014 constituted more than one quarter of all criminal cases in relation to which a final judgment was handed down.

Table no. 1 – Criminal cases where the defendant(s) was represented by state-appointed lawyers, compared to the total number of cases

Type of defender	No. of decisions	As a percentage
Ex officio lawyer	1377	26.7%
Chosen lawyer	3705	73.3%
Total	5152	100%

The large percentage of such cases (26.7%, or 1,377 out of 5,152 cases) amply shows that there is a significant need for legal aid in criminal proceedings.

b. Opting for an abbreviated trial as a criminal defence strategy

One of the survey's findings was that defendants often request a trial under the abbreviated (or summary) trial procedure. In order to better understand the advantages and disadvantages of an abbreviated trial in the framework of criminal proceedings and how these can affect the performance of state-appointed or privately retained lawyers, a closer look at the institution of abbreviated trial is necessary.

Regulated by Articles 403-406 CCP, an abbreviated trial is a special form of trial, consisting of the voluntary waiver by the defendant of several fundamental aspects of his right to a fair trial such as the principle of equality of arms or the right to adversarial proceedings, in order to benefit from a reduction of sentence.[110] Unlike an ordinary trial, an abbreviated trial effectively bypasses the stages of the trial proceedings between the introduction of the case to the court and the handing down of the verdict.

It is the obligation of the court to assess whether, on the basis of the case file and its contents, it can render a decision guaranteeing on the one hand the proper administration of justice and, on the other hand, that the legitimate interests of the defendant will be safeguarded.[111]

110 Constitutional Court decision no. 4 dated 10.02.2012.

111 In the decision of the Joint Benches No. 2/2003, the High Court unified the judicial practice, holding that in relation to abbreviated trials, the case should be resolved on the basis of the case file as it stands, which in turn means that the parties cannot request the holding of additional investigative measures. Under the Criminal Code, the defendant should request the the holding of an abbreviated trial at the beginning of the judicial examination (i.e. before the filing of any nullity requests or the administration of evidence). Should the court grant the request, the prosecutor's file effectively become's the case's judicial file, on the contents of which the court will premise its decision.

From the perspective of the justice system, the advantages of abbreviated trials are rather self-evident, namely the swift disposal of cases. This is because, in the absence of the holding of a proper court hearing, cases tried under the abbreviated procedure are concluded in not more than two sessions, namely a preparatory session (where the defendant makes the request for the holding of the abbreviated trial) and the judicial determination session, where the parties present their final arguments and the court hands down its verdict.

From the perspective of the defendant, the advantage lies in the reduction of the sentence by one third in case of a guilty verdict. It should be emphasized that despite its similarities with the concept of plea-bargaining, requesting the holding of an abbreviated trial does not presuppose or entail an admission of guilt. Rather, the defendant merely waives all additional procedural rights he had at the time he files the request for an abbreviated trial and acknowledges that his trial can be conducted on the basis of the evidence already collected and included in the case file, which now assumes full probative force. As a result, the court might render either a guilty or not guilty verdict or proceed to requalify the offence with which the defendant was charged.

It should be stressed that a request for an abbreviated trial is not automatically granted, as such an outcome will depend to a great extent on whether the case file prepared by prosecutor is reasonably complete, in terms of the evidence included as well as its qualification.[112]

112 According to Constitutional Court Decision No. 4, dated 10 February 2012: "In order for the defendant to decide whether it is to his benefit to request an abbreviated trial, he should first review how the preliminary investigation has been conducted and how the offence has been qualified by the prosecutor. This is important because, should there be any mistakes or omissions by the prosecutor, in e.g. qualifying the offence, the indictment can undergo a substantial change. The defendant should therefore have enough time to scrutinise the case file in order to make an informed decision. Not granting enough time to all defendants to do so could violate the right to defence as well as the principle of the equality of arms, since those granted enough time to study the case file] would be allowed more opportunities to identify potential mistakes and omissions committed by the prosecutor in the preliminary investigation stage (see decisions no. 333/2009

The quality of the case file will also depend on whether the defendant was assisted by defence counsel during the preliminary investigation phase; legal assistance or lack thereof can have an indirect bearing on the likelihood of success of the request for an abbreviated trial, as it can affect the quality of the evidence included in the case file.

The following table presents the percentage of cases where state-appointed and privately retained lawyers, after securing the agreement of their client, requested the holding of an abbreviated trial.

Table no. 2 – Abbreviated trial requests by state-appointed and privately retained lawyers

Type of defender	Ordinary trial	Abbreviated trial
Appointed lawyer	24%	76%
Chosen lawyer	10%	90%

As can be seen from the data presented above, it appears at first glance that privately retained lawyers resort more regularly to abbreviated trials than state-appointed lawyers. Following however a more in-depth study of the case files, it transpired that nine out of the twelve cases where the state-appointed lawyer had not requested an abbreviated trial concerned proceedings in absentia; since it is the missing defendant's exclusive prerogative to request such a trial, it was not possible for an abbreviated trial to be held. In one case, a female defendant insisted on being tried under the ordinary procedure, and in another case, the file was returned to the prosecutor at the latter's request, without the court adopting a decision.

and no. 265/1994 of the Italian Constitutional Court)." The reference to the Italian Constitutional Court decisions is explained by the fact that the institution of an abbreviated trial in the Albanian legal order was borrowed from the Italian legal order; indeed, even the Albanian Code of Criminal Procedure has been influenced heavily of the Italian one. For this reason, the Albanian Constitutional Court often refers to Italian criminal law jurisprudence.

From the above, it transpires that out of all the trials held under the ordinary procedure, only one took place following a explicit request to that effect by a defendant represented by a state-appointed lawyer. On the other hand, privately retained lawyers represented the defendants in five trials held under the ordinary procedure, suggesting that the defendants in those cases did not request to be tried under the abbreviated trial procedure.

In light of the above, the table should be revised as follows in order to more accurately reflect the number of requests for ordinary and abbreviated trials respectively, on the basis of whether the defendants in those cases consented to the holding of an abbreviated trial or not.

Table no. 3 - Requests for ordinary and abbreviated trials by state-appointed and privately retained lawyers, on the basis of the defendants' explicit request to that effect

Type of defender	Ordinary trial	Abbreviated trial
Appointed lawyer	2%	98%
Chosen lawyer	10%	90%

Considering the statistical significance of the data ($P<0.1$), it can be argued that cases where the defendants are represented by state-appointed lawyers are more likely to be tried under the abbreviated trial procedure.

Considering that a trial under the ordinary procedure (which often state-appointed lawyers do not prefer but due to other factors such as the fact that the defendant is at large, cannot avoid) entails more work for the lawyer, a case tried under the ordinary procedure is likely to entail more judicial sessions, which translates into additional remuneration for the state-appointed lawyers. The change of the number of sessions is given in the following table.

Table no. 4. Number of sessions held in trials under the ordinary and abbreviated procedures in the 100 case files surveyed, broken down by type of defence counsel (state-appointed / privately retained)

Type of defender	Sessions (ordinary trial)	Sessions (abbreviated trial)
Appointed lawyer	135	178
Chosen lawyer	66	175

The number of sessions held in trials under the ordinary procedure litigated by a state appointed lawyer is approximately twice as high than that in trials where the defendant has chosen his own lawyer. This difference affects the payment of the state-appointed lawyers, as their remuneration is made on the basis of the number of sessions they attend and not on the basis of the type of case or its complexity.

Although an ordinary trial is often held contrary to the preference of the state-appointed lawyer, the consequences are borne by the defendant who, if found guilty, does not benefit from the one third sentence reduction. The effect is often greater in practice as in trials under the ordinary procedure, the courts appear to hand down more severe sentences, thereby depriving the defendants of more than the one third sentence reduction. The following table shows what this entails, in practical terms, for the defendant.

Table no 5. Effect on the level of sentence handed down by courts in trials under abbreviated and ordinary procedures, broken down by type of defence counsel (state-appointed / privately retained)

Type of defender	Sentence imposed by courts in ordinary trials		Sentence imposed by courts in abbreviated trials	
	Years of imprisonment	Fine	Years of imprisonment	Fine
Appointed lawyer	31.75 years	520.000 ALL	54.55 years	290.000 ALL
Chosen lawyer	0.8 years	240.000 ALL	50 years	220.000 ALL

As the data show, a trial under the ordinary procedure where the defendant is represented by a state-appointed lawyer is likely to result in a considerably higher sentence, compared to the sentence handed down by courts in abbreviated trials. This disparity is due primarily to the following two interrelated reasons. First, the defendants are tried in absentia. They are hiding from justice, and that clearly has an effect on how their guilt is perceived by the prosecution and the court. Second, prosecutors and judges exhibit a marked preference for the abbreviated trial procedure, as it makes it possible for them to dispense their duties more quickly and without subjecting them to criticism regarding their work. Requesting the holding of a trial under the ordinary procedure on the other hand is often viewed as an "annoyance" by the court and the prosecution.

Turning to a closer inspection of the data, it transpires that in the case of trials under the ordinary procedure where the defendant had a state-appointed lawyer, the level of the sentence on average amounts to about 2.6 years of imprisonment for each defendant, while in the case of privately retained lawyers, the level of the sentence is only 0.2 years for each defendant. The level of statistical significance is $P<0.01$, suggesting a statistically significant result. Another element that might be of relevance in this respect is that privately retained lawyers appear to prefer (and advise their client accordingly) the holding of a trial under the ordinary procedure when they believe that their client has a good chance of being found not guilty, or that the offence might be requalified to a lower one, or that some counts of the indictment will be rejected. On the other hand state-appointed lawyers, often by force of circumstances (e.g. the defendant is tried in absentia and therefore cannot request an abbreviated trial), are obliged to defend their clients in trials held under the ordinary procedure, even against their better professional judgement.

Summarising, by not holding an abbreviated trial when there is no expectation of discovering new evidence or seeking the invalidity of any of the evidence against the defendant, the defendants in the case files studied were penalised by seeing their sentence increase on average by 10.5 months of imprisonment, notwithstanding that, as noted above, this outcome is not directly imputable to the state-appointed lawyers.

It is interesting to see what the members of the three focus groups think about the different defence strategies pursued by state-appointed lawyers.

Table no. 6 – Main perceptions of the members of the focus groups regarding the state-appointed lawyers requests for the holding of trials under the abbreviated / ordinary procedure

Focus groups	Judges	Prosecutors	Lawyers
Answers	Court appointed lawyers are usually not present during the investigation phase and advice their clients to request an abbreviated trial. This means they have no interest in challenging potentially invalid investigative measures, on grounds of e.g. their non-participation in the holding of these measures.	It varies, they do not see a difference in practice between appointed lawyers and chosen ones. It is to be expected that appointed lawyers ask for an ornidary trial as a rule, because of their absence during the preliminary investigation phase.	In the largest number of cases, they advise the defendants to ask for an abbreviated trial.

As it can be seen, prosecutors think that state-appointed lawyers are reluctant to request trials under the ordinary procedure, so they tend to prefer abbreviated trials, whereas judges do not see a difference in the state-appointed lawyers' preferences. Nevertheless, the judges noted that they expect in trials where the defendants are tried under the ordinary procedure, they are more likely to have a state-appointed lawyer, due to the defendants trial in absentia or due to having a different state-appointed lawyer during the preliminary investigation phase. Last, lawyers note that they always try to convince their clients to request an abbreviated trial.

A more in-depth analysis of these answers, combined with data from the study of the case files, suggests that usually the holding of a trial under the ordinary procedure is not due to the defence strategy adopted but rather dictated by the circumstances and the impossibility of requesting an abbreviated trial.

Interestingly, according to the prosecutors' and judges' focus groups, in some cases an abbreviated trial serves to effectively "whitewash" irregular investigative actions.

Summarising the above, it is concluded that regardless of the reasons why state-appointed lawyers take part in trials under the ordinary procedure more often than privately retained lawyers, this disparity is indicative of a shortcoming in the applicable legislative framework and the way it is implemented in practice, a shortcoming that not only increases the prosecution's and courts' workload but is also to the detriment of the defendants.

c. Lawyers' request for sufficient time to study the contents of the case file

According to the focus groups of lawyers and prosecutors, state-appointed lawyers usually do not take an active part in the phase of

preliminary investigation; as if this were not problematic enough on its own, it is very likely that the state-appointed lawyer representing the defendant before the court will not be the same lawyer who represented the defendant in the preliminary investigation phase, thereby undermining the continuity and ultimately the effectiveness of the criminal defence. Indeed, the study of the case files suggests that in a full 80-85% of the cases the defendants are not represented by the same state-appointed lawyers in both stages of the proceedings (investigation and trial), a finding corroborated also by the responses of the members of the focus group of prosecutors.

Furthermore, state-appointed lawyers more often than not have not even met - let alone consult - at least once with their client, not only because the defendant is tried in absentia (in at least 20% of the cases, the trial takes place in the absence of the defendant), but even when the defendant is under arrest and therefore easily accessible, the state-appointed lawyer is more likely than not to meet his client for the first time in the courtroom. It is therefore to be expected that the state-appointed lawyer will request the adjournment of the trial with a view to consulting with his client and studying the case file. This in turn would suggest that trials of defendants represented by state-appointed lawyers last longer and are concluded after a higher number of sessions in comparison to cases of defendants represented by privately retained lawyers, as there is no continuity of legal representation, an element that can also have an adverse impact on the quality of legal assistance.

In the light of the above, the researchers concluded that the number of motions for adjournment filed by state-appointed lawyers with a view to studying the case files, would be a substantive and, more importantly, objective indicator regarding the quality of their performance as well as their professionalism.

Table no. 7 – Lawyers' motions for adjournment with a view to studying the case file

Type of defender	Requests to postpone sessions to learn about the file, as a percentage of the total
Appointed lawyer	24%
Chosen lawyer	12%

It is rather striking that, contrary to the rather legitimate expectation that the number of sessions would be increased, in reality state-appointed lawyers do not appear to make concerted efforts to familiarise themselves with the contents of the case file with a view to mounting a more effective defence, thus turning the very role of the lawyer in the proceedings into a mere formality. In particular, it transpires that in more than 75% of the cases, state-appointed lawyers do not ask for time to familiarize themselves with the case file but assume their defence work even though the case file might be voluminous, incomplete, or contain inadmissible evidence.

The above conclusion is also corroborated from the court sessions monitoring undertaken in the context of the present study, in which cases were observed where newly designated state-appointed lawyer asked the court for only a minute to "confer" with their clients, whom they met for the first time in the courtroom; following this short conversation, very often within earshot of both the judges and the audience (and usually consisting of urging the defendant to request an abbreviated trial), the trial resumed, with the state-appointed lawyer filing a motion for an abbreviated trial.

It is interesting in this respect to compare these findings with the answers provided by the members of the three focus groups to the following question:

Table no. 8 - Do state-appointed lawyers request time to familiarize themselves with the case file?

Focus groups	Judges	Prosecutors	Lawyers
Answers	Yes, and when they ask they are given the time necessary to study the file, but no longer than 15 days.	Yes, they are given the time of 15 days provided by law for studying the file.	In large part, time is granted to study the file if they ask for it, but there are cases when the judges are annoyed by such requests.

It is to be noted that the answers by the judges and prosecutors focus groups seem to contradict the findings from the study of the case files and the court sessions monitoring. The reason behind this discrepancy might lie in the desire of judges to shield themselves from criticism, as they are aware that they should take measures (e.g. appoint another lawyer) if the state-appointed lawyer is exercising his duties in a palpably unprofessional manner - and indeed not requesting time to study the case file is an easily attestable example of lack of professionalism.

It is interesting in this respect to note that as it will be seen below judges continue to have a very low opinion as to the quality of state-appointed lawyers (suggesting at the very least that despite the granting of adjournments, state-appointed lawyers do not study the case file), whereas the members of the lawyers focus group noted that there are times when the judges visibly express their annoyance when confronted with a request for time to study the case file. This often leads state-appointed lawyers to be reluctant to make such requests, in order to not fall out of favour with a particular judge.

d. (In)ability to meet the person under arrest / detention during all phases of the criminal proceeding

One of the most frequent criticisms about the legal assistance provided by state-appointed lawyers is that they are not present at all phases of the criminal proceedings, starting from the moment when these begin (e.g. upon arrest) until the court hands down its sentence, and after that during the execution of the sentence.

Whereas it is true that the presence of a lawyer does not necessarily correlate with the provision of high quality legal assistance, it cannot be doubted that even the mere presence of a lawyer can act as a safeguard for the defendant's rights. Thus for example, it often happens that criminal trials take place in the absence of the defendant, who frequently has not been notified of the filing of proceedings against him. Data collected for the purposes of the study show that around 20% of the cases are tried in the defendant's absence.

It should be noted that often these cases concerns defendants who are purposefully evading justice and consequently might not be entitled to request that the rights they have waived be respected. Nevertheless, there are also cases where the defendant is not hiding from justice and the failure to properly summons him is due to problems in the service of the relevant notifications or the judicial authorities' failure to take all reasonable measures with a view to ensuring the service of the notifications; the case of A. M. described in detail below, amply attests to this. In those cases, a trial in absentia violates several principles, such as the equality of arms and the adversarial principle, which are crucial for the mounting of an effective defence and the respect of the right to a fair trial, as guaranteed by Article 31 of the Albanian Constitution and Article 6 of the European Convention on Human Rights, principles that in themselves constitute the most fundamental elements of due process.[113]

113 According to Constitutional Court Decision No. 4/2012, op. cit., "In order for

In this respect, the Code of Criminal Procedure (CCP) devotes a series of provision to the issue of serving of notifications. Under Article 141 CCP:

> *"Serving notification to a defendant who cannot be found*
> *1. In cases where notice cannot be served according to the rules on serving notification to the free defendant, the proceeding authority shall order the conduct of a search operation for the defendant. If the search does not give any positive result, a decision of failure to find shall then be issued, by which after appointing a defence counsel for the defendant, shall be ordered that a copy of the notification is delivered to such defence counsel. The person who cannot be found shall be represented by the defence counsel. 2. The decision of not being found shall cease to have effects when the preliminary investigations are concluded or a ruling has been issued by the court.*
> *3. Notification addressed to the defendant who is hiding or a fugitive shall be served by delivering a copy of the procedural act/ document to his defence counsel and when he does not have one the proceeding authority shall ex-officio appoint a defence counsel, who shall represents [sic] the defendant.*"

Failure to notify the defendant is in violation of the principle of due process of law, as the absentee party is precluded from filing a series of procedural requests, such as that for an abbreviated trial or for the application of alternative (i.e. non custodial) sentences.

For the purposes of the present study, the reasons why a defendant may fail to be properly summonsed or serviced with the relevant

the courts of ordinary jurisdiction to fully respect these principles, they should, depending on the facts of the case, ensure among others, that the defendant has been duly notified of the indictment or any legal remedies (appeals, cassation motions) that might have been exercised, as well as of the court decision ultimately delivered. Such procedural steps are necessary with a view to ensuring that the prosecution and the defence are placed on an equal footing when it comes to determining the case and the administration of justice by the court (see Constitutional Court decisions No. 37 dated 19.09.2011; No. 25 dated 10.06.2011; No. 19, dated 18.09.2008; No. 13 dated 21.07.2008; No. 16 dated 08.06.2006)."

document are not important; rather, what is more important is the role of the defence lawyer in such cases.

When the defendant is absent, the prosecutor or court will propio motu proceed to designate a state-appointed lawyer, who for obvious reasons will have no contact with the defendant during the whole duration of the proceedings. The state-appointed lawyer is under no obligation to attempt to find and notify the person he is defending, even though it might be decisive for the outcome of the case to do so.

Another problem lies in the lack of any provision for notifying the state-appointed lawyer appearing before a court and representing a defendant being tried in absentia that his client has been arrested (e.g. in execution of an arrest warrant or a criminal decision issued earlier). This is because as seen above, different organs have at time concurrent jurisdiction in nominating state-appointed lawyers.

Turning to the issue of notification of the state-appointed lawyer as to the arrest of his client and the holding of a consultation with him, the findings from the discussions with the three focus groups of prosecutors, judges and lawyers are set out in the following table:

Table no. 9 – Notification and consultation of the lawyer with the defendant

Focus groups	Judges	Prosecutors	Lawyers
Answers	In case of the defendant's absence, a lawyer is appointed ex officio. The lawyer does not have any contact with the defendant during the entire procedure.	When a defendant is at large, a lawyer is appointed ex officio. The lawyer does not have any contact with his/her client.	When a person is detained, they are called by the police with delay. They usually meet the clients, depending on the phase of the proceeding, in the courtroom or places of pretrial detention.

As it can be seen from the lawyers' answers, the meeting with the client often does not take place immediately after his arrest and placement in detention - rather, the lawyer becomes aware of his prospective client's case only at the courtroom (i.e. when the arrested person is brought before the judge) which makes it practically impossible, both due to the lack of time as well as due to the lack of privacy, to become familiar with the case file and instruct the defendant as to his rights, let alone devise a bespoke criminal defence strategy. As an inexorable result, the lawyer cannot mount an effective criminal defence.

In addition, another source of particular concern is the persistent failure in serving notifications to the defendant, thereby preventing the state-appointed lawyer from defending his rights effectively. On the basis of the answers by the judges and prosecutors focus groups, it transpires that when a defendant is not located immediately, the prosecution / court will not make any additional efforts to locate him but will proceed with the proceedings in his absence (as noted above, on the basis of the study's findings, 20% of these trials are conducted in the absence of the defendant), notwithstanding the fact that when the defendants are eventually informed of the launching of proceedings against them or of the court decision, they may ask for the reopening of the proceedings from the beginning, thus leading effectively to their duplication.

e. State-appointed lawyers in proceedings against juvenile defendants

Under Albanian criminal law, juveniles between the ages of 14-18 can be held criminally responsible for their acts. On the basis of domestic and international law instruments and by virtue of the juveniles' particular characteristics (such as their psycho emotional development), this particular category of defendants enjoys increased protection under criminal law.

According to a joint study by Save the Children and the Foundation for Conflict Resolution and Reconciliation of Disputes regarding restorative justice and the phenomenon of recidivism of juveniles in conflict with the law in the penitentiary system, imprisonment is the most intrusive custodial measure for juveniles and does not produce positive effects. The study revealed that the earlier in a juvenile's life that imprisonment has been imposed as a sanction, the higher the danger of recidivism. The level of recidivism of juveniles in pretrial detention centres increased by 17.7% in 2013 and 25.7% in 2014.

The same study highlighted the need to give priority to alternative sanctions and measures for juveniles, with a view to protecting and promoting their rights and contributing to their social rehabilitation. The use of such methods, in line with modern standards on juvenile justice, will not only address the issue of juvenile delinquency more effectively but would also reduce their exposure to violence.

Referring to data from the Ministry of Justice, the study noted that involvement of children in conflict with the law is increasing: 680 juveniles were sentenced to prison sentences in 2013 while 773 juveniles were sentenced to prison sentences in 2014, an increase of 12% within one year.

The study also stressed that the imposition of prison sentences to juveniles also gives rise to negative stereotypes, prejudice and ultimately discrimination against them, thus leading to their social marginalisation; alternative measures on the other hand are more likely to be effective in the long term. Indeed, according to data from the study, children to whom alternative measures to imprisonment have been applied are more easily integrated into society and are less inclined to resort to violence in a community or a family setting.[114]

114 Presentation of the report by Save the Chidren Country Director for Albania, Ms. Anila Meco, available in Albanian at: http://www.zeriamerikes.com/content/save-the-children-drejtesia-per-te-mitur-anila-meco/3065166.html

In light of the particularly sensitive nature of the proceedings, lawyers who have not been specialized in litigating such cases might face difficulties in ensuring that their juvenile client will have a fair trial.

Table no. 10 – Ratio of type of legal representation in cases against juvenile and adult defendants, broken down by type of defence counsel (state-appointed / privately retained)

Type of defender	Juvenile defendants	Adult defendants
Appointed lawyer	32%	68%
Chosen lawyer	6%	94%

Considering that, on the basis of the data above and for a number of reasons (primarily related to their families' poverty that prevents them from retaining a private lawyer) juvenile defendants are more likely than not (indeed, five times more likely) to be represented by state-appointed lawyers, the latter's specialization in the field of juvenile justice is of paramount importance.

The study of the criminal case files of juveniles also yielded a particularly interesting case that illustrates the low level of performance by state-appointed lawyers as well as (thankfully for the defendant) the responsibility of the judges in supervising their performance and mitigating the impact of their (the lawyers) lack of professionalism. In one of these cases, the state-appointed lawyer representing a juvenile defendant readily agreed that his juvenile client should be sentenced to a prison term. Nevertheless the court, although finding the defendant guilty, did not impose any sanction on him but proceeded to exempt the defendant from the obligation to serve the sentence after taking into account of its own initiative his age and the low social risk that his crime entailed.

f. Delivery of closing arguments at the concluding trial session

For the reasons set out in the introduction to this chapter, it is difficult to evaluate the quality of criminal defence in the abstract. Nevertheless, certain procedural aspects of the case can serve as substantive indicators regarding the professionalism and quality of service provided by lawyers. One such indicator referred to above was the filing of motions for the adjournment of the trial with a view to studying the case file.

Another substantive and objective indicator is the delivery of the lawyer's closing arguments before the court reaches its verdict. An articulate, well-grounded in domestic and international law closing argument not only is an indicator that the lawyer has studied the case file and devised a defence strategy aimed at benefiting his client, but might also be of crucial assistance to the judge in reaching a fair decision (by e.g. drawing his attention to relevant international law principles or domestic case-law). A related sub-indicator is whether the lawyer submits his closing argument to the judge also in writing: regardless of issues of writing style, content or length, the submission of the closing arguments also in writing would suggest at the very least that the lawyer took the time to write down his arguments that the judge can study (as opposed to merely listen to), thus maximizing their (the arguments') effectiveness.

According to the findings from the court sessions monitoring, it transpires that in the vast majority of case, the closing arguments are formulated only orally and tend to be rather short, with the lawyer usually merely asking for his client to be found not guilty and / or receive the minimum sentence.

Table no. 11 –Submission of closing arguments in writing

Type of defender	Percentage of cases
Appointed lawyer	18%
Chosen lawyer	41%

As it can be seen, fewer than 1/5 of the state-appointed lawyers submitted their closing arguments in writing. Putting this finding in perspective however, it should also be noted that fewer than half of the privately retained lawyers in the court sessions monitored did the same; still however, it is rather telling that privately retained lawyers are more than twice as likely as their state-appointed colleagues to file their closing arguments in writing. And although one should be rather cautious in making a broad claim to the effect that the failure to present closing arguments in writing can have an impact on the decision to the detriment of the defendant, it is rather logical to expect that the filing of the closing arguments in writing will be perceived as a mark of professionalism by other actors of the justice system.

This is why the two focus groups of judges and prosecutors were also asked to make an overall assessment of the quality of legal assistance provided by state-appointed and privately retained lawyers, by choosing a number from a scale of 1 to 5, with 5 denoting high quality legal assistance.

Table no. 12 – Assessment of the quality of work of state-appointed and privately retained lawyers

Focus groups	Judges	Prosecutors
Answers	On a scale of 1 to 5, they rate the quality of appointed appointed lawyers a 2 to 3, that is, they consider it average. Chosen lawyers are more motivated to provide a better defence.	On a scale of 1 to 5, they rate the quality of appointed lawyers a 1 to 3. Chosen lawyers provide a better defence.

As it can be noted, judges and prosecutors seem to harbour similar opinions regarding the quality of legal assistance provided by state-

appointed lawyers; it should be noted that during the interviews, the issue of their failure to submit their closing arguments in writing was considered by both groups as evidence of low professionalism.

It is interesting to note a rather subtle difference between the evaluation of the performance of state-appointed lawyers by judges and prosecutors, with the latter having and even lower opinion of their skills as lawyers than judges. On the basis of the discussions with members of the two focus groups, the explanation might lie in the fact in the preliminary investigation phase (namely when they come into contact with the prosecutors), lawyers tend to be more passive than when they appear before the court.

g. Trial within a reasonable time and the role of the lawyer

The right to a trial within a reasonable time is a right protected under both domestic and international law. Respecting it is also to the benefit of the state, as lengthy trials are one of the main reasons behind the overloaded court dockets.

Article 6 paragraph 1 of the European Convention on Human Rights provides that at:

> *"In the determination of (…) any criminal charge against him, everyone is entitled to a fair and public trial within a reasonable time by an independent and impartial court (…). "*

Article 6 ECHR is echoed by Article 42. 2 of the Constitution, which provides that:

> *"Everyone, to protect his constitutional and legal rights, freedoms and interests, or in the case of charges against him, has the right to*

a fair and public trial, within a reasonable time, by an independent and impartial court specified by law".

Notwithstanding these legal provisions, national and international reports by both NGOs and INGOs indicate that judicial proceedings in Albania are characterized by long delays and continuous adjournments of courts sessions. Unduly protracted proceedings have a series of negative effects such as artificially increasing costs and expenses both for the parties to the proceedings as well as for the judicial system in general, undermining the trust of the public in the efficiency of justice system, creating room for practices of corruption and so forth.

For the purposes of the present study, the working group focused on ascertaining whether the conduct of lawyers has any impact in the length of proceedings. It should be noted in this respect that according to Article 34 of the Attorney Ethics Code, lawyers should not cause unnecessary delays in judicial proceedings.

It is reminded that as seen above at table no. 4 above, the average number of court sessions in cases where the defendant is represented by a state-appointed lawyer is higher than that where he is represented by privately retained counsel. One reason advanced for this difference was that state-appointed lawyers are more likely to litigate cases under the ordinary procedure rather than the abbreviated procedure which, as its very name suggests, is concluded more swiftly. Another reason lies in the filing of motions for adjournment with a view to studying the case file (see table no. 7 above) which is due to the fact that usually the state-appointed lawyer representing the defendant before the court is not the same lawyer who represented him during the preliminary investigation phase.

Both reasons are valid - indeed, no one could reasonably reproach a state-appointed lawyer for requesting an adjournment in order to

study the case file (though one would rightly wonder whether this issue could be addressed by making mandatory the court representation of the defendant by the same lawyer who represented him during the preliminary investigation).

Nevertheless, the study identified another, less charitable, reason responsible for the protraction of the proceedings.

Postponement of sessions for failure to appear as part of a "defence strategy"

Another reason for the adjournment of trial sessions that emerged from the study is the failure of both state-appointed but also rather surprisingly of privately retained lawyers to attend the trial sessions (see table no. 13), a problem already identified in previous studies.[115] It is believed that such failures are part of a "defence" strategy consisting of taking as much advantage as possible of the pretrial detention period, namely when the defendant is remanded into custody, since the period on remand will be offset against the final sentence; what is more, the period spent on remand is estimated on the basis of a 1.5 coefficient. In other words, a month in remand will lead to the deduction of one and a half month prison time from the final sentence imposed by the court.

Such a "defence" strategy however means that the defendant might continue to remain in pretrial custody even though there are reasons for his release. Indeed, as it has been pointed out repeatedly by the High Court, such "stratagems" are unlawful as they effectively penalise the defendants for actions that are not attributable to them.[116]

115 See OSCE, Analysis of the Criminal Justice in Albania, 2006, at: https://www.osce.org/albania/22211 p. 74

116 Unifying decision of the High Court No. 6, 11 November 2003; see also Commentary to the Code of Criminal Procedure, p. 365

Another presumed reason for the failure of lawyers to attend court session posits that this failure should be seen as part of a illicit "negotiation" strategy between the lawyer and the judge, with trials being postponed in order for an "agreement" to be reached. Although this is rather speculative, it is interesting to note that it is primarily privately retained, and not state-appointed, lawyers who ask for adjournments, as it will be seen below.

As table 13 shows, state-appointed lawyers are rather diligent in attending trials and do not seek adjournments very often. While undoubtedly positive, it is believed that at least part of the reason behind this might be their fear of being replaced by another state-appointed lawyer if they do not appear in the next session, which would entail a loss of revenue for them.

Table no. 13 – Percentage of adjournments of court sessions due to the failure of lawyers to attend

Type of defender	Postponement of session due to the non-appearance of the lawyer
Appointed lawyer	24%
Chosen lawyer	76%

Main reasons for the delays in proceedings

Although indirectly pertaining to the purposes of the present study, the working group sought to identify the most common reasons for the adjournment of court sessions for the period 2013-2014, if only in order to serve as a point of departure for further studies on this issue but also in order to address some widely held misconceptions as to the Albanian justice system. The following table shows the reasons why sessions were adjourned and their frequency:

Table no. 14 – Most frequent causes for the adjournment of court sessions

Reasons for postponement of sessions	Percentage of the total amount of postponements
To give the prosecutor time to draft the conclusions	25.8%
To notify the parties	15.9%
Failure of the prosecutor to attend	15.6%
Failure of the lawyer to attend	13.4%
Failure of the defendant to attend	10.5%
Summonsing of witnesses	8.0%
To give lawyers time to acquaint themselves with the file	6.5%
Because the judicial panel could not be formed	4.3%

Most sessions were postponed due of the absence of the prosecutor or following a request by the prosecution office to submit its closing arguments in writing, as well as in order to notify the parties, but not because of the conduct of the lawyers who, contrary to popular perception, were the cause of the adjournments in only 13.4% of the cases. Turning in particular to state-appointed lawyers, they were responsible for the adjournments in only 6.4% of the cases they litigated, compared to 20.4% of the cases litigated by privately retained lawyers.

h. Effect of lawyers' motions regarding the criminal sentences to be imposed by the court

In addition to the presentation of closing arguments or their active participation in court sessions, it is also interesting to review whether state-appointed lawyers are active in other phases of the trial, e.g. whether they file motions as to the type and length of sentence to be imposed or as to whether and why the sentence should be replaced

by a non-custodial measure. Although admittedly the filing of such motions might not be in itself a good indicator of the quality of legal assistance rendered by state-appointed lawyers (in so far as they might merely file generic motions that are not well-grounded on the facts and the law applicable to the case and hence are disregarded by the court, or conversely the courts' decisions to not take into account the motions might be unreasonable), it can nevertheless serve as an indicator of the lawyers' professionalism.

Table no. 15 – Effect on the court's decision of motions for a not guilty verdict filed by the defence lawyer, broken down by type of defence counsel (state-appointed / privately retained)

Type of defender	Motions of not guilty verdict	Number of motions granted	Percentage of successful motions
Appointed lawyer	11	0	0%
Chosen lawyer	10	1	10%

The findings presented in the table might lead to the conclusion that the courts are rarely influenced by a motion for a not guilty verdict, regardless of whether the lawyer filing the motion is a state-appointed or a privately retained one. Nevertheless, caution is in order as the aforementioned result is not statistically significant. According to statistics from the Tirana District Court, it transpires that a not guilty verdict is rendered in only 2% of the cases - a finding also corroborated by the present study, where in cases where the defendant is represented by a privately retained lawyer, the percentage of a not guilty verdict is exactly 2%. Putting aside the staggering conviction rate of 98%, what is rather more important for the purposes of the present study is that lawyers, regardless of whether they state-appointed or privately retained, filed a motion

for a not guilty verdict only in 20% of the total number of cases reviewed and the courts accepted only 10% of these motions. Nevertheless, in the 5,152 case-files that were examined, no case where the court granted a state-appointed lawyer's not guilty motion was identified, except for one case where the court returned the case to the prosecutor before reaching its verdict, following the latter's request to that effect.

The very low number of not guilty motions filed might be due to not only lack of professionalism on the part of the lawyers but also due to the work of the prosecution. In order to better evaluate the cause of this phenomenon, it is important to examine other indicators, such as whether motions filed by lawyers calling for the imposition of alternative sentences are more likely to be accepted.

Under Albanian criminal law, the imposition of an alternative sentence can be requested in accordance with the provisions of Articles 53, 59, and 63 of the Criminal Code (CC).

A**rticle 53** allows a court to reduce the sentence below the minimum limit provided for, if the court is convinced that both the offense and the perpetrator (i.e. the defendant) pose a low social risk, or that other mitigating circumstances apply.

Under **Article 59,** a court can suspend the execution of a prison sentence and place the defendant on probation (that can last from 18 months to five years), provided among others that the prison sentence imposed does not surpass five years, the defendant does not pose a threat to public order, and that due to background to the offence, his conduct cannot be qualified as criminal.

Last, under **Article 63**, the court can order the suspension of the execution of prison sentence and replace it with the obligation to

perform community service. Such alternative sentences are usually handed down by the courts when the defendant does not pose a threat to public order and when the offence for which he was convicted carries a prison sentence of not more than one year.

The following table provides an overview of the motions for alternative sentences filed by both state-appointed and privately retained lawyers as well as their success rate:

Table no. 16 – Motions for alternative sentences in relation to the decision of the court, broken down by type of defence counsel (state-appointed / privately retained)

Type of denfender	Defence motions for not guilty verdict	Motions granted by the court	Percentage of successful motions	Alternative sentence imposed by the court itself
Appointed lawyer	14	9	64%	6
Chosen lawyer	11	8	73%	5

Even though given the sample audited, these data do not show a statistically significant difference, it is rather interesting to note that the success rates of the motions filed by state-appointed lawyers is not that different to that of motions filed by privately-retained ones. There might be different explanations for this rather unexpected outcome or maybe it is because the issue is more complicated and cannot be reduced to a simple statistical quantitative analysis. Perhaps however a rather more alarming reason is at play, namely that the impact of the defence (regardless of whether the lawyer is state-appointed or privately retained) in the court's verdict is less significant that it is often believed. In order to shed some more light on this issue, it is necessary to also assess a number of additional variables:

Table no. 17 – Relation between the sentencing motions filed by the prosecutor and sentence handed down by the court, broken down by type of defence counsel (state-appointed / privately retained)

Type of defender	Prosecutor's motion		Court decision		Difference (percentage)	
	Imprisonment	Fine	Imprisonment	Fine	Imprisonment	Fine
Appointed lawyer	103.6 years	980.000 ALL	86.5 years	1.810.000 ALL	-16.5%	+84.7%
Chosen lawyer	74.5 years	2.240.000 ALL	51.1 years	2.460.000 ALL	-32.4%	+9.8%

As it can been seen, there is significant difference between sentencing motions filed by the prosecutor, which are 39% more severe when the case is investigated and tried in the presence of a lawyer appointed ex officio. The same pattern can also be seen in the length of the sentence imposed by the court, with the courts issuing almost 40% more lenient sentences for the same offence to defendants represented by a privately retained lawyer, compared to cases where the defendants were represented by a state-appointed lawyer. The same pattern can also be observed in relation to the height of criminal fines imposed by courts, with fines imposed to defendants with privately retained lawyers being almost half than those imposed to defendants represented by state-appointed lawyers. Whereas once again it is difficult to fully identify the reasons behind this significant discrepancy, it is suggested that the low quality of legal assistance provided by state-appointed lawyers throughout the preliminary investigation phase and their passive role vis-a-vis the prosecutor, leads to the filling of harsher motions by the prosecutor and the proportionately lower reduction of the final sentence by the court.

Concluding, it is noted that defendants represented by privately retained lawyers are more likely to receive a 40% lower sentence

(in terms of height of prison sentence or criminal fine) for the same criminal offence, compared to the sentence imposed on defendants represented by state-appointed lawyers.

i. The impact of changing lawyers during the proceedings

Ensuring the continuity of legal representation from the beginning of the preliminary investigation phase until the conclusion of court proceedings at all judicial instances is clearly to the defendant's advantage for a number of reasons.

First of all, an effective defence entails the pursuit of a consistent defence strategy; the consistency of such a strategy would undoubtedly be compromised by the change of lawyers. Secondly, an effective criminal defence during the preliminary investigation phase is often of crucial importance for the interests of the defendant, since it is precisely during that stage that the evidence will be collected and the case file completed. Shortcomings or mistakes on the part of the lawyer during this phase can lead to the unnecessary prolongation of the proceedings at best, or to the undermining of the effectiveness of the defence at worst.

From a study of the case files it transpires that more often than not the state-appointed lawyers representing the defendants during the court proceedings were not the same as those appointed in order to assist them during the preliminary investigation phase. During the interviews with the members of the two focus groups of judges and prosecutors, the respondents estimated that in only about 15-20% of the cases they have handled were the state-appointed lawyers the same during the preliminary investigation phase and the court proceedings. The same phenomenon is also observed in relation to the representation before the appeals court; in other words, it is entirely possible that a defendant will be represented by at least three

different state-appointed lawyers, one during in the preliminary investigation phase and two during the two judicial instances.

This phenomenon was corroborated by the findings from the review of the criminal case files for the purposes of the present study: indeed, only in four out of the fifty cases was the same state-appointed lawyer representing the defendant before both the first instance and the appeals court. Interestingly enough, even in those four cases, the defendants had been represented by another state-appointed lawyer during the preliminary investigation phase. It should be mentioned in this respect that despite the frequent changes of state-appointed lawyers, there is no evidence that the newly designated lawyers attempted to get in contact with the previous ones in order to ascertain whether the relationship between the client and his previous lawyer was properly terminated, as required by Article 43 of the Attorney Ethics Code.

Similar were the findings from the interviews with the focus groups of lawyers, prosecutors and judges.

Table no. 18 – Change of state-appointed lawyers during the phases of the criminal proceeding

Focus groups	Judges	Prosecutors	Lawyers
Answers	In general, they try to appoint the same lawyer who was present during the proceedings at the police station.	In general they try to appoint the same lawyer who was present during the preliminary investigation.	They don't follow a case from start to finish, because their appointment depends of the will of the judge, who prefers to appoint a lawyer he/she knows, or because the the defendant doesn't want the same lawyer.

The focus groups answers highlight a different approach to the issue between judges, who claim they generally try to nominate the same state-appointed lawyer, and prosecutors, who say that this generally does not happen. The lawyers tend to agree with the prosecutors, noting that the defendant is not usually represented by the same lawyer from the beginning of the proceedings until their conclusion These answers suggest that it is more likely that the lawyer will change when the case is brought before the court, but that in all likelihood the same state-appointed lawyer will represent the defendant in both major stages of the preliminary investigation phase, namely the police questioning and that of the deposition before the prosecutor.

What is however striking is the lawyers' assertion that the reason behind the frequent changes of lawyers is that the defendant so requests, suggesting that there is a lack of trust by the defendant towards his lawyer. Indeed, the present study has identified reasons why such lack of confidence might not be entirely unjustified: as noted above, state-appointed lawyers appear to be passive and often do not take the time to meet, let alone consult with, their client before he is brought before the judge, thus undermining the defendant's confidence in them.

j. Appealing the first instance court decisions

The right to appeal is an important element of due legal process, complementing the right to an effective remedy protected under Article 13 of the European Convention of Human Rights; particularly in relation to criminal cases, it is also explicitly laid down in Article 2 of Protocol 7 to the European Convention. It consists of the right of a defendant to challenge a court decision to a higher court, under conditions (in terms of procedural entitlements) similar to those applicable before the first instance court. The higher court should have the competence of reviewing most, if not all, aspects of the case brought before it.

The following table presents the number of appeals filed by the parties as well as their outcome.

Table no. 19 – Appealing a first instance court decision before the appeals court, broken down by type of defence counsel (state-appointed / privately retained) and party filing the appeal (defendant/prosecutor)

Type of defender	Appeal by the defendant		Appeal by the prosecutor		Decision uphold		Withdrew		Decision changed in favor		Decision changed in disfavor	
	Nr.	%	Nr.	%	Nr.	%	Nr.	%	Nr.	%	Nr.	%
Appointed lawyer	15	30%	2	4%	13	76%	1	7%	3	20%	0	0%
Chosen lawyer	22	38%	6	12%	15	60%	6	27%	2	9%	2	8%

As it can be seen, appeals in general are favourable to the defendants in that they tend to lead to the lowering (by the appeals court) of the sentence handed down by the first instance court, and filing an appeal will almost always be to the defendant's interest, in so far that the only real risk that he runs is that the appeals court will uphold the first instance court sentence. It is interesting however to note that there is no significant difference in the number of appeals filed by the two categories of lawyers; indeed, if the cases where the state-appointed and privately retained lawyers withdrew the appeal are deducted, it transpires that 14 cases were litigated before the appeals court by state-appointed lawyers as opposed to 13 by privately retained ones. What is however rather striking is the rather counter intuitive fact that appeals filed by state-appointed lawyers tend to be more successful than the ones filed by privately retained lawyers. Nevertheless this finding should be treated with some caution since first, the sample of appeals is small (27 appeals) and consequently not statistically representative; second, it should not be forgotten that as noted above, courts tend to impose significantly higher sentences on defendants represented by state-appointed lawyers. The lowering of the sentences in those cases by the appeals court might be a way of "making it up" to that category

of defendants. It should also be noted that privately retained lawyers are more likely to withdraw from arguing the appeal they filed than state-appointed lawyers. Although the difference is significant, it is recalled that the overall sample is rather small and hence any conclusions should be treated with caution. Thus it cannot be excluded that the withdrawal from the appeal, an act that might at first blush appear as wholly unprofessional, is in fact part of a more nuanced criminal defence strategy, whereby an appeal is filed with the sole purpose of preventing the judgment from becoming final and prolonging the pretrial detention period (thus also ensuring that, thanks to the 1.5 coefficient, a longer period will be deducted from the sentence imposed by the appeals court prison). Should the defendant subsequently be released, then the appeal is withdrawn with a view to preventing the hearing of the prosecutor's counter-appeal, thus minimising the risk that the appeals court will increase the defendant's sentence.

Another interesting finding concerns the number of appeals filed by the prosecution: as it can been seen, the prosecutor is three times more likely to file an appeal in a case litigated by a privately retained lawyer than in a case litigated by a state-appointed one. A potential reason for this discrepancy might lie in the fact that the prosecutors disagree with the imposition by the first instance courts of significantly lower sentences to defendants represented by privately retained lawyers, while considering that the high sentences imposed on defendants represented by state-appointed lawyers are fair and proportionate.

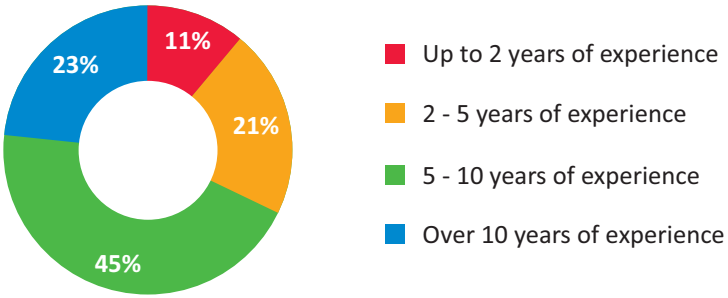
Under the Albanian legal system, defendants are also entitled to file an appeal on points of law (rekurs in Albanian) before the High Court.

Table no. 20 Filing an appeal on points of law to the High Court

Type of defender	No. of appeals	Inadmissible	Upheld
Appointed lawyer	0	0	0
Chosen lawyer	4 (3 by prosecutor)	3	1

Although the sample is small, it supports empirical findings to the effect that lawyers in general decline bringing their client's case before the High Court; indeed, according to the Tirana District Court's official statistics (following the delivery of the appeals court decision, the case file is returned to the district court which will be notified if an appeal on points of law is filed), appeals on points of law were filed by the defendants in only 0.6% of the total number of cases for the period 2013 - 2014. It should be noted in this respect that by not filing an appeal on points of law before the High Court, the defendant also forsakes the possibility of filling a constitutional complaint with the Constitutional Court.

From the audit of the 5,152 cases undertaken under the present study, it transpires that it is exclusively privately retained lawyers who file appeals on points of law before the High Court; no such appeal filed by a state-appointed lawyer was identified. Once again, the reasons for this phenomenon are more than one. It is noted for example that according to an instruction by the National Chamber of Advocacy (NCA), only lawyers with a professional experience of more than ten years are allowed to litigate case before the High Court and the Constitutional Court. On the basis of the names included in the state-appointed lawyers list and more importantly their license number (that can serve as a proxy indicator for when they started working as lawyers), only 23% of the lawyers mentioned therein meet this criterion. In particular, almost half of the lawyers on the list have a (nominal) professional experience ranging from five to ten years, with eight being the average years of experience, as illustrated in the following graph:



k. Respecting the defendant's preference as to the state-appointed lawyer designated to represent him

Although closely modelled on Article 6.3 of the European Convention on Human Rights, the wording of the equivalent provision in the Albanian Constitution, namely Article 31, suggests that a defendant's preference as to the lawyer that should represent him should also be respected in relation to lawyers appointed under the criminal legal aid scheme.[117] The Albanian Code of Criminal Procedure (CCP) on the other hand is silent about the method of appointment of a legal aid lawyer or whether the defendant's preference should be taken into consideration, with Article 49 CCP providing simply that the proceeding organ (namely the prosecution or the court) should appoint a legal aid lawyer when it is mandatory or the defendant has not retained a lawyer or has been left without legal representation.

While clearly no issue arises in relation to defendants who can afford to retain a lawyer, it is important to examine the procedure whereby a legal aid lawyer is appointed by either the prosecutor or the court. Precisely because of the lack of such a procedure set out in a official document (in the form of e.g. a circular or guidelines) that would serve as a benchmark, it is only through a study of the criminal case files that a picture of the criteria (if any) on the basis these two bodies appoint legal aid lawyers in everyday court practice.

In order to reach a statistically significant result, the working group sought to first ascertain how many lawyers from the legal aid list

117 Article 31 of the Constitution provides: "During a criminal proceeding, every one has the right...ç) to be defended by himself or with the assistance of a legal defender chosen by him ... as well as to be assured of free defence when he does not have sufficient means." It is interesting to note that Article 31 lays down only a means test, and not a combined means and merits test as Article 6 of the European Convention does.

were appointed not only in relation to the 100 criminal case files that were the object of a more comprehensive study, but in relation to the total number of cases in which the Tirana First Instance Court adopted a decision in the years 2013-2014, namely a total of 5,152 cases. The findings from this survey are set out in the table below (for data protection purposes, the lawyers in question are identified only by their initials).

Table no. 21 – List of the most often appointed legal aid lawyers in all cases before the Tirana First Instance Court during 2013-2014 broken down by number of cases and as a percentage of the total number of appointments

Appointed lawyers (initials)	No. of cases identified 2013 - 2014	Distribution of cases percentage
N. P.	334	24.3%
M. R.	170	12.3%
D. L.	132	9.5%
E. H.	100	7.2%
V. T.	98	7.1%
K. C.	73	5.3%
S. T.	57	4.1%
V. P.	54	3.9%
A. T.	54	3.9%
S. M.	47	3.4%
A. K.	25	1.8%
V. V.	23	1.6%
E. K.	17	1.2%
N. C.	12	0.8%
N. R.	11	0.7%
44 other lawyers	Fewer than 10 cases	12.9%

Considering that during that period, the legal aid lawyers list compiled by the National Chamber of Advocacy (NCA) - from which the Tirana District Court should choose the lawyer to be appointed- contained 87 names, it is striking to see that three of them were appointed in 46% of the cases, while 29 lawyers from the list were not appointed at all. The above strongly suggest that there are no guidelines or criteria for the nomination of state-appointed lawyers, leading to concerns that the appointments are done on the basis of personal connections.

Indeed, the findings strongly suggest that the appointments are not made at random, otherwise it would be impossible to explain how lawyer N.P. could be nominated as a state-appointed lawyer in 334 cases, namely in almost one quarter of the total number caseload of the Tirana First Instance Court for the years 2013-2014. Further analysing the data, it emerges that in order to reach this number of cases, this lawyer should be devoting on average about one and a half working days per case, or about 17 cases per month during a period of 22 months (considering that in August courts are in summer vacation). Without wishing to pass judgement on the abilities or professionalism of that particular lawyer - or any other lawyer for that matter-, it is legitimate to question whether he had enough time to mount an effective criminal defence under such heavy time pressure.

In order to further explore the grounds on which the Tirana District Court exhibited such a marked preference to a small number of legal aid lawyers, the working group sought to exclude another possible reason, namely the defendant's preference to those particular legal aid lawyers. To that end, it addressed a question to that effect to the members of the three focus groups but also to the NCA; the tenor of their answers is reproduced in the table below.

Table no. 22 – Is the preference of the arrested person/defendant as to the state-appointed lawyer to represent him taken into consideration in the appointment process?

Focus groups	Judges	Prosecutors	Lawyers
Answers	The defendant is informed of his/ her right to choose a lawyer and if he/she has no means, a legal aid one is appointed. The list is not provided to him/ her to make his own choice, but the consent is obtained as to the lawyer suggested. In general, the legal aid lawyer is chosen on the basis of his/her availability.	A lawyer is appointed from the list at random. The arrested person does not choose the lawyer from the list, but he/she is asked if he/she agrees with the lawyer chosen by th prosecutor.	The lawyers are chosen on the basis of the list. If the arrested person/defendant asks to be defended by a particular lawyer, this is taken into account by the court. Previous good performance by the legal aid lawyer is not taken into account at the appointment process.

Based on the examination of over 1,300 cases where the defendants were represented by state-appointed lawyers, it can be concluded that the judges enjoy an unfettered discretion when nominating a state-appointed lawyer. As a consequence, state-appointed lawyers have no incentive to work diligently, as their skills and performance will not have a bearing on their appointment.

The members of the judges and prosecutors focus groups were aware of this situation and indeed acknowledged that in practice, the defendant is informed of his right to retain private counsel. Should he respond

that first, he lacks the means to appoint one and second, request the appointment of a lawyer, then the judge or the prosecutor will assign one from the legal aid lawyers list. The defendant is not offered the possibility to choose a lawyer from the list but he is at times asked if he agrees with the appointment of the proposed legal aid lawyer. It would however take a rather brave defendant to object to the judge's or the prosecutor's proposal as to the lawyer to be appointed. Similarly, the NCA informed the working group that as a rule, the defendant is not provided with a copy of the legal lawyers list in order to state his preference as to the lawyer to be appointed to represent him. Rather, he is merely asked whether he agrees with the name suggested by the prosecutor / judge. It should be noted here that despite complaints to the NCA about the method of appointment of legal aid lawyers by the proceeding organs, the NCA has failed to take any concrete action, suggesting that it does not consider that the current system of appointment gives rise to any concerns. In the light of the above, it is interesting to see that the members of the focus group of lawyers noted that in cases where the defendant requests that a particular legal aid lawyer be appointed to represent him, then his preference is respected.

Nevertheless it should be noted that the judges' and prosecutors' answers and overall demeanour during the interviews seem to suggest that they are conscious of the fact that their unlimited and unreviewable discretion in appointing legal aid lawyers is rather problematic. This might be the reason why they stressed that the appointments are in fact made on the basis of an objective criterion, namely that of availability of the lawyers on the legal aid list. Again however, if the only criterion is that of availability (which in practice means waiting outside the prosecutor's office or the courtroom), then legal aid lawyers still have no real incentive to deliver a high quality service.

Rather, even this criterion is rather indicative of low quality of defence, since if a lawyer is appointed to represent many clients, as in the case above of the lawyer who is assigned to a case every day and a half, he cannot have the time or the practical possibility to mount an effective defence.

In the light of the above, and pending the adoption of a more transparent system for the appointment of legal aid lawyers, it is recommended that defendants should be afforded more say in choosing their legal aid lawyer, rather than entrusting their appointment to the complete discretion of prosecutors and judges. Such a practice would also serve to alleviate to some extent the legitimate concerns that the defendants might harbour as to the commitment and impartiality of their legal aid lawyers, considering that their role will effectively require them to oppose and challenge the authority that appointed them. Though admittedly this will not be possible in cases where the defendant is evading justice, it is recalled that in the overwhelming majority of cases reviewed (80%) the defendant was at the disposal of the authorities and consequently asking him to state his preference was possible.

l. Other findings from the focus groups and the court sessions monitoring

Behavior towards state-appointed lawyers

A rather disturbing finding concerns the attitude and behaviour of the police and prosecution towards state-appointed lawyers, with only 20% of the lawyers interviewed observing that they were treated with dignity and respect. The remainder responded that the authorities' behaviour towards them was either good enough or disrespectful, thus not creating a conducive environment for the lawyers to discharge their duties.

Failure to inform persons placed under arrest of their rights

Placing a person under arrest, including at the end of a judicial proceeding for the purpose of executing the court's sentence, puts the individual in an extremely vulnerable situation. According to studies and reports by different national and international bodies, persons

placed under arrest are not informed of the charges against them, nor are they provided with a meaningful opportunity to procure effective legal assistance.[118] Moreover, the European Court of Human Rights considers the phase of execution of decisions an intrinsic part of the judicial process, and has consequently held that the requirements of Article 6 of the Convention are also applicable to this phase. This in turn means that a defendant tried in absentia should benefit, when arrested and sent to prison for his sentence to be executed, from the same rights (including access to legal aid) that any other defendant enjoys. A significant deficiency in this respect in the applicable Albanian legislative and regulatory frameworks was identified in the case of A. M., which precisely due to its bringing together many of the issues discussed in this study, will be the subject of the extensive case study presented below.

Administrative barriers hindering the communication between client and lawyer

A seemingly minor yet potentially important issue is that of purely administrative limitations, in the form of strict time schedules, preventing the unhindered communication between a client and his lawyer, irrespective of whether the latter is a state-appointed or a privately retained one. Thus persons detained in police stations cannot meet with their lawyer, except during working hours from 09.00 to 17.00 hrs, from Monday to Friday. This in turn means that persons who need to meet with their lawyer over the weekend are not allowed to do so and have to wait until Monday morning at 09.00. Although it is understandable that the right to meet with one's lawyer can be subject to common sense limitations, such blanket restrictions not only violate the defendants' procedural rights but might also endanger the defendant's physical integrity, as the following case study shows.

118 See e.g. the 2006 OSCE report, op. cit., at p. 21.

4. Case study of A. M.

In order to form a better picture of the differences that emerge in practice between court representation by state-appointed and privately retained lawyers, Res Publica provided free legal representation to Mr A. M., who was initially tried in absentia. Represented by a state-appointed lawyer, he was sentenced to a six months prison sentence. With the assistance of Res Publica, Mr A.M.'s case was reopened.

The case

The Tirana Prosecutor filed charges against Mr A. M. under Article 186 of the Criminal Code, accusing him of document falsification. According to the case file, since there was no document attesting to his address, the Prosecutor's Office called upon the police to locate and serve a summons on the defendant; nevertheless the police responded that the defendant could not be located. As a result of his lack of notification, the entire investigation took place in his absence.

At the trial, the Tirana District Court, after noting that the defendant had been properly summonsed but did not shown up in court, considered this as a waiver of his right to be present at the trial. In accordance with the applicable legislation, it designated on the spot a legal aid lawyer to represent him. The trial lasted only one session; in her closing arguments, the defendant's lawyer acknowledged her client's guilt and called upon the court to impose a lenient sentence. The court, finding the defendant guilty as charged, sentenced him to a six months prison sentence. Since neither of the parties filed (or, in the defendant's case, could file) an appeal, the decision became final and an order of arrest was issued against him, on the basis of which he was found and arrested at his home after a few days, on a Friday at 14.00 pm. It was subsequently discovered that defendant was suffering from complete kidney failure and had to hospitalised,

as he had to undergo dialysis four times a week. Even short delays in receiving dialysis could seriously endanger his life.

Retrial

After a perfunctory review of the case file by Res Publica on the day the defendant was arrested (a Friday), it was revealed that the police had not contacted the Civil Registry with a view to ascertaining whether the defendant had a registered home address. It took Res Publica's lawyers fewer than 10 minutes to contact the Civil Registry and ascertain the defendant's home address that had not changed since 1994; rather interestingly, it would appear that the police charged with executing the sentence and arresting him also had contacted the Civil Registry, otherwise they would not have located him so easily and so quickly.

As a result, the defendant had grounds to request the reopening of the case against him, arguing that the failure to notify him in the first place was not attributable to him. Nevertheless filing a request to that effect would have to wait until Monday. Similarly, when the defendant's wife visited the police station where her husband was detained and informed them of his precarious medical condition, she was informed that she would have to wait until Monday in order to visit him and that should his condition become critical, a medical orderly would be available. It was only after the defendant's wife contacted Res Publica and some rather heated exchanges between Res Publica's lawyers and the police and the "threat" that an urgent request for the defendant's immediate transfer to a hospital would be filed with the European Court of Human Rights (the European Court had granted a similar request in Grori v. Albania, no. 25336/04, 7 October 2009) that the defendant was taken to hospital, where he remained under police guard until his discharge the following Thursday. His prolonged stay at the hospital is ample proof that his detention in the police station would have been inappropriate.

In order to reopen the proceedings, the defendant's lawyers had to first file a request to restore the time-limits for filing an appeal; the request was easily granted by the court. This in turn meant that the first instance court's decision by which the defendant had been found guilty was no longer final and concomitantly, it has lost its executive character. As a result, the defendant was discharged from the hospital on Thursday. The defendant's lawyers then duly filed an appeal before the Tirana Court of Appeal which, after noticing that the defendant had not been properly summoned, declared the appeal admissible.

This time, the retrial took place in the presence of the lawyer retained by defendant, namely a lawyer by Res Publica acting pro bono. At the hearing, the Appeals Court heard evidence that the defendant suffered from renal deficiency and he could not benefit from appropriate medical care and assistance in prison. At the same time, the defendant's personal presence at the trial meant that he could request an abbreviated trial as well as for an alternative sentence (namely a suspended one), even though his lawyer, on the basis of the case file that contained strong evidence of his innocence, suggested otherwise. The Appeals Court accepted the defendant's requests and converted the original six months prison sentence to an alternative non-custodial sentence of 18 months (the minimum probation period that can be imposed under Article 59 CC) on probation, on condition that he should not reoffend and keep in contact with the probation service during this period.

Problems identified during the two sets of proceedings

Perhaps the most striking finding was that, on the basis of information in the case file (namely the entries regarding the beginning and the conclusion of the session), the defendant's trial in absentia (where he was represented by a state-appointed lawyer) lasted only 20 minutes. In those 20 minutes, the court had to first verify whether both parties were properly summonsed and proceed to designate a state-

appointed lawyer (effectively choosing the first lawyer waiting outside the courtroom). Always within those 20 minutes, the state-appointed lawyer presumably studied a rather thick case-file consisting of 50 pages and considered that he could argue the case. Again within these 20 minutes, the prosecutor presented his arguments, the court reviewed all pieces of evidence included in the case file and heard the state-appointed lawyer's arguments. The court then called upon both the prosecutor and the state-appointed lawyer to present their closing arguments and then deliberated.

Even though the above are sufficient to demonstrate that the defendant's first trial was one only in name (and unfortunately is far from being the only such case, as the court sessions monitoring findings suggest), the following elements should be stressed.

First, it is striking that the prosecutor's office, the police and ultimately the court, all failed to take any reasonable measure in order to ascertain whether the defendant was of unknown address. In fact the court bears a significant share of responsibility, since the police's and the prosecutor's office failure to take reasonable steps to locate the defendant should have alerted it to the possibility that the defendant had not been properly summonsed and that his failure to show up did not amount to a waiver. This is all the more surprising since due to major deficiencies in the street naming and numbering system, even the postal service often encounters difficulties in delivering mail. Thus following the failure to locate him, the authorities should have contacted the Civil Registry with a view to at least double checking whether the address they were given was the same address the defendant had declared. The fact that, notwithstanding that failure, he was subsequently immediately found for the execution of the sentence showed how easily his address could have been found, just as the lawyers of Res Publica managed to find it merely by enquiring with the local town hall.

Second, it is equally striking that the state-appointed lawyer did not review the case file with a view to ascertaining whether the defendant

was properly summonsed. As it this were not enough, the lawyer readily and without any qualifications acknowledged his client's guilt, merely calling upon the court to impose a lenient sentence.

Third, the failure to notify the defendant for which he bore no responsibility, not only violated his right to a fair trial but also, in light of his serious medical condition coupled with the inflexible detention regime, placed his life in danger. It is recalled that A.M. was arrested on Friday at 14:00 am, even though the authorities knew fully well that he could not have had recourse to the courts over the weekend with a view to e.g. requesting his conditional release on grounds of his poor health. Worse yet, they were unwilling to secure proper medical care for him. It was only following some heated exchanges between the police and his lawyers that the police ultimately decided to transfer him to hospital – evidence of the crucial role that lawyers play in preventing instances of ill-treatment and securing that the defendant receives adequate medical assistance.

Fourth, as the defendant informed Res Publica, he was not informed upon arrest or thereafter of his right to free legal aid. Indeed, Albanian legal practice do not consider that a person in the position of the defendant (namely someone arrested on the basis of a final decision against him) is entitled to free legal aid, even if the decision was rendered after a trial in absentia. This gives rise to the following rather paradoxical situation: a fugitive from justice is entitled to mandatory legal representation (in the form of a state-appointed lawyer) but as soon as he is arrested with a view to executing the sentence, he ceases to benefit from free legal aid, even though his absence from the trial may not be attributable to him and even though he might need legal assistance precisely in order to argue that his failure to show up at the trial was not his fault! In the particular case of A.M., this also meant that he did not have access to legal aid even with a view to requesting, on humanitarian grounds, his conditional release and / or his transfer to a hospital.

5. Findings from the court sessions monitoring: an overview

As noted above, a team of Res Publica monitors audited 200 judicial sessions of the Criminal Division of the Tirana District (First Instance) Court, during the period from 1 December 2015 until 29 February 2016. Out of these sessions, 68 pertained to 61 cases argued by state-appointed lawyers, while the other 132 sessions pertained to 125 cases argued by privately retained lawyers. In total, these 200 sessions correspond to 186 different cases, as 14 sessions concerned adjourned proceedings from some of these cases.

Of the 68 sessions argued by a state-appointed lawyer, 63 of them consisted of an introductory session, namely the first session where the judge is seized with the case and will proceed to nominate a legal lawyer if necessary. This in turn means that it is at these sessions that a legal aid lawyer is assigned to a case and has to meet and consult with the client, familiarises himself with the case file, files any preliminary motion (regarding e.g. the invalidity of any investigative act) that might be called for and in general starts putting together a defence strategy. Should the defendant be present and request an abbreviated trial, then if the court grants the request, this introductory session might also be the concluding one, if the defence lawyer does not request an adjournment to submit his closing arguments in writing, which is usually the case in four fifths of the cases reviewed.

Many of the court sessions monitoring findings have already been referred to above; nevertheless it was thought that by setting them out in the manner below would assist in painting a more composite picture of everyday court practice.

The procedure of designating the state-appointed lawyers by the court

It was observed that the secretaries of the judges would call the court-appointed lawyers from among the lawyers waiting outside the courtroom, with the court clerks effectively ushering in the

courtroom the very first they would come across. No attempt was made to consult the list, inquire as to whether the state-appointed lawyer who represented the defendant during the preliminary investigation phase was available, or ask the defendant to indicate his preference among the lawyers present.

Consulting with the client and studying the case file

It was observed that in only five out of the sixty three introductory sessions monitored (i.e. 8%) did it appear that the defendant knew the legal aid lawyer appointed to represent him. Nevertheless it was also obvious that their acquaintance was made not in the context of the case brought before the court (i.e. the legal aid lawyer appointed by the court had not represented the defendant in the preliminary investigation) in question but has been made in the past, when presumably the legal aid lawyer had represented the defendant in a previous case. All the other defendants met their lawyers for the first time in the courtroom. Moreover, in only one case did the newly designated state-appointed lawyer ask for time to consult with his client, with the "consultation" lasting not more than a minute. In yet another case, it was the judge who politely suggested to the lawyer that he should consult with his client before embarking on his defence.

The exchanges between lawyer and client took place under entirely inappropriate conditions, with the lawyer sitting at the counsel's table and leaning towards the defendant who would usually be under police escort and sitting on a bench in an iron cage. Nor was there any need to eavesdrop on them, as the exchanges were audible without any effort in the usually small court room, thus negating their confidentiality. In some other cases, and when the defendants were not under police escort, lawyers would communicate with their clients shortly before the session began in the hall outside the courtroom or in the courtroom itself, until the judge would be seated.

Last, it was only in seven out of sixty three introductory sessions (i.e. 11%) that the state-appointed lawyers asked for time to familiarise themselves with the case file; in the remaining cases, the lawyers shuffled through the case-file during the court hearing.

Filing of motions

In only eleven out of the sixty three (18%) sessions did the state appointed lawyers ask for time to prepare and submit their closing argument in writing – interestingly, the exact same percentage of state-appointed lawyers filing their closing arguments in writing emerged from the more in-depth study of the 100 case files. One the other hand, state-appointed lawyers were ten times more likely than privately retained lawyers to deliver their closing arguments only orally. All other motions / requests (e.g. on requalification of the offence, application of an alternative sentence and so on) were made orally. The court accepted 21% of the motions / requests made by state-appointed lawyers, compared to 36% of motions / requests made by privately retained lawyers. The motions that met with the greatest success were those calling for the imposition of a more lenient sentence; 40% of these motions were accepted by the court. Privately retained lawyers seldom presented such motions calling for e.g. a more lenient sentence; rather, they would invoke different mitigating circumstances which they would briefly present to the court.

Submission in writing of arguments on mitigating circumstances in cases tried under the abbreviated procedure

State-appointed submitted their arguments regarding the existence of mitigating circumstance only in 9% of the abbreviated trial sessions; by way of indication, privately retained lawyers would do the same in 48% of the abbreviated trial sessions. This quite significant difference amply demonstrates that the privately retained lawyers took more effort and time to defend their clients, as opposed to the state-appointed ones.

6. Analysis of the findings from the quantitative study, questionnaires, court sessions monitoring and the case study

The findings and conclusions of the present study strongly suggest that there are serious legitimate concerns regarding the quality of legal assistance provided by lawyers in general and by state appointed lawyers in particular. Rather interestingly however, commonly held perceptions (such as that privately retained lawyers invariably offer more professional service to their clients than state appointed lawyers) are not always borne out by the conclusions of the present study. Nevertheless, and on the basis of all research activities undertaken in the context of the present study and their analysis, the following important conclusions can be drawn:

1. The number of trials litigated by a state appointed lawyer is very high, constituting more than 1/4 of all criminal cases surveyed. In Tirana alone, about 700 such trials were held during the period concerned, while it is believed that as a percentage the amount of such cases may be even greater in rural areas where the average income of the population is lower, making resorting to free legal aid more likely. In any case, more thorough research on the quality of legal aid assistance provided is required.

2. Although state appointed lawyers have more to gain by and would prefer the holding of a case under the abbreviated procedure, in practice they mostly litigate trials under the ordinary procedure as they are often appointed to represent a defendant tried in absentia. The number of sessions held in an ordinary trial with an appointed lawyer is twice that of cases with a lawyer chosen by the defendant. This difference has an effect on the payment of the appointed lawyers, which is carried out on the basis of the number of sessions and not on the basis of the nature of case or its complexity.

3. Trials held under the ordinary procedure and where the defendant is represented by a state appointed lawyer appear to result in a

considerable increase in the severity of the sentence compared to trials litigated by privately retained lawyers.

4. Prosecutors believe that state appointed lawyers are more likely to opt for the ordinary trial procedure, due to their absence in the preliminary investigations or the fact that the lawyer changes when the case goes to trial. They also noted that in some case an abbreviated trial functions as means of "repairing" or "whitewashing" irregular investigative actions or mistakes / omissions of the lawyers, to the detriment of the defendants.

5. After their appointment, state appointed lawyers are not particularly active during the proceedings, thus turning their presence in the courtroom and the criminal proceedings in general into a formality. It transpires that in over 3/4 of the cases reviewed state appointed lawyers do not ask for additional time to familiarise themselves with the case file but readily jump to their clients' defence, even if the case file is voluminous, and without ascertaining whether there have been irregularities in the investigative actions or whether additional investigative measures need to be taken. For their part, the lawyers contend that there are cases when the judges express annoyance about their requests to familiarize themselves with the case file. This makes state appointed lawyers more reluctant to file such requests, at least partly with a view to avoid "annoying" the judges and thus incurring the risk of not being appointed again by them.

6. Meetings between the lawyer and defendant usually do not take place immediately after the latter's detention or arrest. In cases where the legal aid lawyer is appointed by the court, the first meeting between them takes place in the courtroom, which makes it practically impossible for the lawyer to study the case file, to obtain the defendant/s opinion, let alone to devise and formulate a well thought-out defence strategy, both because of time constraints and because of the absence of privacy.

7. In the overwhelming majority of cases against juvenile defendants, the latter were represented by state appointed lawyers; indeed, a juvenile defendant is five times more likely to be represented by a state appointed lawyer rather that a privately retained one. There was no evidence in the case files studied suggesting that these lawyers were in any way trained in approaching and litigating such complex cases. On the contrary, it was mostly the judges who displayed an increased sensitivity in such cases, assuming a more active role in the proceedings.

8. Most of the state appointed lawyers failed to submit their closing arguments in writing, with only 1/5 so doing. On a scale from 1 to 5 and with 5 being the most effective level of legal representation, judges and prosecutors in general assess the work of state appointed lawyers with grades from 2 to 3, with some prosecutors contending that even these scores are not deserved.

9. On a more positive note, state appointed lawyers are not the main culprits for the delays experienced in the majority of criminal proceedings. Proceedings where the defendant was represented by a state appointed lawyer are three times less likely to be postponed, compared to proceedings where defendants have a privately retained lawyer. Contrary to the widely held belief that state appointed lawyers seek to delay the proceedings in order to increase their remuneration, the main justice actor responsible for the protracted length of criminal proceedings are the prosecutors who often do not appear before the court or fail to file their submissions in time.

10. Regarding the impact of the closing arguments filed by both categories of lawyers on the courts' decisions, the data collected show no statistically significant difference. This in turn suggests that the often assumed higher effectiveness of privately retained lawyers over their state appointed counterparts is lower than what is believed.

11. There is a significant difference in the severity of the sentence requested by the prosecutor when the defendant is represented by a state appointed lawyer (about 40% higher). The same tendency is seen also in the level of sentences handed down by the courts, which are two times more lenient in cases where the defendant is represented by a privately retained lawyer than when he is represented by a state appointed lawyer.

12. In general, sentences handed down for the same offenses were over 40% more severe in cases litigated by state appointed lawyers. Compared to state appointed lawyers, privately retained lawyers undertook more strenuous efforts to ensure that their clients receive an as low sentence as possible.

13. In fewer than 10% of the cases was the defendant represented by the same state appointed lawyer in both judicial instances; even in those cases, however, the defendant had been represented by a different state appointed lawyer in the preliminary investigation phase.

14. The number of cases appealed against is relatively low, but without a significant difference between the number of appeals filed by both categories of lawyers. However, in cases litigated by a state appointed lawyer, the prosecutor was more than three times more likely to file an appeal than in cases where the defendant benefitted from the services of a privately retained lawyer. The number of appellate decisions in favour of the defendant is about the same for both categories, with an insignificant difference in favour of state appointed lawyers.

15. State appointed lawyers do not file appeals on points of law. This is primarily due to the restriction imposed by the NCA, whereby only lawyers with more than 10 years of professional experience can appear before the High Court and the Constitutional Court. On the basis of the legal aid lawyers list made available by the National Chamber of Advocacy, only 23% of the lawyers meet that

criterion. Another reason is often the lack of standing on the part of the lawyer to file such an appeal, as this right can be exercised exclusively by the defendant.

16. The prosecution is more likely to file an appeal on points of law when the defendant has employed a privately retained lawyer compared to cases where the defendant had a state appointed lawyer, notwithstanding the fact that there is no difference in the number of successful (for the defendant) appeals accepted by the Court of Appeal brought forward by both categories of lawyers.

17. On the basis of the legal aid lawyers list made available by the National Chamber of Advocacy, it transpires that a full 87% of the 5,125 cases were litigated by only 15 lawyers on the list, while just three of them were assigned approximately 50% of all cases tried, strong evidence of unfair appointment procedures and resulting in an extremely unequal case distribution among the lawyers on the list. Approximately 1/4 of the defendants in over 300 cases were represented by the same lawyer, giving rise to well-founded concerns regarding the quality of legal assistance provided by that lawyer in light of the exhausting workload.

18. The defendants' preferences as to the lawyer to represent them are not sought, nor are the defendants provided with the legal aid lawyers list. The defendants are only asked whether they agree to be represented by the lawyer already appointed by the prosecution/court, leaving little room for objection. This method of appointment, especially during the preliminary investigation phase, gives rise to a conflict of interest undermining the link of trust that should exist between the lawyer and his client, since the lawyer is effectively chosen by the institution (i.e. the prosecution) whom it is his duty to oppose.

19. Only 20% of the state appointed lawyers questioned stated that the police/prosecutors treat them with respect. Other lawyers had no particular complaints whereas some lawyers maintained they were

treated badly; this gives rise to concerns regarding discrimination between the two categories of lawyers and undermines the effectiveness of the criminal legal aid.

20. Persons are not informed at the moment of detention/arrest of the reasons for the detention/arrest or of their rights nor are the given the opportunity to be assisted by a lawyer

21. Administrative constraints such as restrictions of the time for meetings, are particularly problematic. For example, prisoners can meet with their lawyers only from 09.00 to 17.00 on weekdays, thus making them vulnerable to a violation of their rights.

22. All stakeholders– the police, the prosecutor's office, the lawyers, the courts – have a role to play in ensuring the provision of effective legal assistance, including by taking appropriate measures in cases where the defendants' rights are abused. Nevertheless lawyers, as seen in the present study, do very little to challenge violations of their clients' rights. It is indicative that out of all the cases surveyed, the study could not identify even a single case that reached the High Court or the Constitutional Court, let alone the European Court of Human Rights, while only a very limited number of cases was brought before the Court of Appeals.

23. In many cases the work of privately retained lawyers could be considered substandard and similar in terms of quality to that of state-appointed lawyers.

VIII. CONCLUSIONS & RECOMMENDATIONS

1. Conclusions

On the basis of the analysis of the applicable legislation, the review of the selected jurisprudence of the Tirana District Court, the interviews with the three focus groups and the monitoring of the court sessions, the following findings emerged:

1.1. Deficiencies identified in the legislative framework

1. A major shortcoming identified in the legislation is that the designation of the state-appointed lawyer at the crucial phase of the preliminary investigation is made by the prosecution which, as a party to the criminal proceedings, has (or can be perceived as having) interests contrary to those of the defendant, thus giving rise to a situation of conflict of interest. An increasing body of international standards calls for the appointment of state-appointed lawyers to be made by an independent authority and /or a court. The unreviewable discretion that the proceeding organs and primarily the prosecution have in Albania is an issue that needs to be addressed urgently.

2. The relevant framework contains no criteria regarding the professional abilities, particular skills and prior conduct that lawyers wishing to join the criminal legal aid scheme should meet. In fact, the only condition is for the lawyer to express his desire to join the scheme. In addition to hurting well-meaning competition

among lawyers, the lack of any even rudimentary criteria might potentially affect negatively the quality of criminal legal aid.

3. Disciplinary measures against lawyers are instituted only in cases of abandoning the defence or refusing to undertake it (after being nominated), or in cases of a violation by the defence lawyer of the principles of trustworthiness and honesty. Nevertheless the latter two qualities are related to the lawyer's personal integrity and not necessarily to his professional ability; in other words, they do not reflect the quality of the legal defence provided. Thus under the applicable legal and regulatory frameworks, failure on the part of the lawyer (be he state-appointed or privately retained) to devise and mount an effective defence does not constitute grounds for disciplinary proceedings. It also transpired that prosecutors and judges do not adequately supervise the defence lawyers' work. Thus even if they ascertain that the state-appointed lawyer's performance does not meet even the most rudimentary standards, they will not proceed to have him replaced but will only reprimand him and then try to address some of the shortcomings (by e.g. indicating that he should ask for an alternative sentence).

4. The remuneration system for criminal legal aid lawyers is unclear. Order No. 1284/3 of the Minister of Justice and the National Chamber of Advocacy dated 16.3.2005 is not being implemented in practice, due to uncertainty regarding the interpretation and application of some of its provisions. Thus for example the Order does not specify whether the payment stipulated concerns one or several legal representation sessions. Complicating the issue even further is the existence of overlapping norms and provisions regarding criminal legal aid lawyers' remuneration and method of payment. In general, criminal legal aid lawyers are paid below the minimum fees stipulated for privately retained lawyers, thus leading to differential treatment between two categories of defence lawyers (state-appointed and privately retained) and discouraging more experienced lawyers from joining the criminal legal aid

scheme. Moreover, the criminal legal aid budget is low and the system of financing legal aid does not ensure that the allocation of funds will be in conformity with the needs, and they are not distributed proportionally between the prosecutor's office, the courts and the State Committee for Legal Aid (SCLA).

5. There are currently two different methods regarding the designation of state-appointed lawyers - indeed, there are two different criminal legal aid schemes. Thus under Law 10039/2008 *On legal aid*, the state-appointed lawyer is designated among the lawyers who, after a competitive procedure, provide civil and criminal legal under the auspices of the State Commission for Legal Aid (SCLA), whereas under the Code of Criminal Procedure, the state-appointed lawyer is designated by the prosecution or the court among the lawyers who merely have to express their desire to be included in the legal aid list prepared by the National Chamber of Advocacy. Although the lawyers appointed by the SCLA are better remunerated than their colleagues appointed by the prosecution or the court, the SCLA-administered legal aid scheme has not been effective due to the lawyer appointment procedure that requires the defendant to file an application for free legal representation with the SCLA and for the latter to approve it. As this procedure is rather time-consuming, it is not effective in cases of defendants in need of immediate legal assistance.

6. Albanian legislation clearly provides that a defendant has the right to be informed of his right to legal assistance; nevertheless the right is not guaranteed in cases where a person is detained as a suspect by the police. This gap in the legislative framework creates room for abuse, particularly by the judicial police which has been often criticised for putting pressure upon persons who are not formally assigned the status of defendant and therefore cannot benefit from the assistance of a lawyer.

7. Albanian legislation guarantees the right to criminal legal aid during certain, but not all, investigatory actions. The wording of the relevant legal provisions does not clearly indicate that criminal legal aid is available from the onset of a person's deprivation of liberty until the beginning of the investigatory actions; similarly, the relevant framework is silent as to whether legal aid is available during the execution of the final decision.

8. Regarding persons with disabilities and juveniles in conflict with the law, the legal framework but primarily its implementation is highly problematic. Thus the relevant provisions appear to espouse a paternalistic approach towards persons with disabilities, whereas international bodies have repeatedly expressed their concern regarding the questioning of juvenile defendants by the police without the assistance of and support by a lawyer, a trusted adult and a psychologist.

9. The right to meet and consult with one's lawyer is theoretically recognized by the legislation, but in practice serious problems are observed in the implementation of that right, due to severe limitations as to the time when lawyer-client meetings can take place, as well as the lack of appropriate facilities. The above have a prejudicial impact on the effectiveness of the legal defence but also prevent lawyers from discharging their duties in accordance with the Attorney Ethics Code.

10. The National Chamber of Advocacy (NCA) is not endowed with a mechanism that would allow it to regularly monitor the quality of the service provided by state-appointed lawyers with a view to identifying means and methods of improving. The NCA can only, in rather extreme cases, launch disciplinary proceedings against lawyers (including state-appointed ones).

11. Whereas the NCA regularly organizes trainings for lawyers, it does not organise trainings or has adopted special curricula for

legal aid lawyers, particularly in relation to specialised topics such as juvenile justice.

12. At present, the relevant legal and regulatory frameworks do not contain any provisions regarding issues such as the employment of paralegals or the forming of partnerships between the state authorities and legal faculties of universities or civil society organizations (CSOs). On the other hand however, the frameworks do not appear to contain any obstacles to that end. Considering that the legal clinics of several universities as well as CSOs already offer free legal aid (often regarding very specialised topics), promoting their association with the state-sponsored legal aid scheme would render the latter more effective.

13. Albanian legislation does not contain any limitation whereby legal aid is to be granted only on grounds of indigence or when the interests of justice so require. In practice, legal aid is available and provided by default (provided the defendant asks for it) while there is no mechanism whereby a defendant might be asked, depending on his means, to contribute to the legal expenses incurred in his case. This in turn means that legal aid might be provided even to defendants who can afford to retain a private lawyer, to the detriment of truly impecunious defendants and of course the state's legal aid and judicial budgets.

14. Albanian legislation endows state-appointed lawyers will a full set of procedural tools and rights, enabling them to mount an effective defence for and on behalf of their clients; the only exception is the restriction placed upon state-appointed lawyers representing a defendant tried in absentia, as in such cases the lawyer cannot file an appeal on behalf of his client. It is interesting however to note that this restriction is not absolute since, as the High Court has held, state-appointed lawyers have the right to file an appeal if their client is a juvenile (and hence does not have the right to file an appeal himself) or when the lawyer has been designated as the defendant's guardian.

15. There is no legal impediment to providing legal aid nationwide; nevertheless, no special measures are provided with a view to making effective legal aid available in poor and remote areas of Albania. The availability of legal aid outside the capital city of Tirana is limited, all the more since the State Commission for Legal Aid (SCLA) has yet to set up six regional offices.

1.2. Findings emerging after reviewing the court practice

1. The number of criminal proceedings where the defendant is represented by a state-appointed lawyer is very high, constituting more than 1/4 of the total number of criminal proceedings at the Tirana District Court. This strongly suggests that there is significant demand for legal aid.

2. In the overwhelming percentage of cases involving juveniles (84%), the latter are represented by a state-appointed lawyer. In view of the lack of specialisation on this particular topic on the part of the lawyers, it has been observed that it is often the court that is assuming a more active role in protecting the interests of this special category of defendants.

3. Individuals are not always informed at the moment of detention or arrest of the reasons for the detention/arrest or about their rights, as well as the possibility that they may be assisted by a defence lawyer. At least one fifth of the state-appointed lawyers interviewed report that the police officers treat them with disrespect (compared to privately retained lawyers), thus bringing about differential treatment between these two categories of lawyers as well as demotivating state-appointed lawyers from fully and efficiently discharging their duties.

4. The proceeding organs (prosecution / court) do not provide the defendant with the list of legal aid lawyers and ask him to indicate his preference. The defendant is only asked whether he agrees

with the appointment of the state-appointed lawyer already designated by the prosecutor/judge, making it unlikely that he will in fact disagree, for fear of (real or perceived) retribution.

5. Cases are not distributed among state-appointed lawyer in a transparent and fair way. About 87% of the cases reviewed have been assigned to only 15 legal aid lawyers, while just three of them were assigned to represent defendants in almost a full half of all the cases surveyed (5,125), amply attesting to an unfair preference by the judges towards these lawyers, and resulting in a highly unequal distribution of cases among the lawyers on the legal aid list.

6. Defendants / arrested persons are not usually allowed to meet with their lawyer immediately after their deprivation of liberty; when a state-appointed lawyer is designated by the court, this happens in the courtroom, making it impossible in practice to get familiar with the case or to obtain the defendant's opinion about it, not to speak of the possibility of devising a well thought-out defence strategy, both because of insufficient time as well as because of the lack of privacy.

7. Persons placed under arrest / detention are not allowed easy access to their lawyer due to administrative limitations regarding visiting hours and days.

8. State-appointed lawyers are not active in challenging decisions or violations of the defendant's procedural rights by either the police or the prosecutor. The study did not identify any such case being brought before the High Court or the Constitutional Court, let alone the European Court of Human Rights.

9. State-appointed lawyers are not particularly active in defending their client's interest during the court proceedings, turning their presence and participation in them a mere formality. In over 3/4 of the cases audited, state-appointed lawyers did not

ask for additional time to become familiar with the case file but immediately undertook the defendant's defence, without paying regard to whether the case-file was voluminous, whether there were irregularities in the investigative actions, and so forth.

10. In fewer than 10% of the cases did the same state-appointed lawyer represent the client in both trial levels (first instance / appellate). In the remainder of the cases, the defendants were represented by different lawyers at both instances, thus preventing the formulation and pursuit of a coherent defence strategy. Aggravating the problem is the fact that the newly appointed lawyers do no appear to consult with their predecessors, in violation of the Attorney Ethics Code.

11. State-appointed lawyers exhibit a marked tendency to steer the defendant's preference towards an abbreviated trial. While such trials do have a number of advantages for the defendant, they can also serve to turn a blind eye on and "legitimise" irregular investigative actions, thus penalizing the defendant.

12. State-appointed lawyers do not often present their closing arguments in writing - indeed, fewer that 1/5 of the lawyers surveyed to do so. Filing of the arguments in writing would not only constitute a sign of respect towards the judge but would also give him the opportunity of studying in more detail and at his leisure the lawyer's arguments, to the benefit of the defendant. In this respect, it is not accidental that judges and prosecutors in general do not think highly of the skills of state-appointed lawyers, considering them at best average.

13. Turning to the lawyers' (state-appointed and privately retained) final requests addressed to the court, the data show no statistically significant difference of statistical significance between acceptance and rejection by the court. It would in fact appear that the lawyer's

status (e.g. state-appointed or privately retained) might be less significant in the eyes of the court that what is often thought to be.

14. Comparisons between cases where the defendant was represented by a state-appointed lawyer and those where he privately retained one show a marked difference between the severity of the criminal sentence requested by the prosecutor when the defendant is represented by a state-appointed lawyer (about 40% higher). A similar tendency is observed in terms of the sentence handed down by the courts, with sentences being two times lower in cases where the defendants have retained their own lawyers.

15. The number of appeals to the court of appeal filed by state-appointed lawyers is relatively low, but without any fundamental difference in comparison to that filed by privately retained lawyers. The amount of appellate decisions in favour of the defendant is the same for both categories of lawyers.

16. State-appointed lawyers seldom, if ever, file appeals on point of law before the High Court. This is partly due to the restriction imposed by the National Chamber of Advocates whereby only lawyers with more than 10 years of professional experience can argue cases before the High Court or the Constitutional Court. In the list of legal aid lawyers for 2016, only 23% of the lawyers met that criterion. Another reason is that it is the defendant personally who has to request the filing of such an appeal. Nevertheless in many cases, the defendant is either tried in absentia or is not informed of his right to file such an appeal before the High Court.

17. State-appointed lawyers do not appear to contribute to the prolongation of the proceedings, though at times this is for reasons (e.g. not requesting an adjournment with a view to studying the case-file) that are to the detriment of the defendant.

18. Rather surprisingly, in many cases it did not appear that the work of privately retained lawyers was not of a higher quality to that of state-appointed lawyers.

2. Recommendations

1. It is imperative that the relevant legal and regulatory frameworks be amended so that state-appointed lawyers will no longer be nominated by the prosecutor or the court, but rather by an independent professional body such as the local Chamber or the National Chamber of Advocacy. The latter could set up and operate a 24/7 legal aid service and thus would be able to respond to urgent demands for the provision of legal aid. Thus for example, should a prosecutor consider that a defendant must be assisted by a criminal legal aid lawyer, he would merely have to contact the respective service of the National Chamber of Advocacy which would then appoint one out of the list maintained by and on the basis of the criteria set out by the Chamber. The Chamber could also act as a clearing house for the payment of state-appointed lawyers, making it easier for them to receive their remuneration from the state. Entrusting the operation and administration of the criminal legal aid scheme to an independent and professional body such as the National Chamber of Advocacy would also make it more likely that the same lawyer would be assigned to represent the defendant during all stages of the criminal proceedings, as well as that the cases would be more equitably distributed among the lawyers on the criminal legal aid list.

2. The National Chamber of Advocacy should revisit the criteria for determining the inclusion of lawyers on the criminal legal aid lawyers list. The criteria should take into account their professional experience, degree of specialisation as well as participation in continuous training courses. More specifically, it is recommended that all lawyers on the list should be required to have more than 10 years of experience, not only in order to ensure that they are well qualified but also to be able to represent their clients in all court instances. Alternatively, the relevant criterion (namely that only lawyers with 10 years of experience

can argue a case before the High and Constitutional Courts) could be removed or modified (for example, it could be lowered to five years). It is also highly recommended that lawyers should join the criminal legal aid scheme following a competitive procedure - as is already the case with the lawyers providing civil and criminal legal assistance under the State Commission for Legal Aid-administered legal aid scheme.

3. A special list of lawyers specialising on juvenile justice issues should be set up; legal aid lawyers appointed to represent juvenile defendants should be designated exclusively from that list.

4. The Law on the Profession of Advocate should be amended with a view to providing for the launching of disciplinary measures against legal aid lawyers in cases where the legal service they provided is of palpably low quality or in cases where they remain passive during the proceedings. Additionally, the Code of Criminal Procedure should be amended with a view to enjoining as well as allowing judges and prosecutors to have a state-appointed lawyer replaced if they have grounds to consider that he is not performing his duties effectively.

5. A new remuneration and payment system for state appointed lawyers should be instituted. The fees should be set at a more reasonable level and be calculated on the basis of the different actions undertaken by the lawyer, the number of court sessions and so forth. At the same time, the funding of the legal aid budget should be commensurate with the needs of effective legal aid provision. It is also that the separate legal aid budgets currently maintained by the Prosecution Office, the Courts and the State Commission for Legal aid should be merged into one and that, by virtue of the important role the National Chamber of Advocacy plays in the field of legal aid, it should always be consulted before any major decisions regarding the legal aid budget's administration are taken.

6. Upon their arrest or detention, individuals should be informed of the reasons of their arrest / detention as well of their rights, including the right to legal assistance by a privately-retained or state-appointed lawyer. In the latter case, they should also be asked to indicate their preference as to the lawyer to be appointed to represent them. Subject to other criteria (e.g. equitable distribution of cases), the nominating authority (ideally the National Chamber of Advocacy) could take this preference into consideration when appointing a legal aid lawyer.

7. The Code of Criminal Procedure should be amended with a view to providing for an express guarantee of access to criminal legal aid from the moment of deprivation of liberty, during the criminal proceedings and during the execution of the final criminal court decision.

8. The Code of Criminal Procedure should reflect the approach of the United Nations Convention on the Rights of Persons with Disabilities and shed its current paternalistic approach towards them. Moreover the authorities and particularly the State Police should take immediate and adequate measures in order to ensure that juveniles will be interviewed by the police only in the presence of a defence lawyer, a trusted adult and a psychologist.

9. The authorities and particularly the State Police as well as the Ministry of the Interior should take measures to ensure full respect of the right of every person deprived of its liberty to meet and consult with its lawyer.

10. The Law on the Profession of Advocate should be amended with a view to providing for the establishment and operation by the National Chamber of Advocacy of a mechanism tasked with monitoring the quality of legal assistance provided by state-appointed lawyers.

11. The relevant regulatory framework on visitation hours should be amended with a view to allowing more opportunities to detainees / prisoners to meet and consult with their lawyers; the currently applicable restrictive schedule should be applicable only in relation to visits by friends or family members.

12. The two criminal legal aid schemes that are currently in force (one on the basis of the Code of Criminal Procedure and the other under the Law on Legal Aid) should be merged. Alternatively, the scope of the Law on Legal aid should be limited only to civil and administrative proceedings.

13. In the continuing education / training programs for lawyers organised by the National Chamber of Advocacy, the latter should also include special curricula on issues such as juvenile defendants' rights, the rights of persons with mental disabilities and so on, specifically addressed to criminal legal aid lawyers.

14. The National Chamber of Advocacy, the Ministry of Justice, the courts and the Prosecution office should also examine the possibility of entering into formal partnerships with universities and CSOs offering free legal aid, with a view to incorporating them into the national criminal legal aid scheme.

15. The National Chamber of Advocacy should take all necessary measures with a view to ensuring that police officers as well as the staff of the prosecution service shall treat lawyers in a dignified manner and assist them in resisting any attempt to prevent them from exercising their duties to the benefit of their clients.

ANNEX I. EUROPEAN AND INTERNATIONAL STANDARDS ON THE RIGHT TO LEGAL AID

A summary of the current minimum international legal standards on the right to legal aid, from the European Convention on Human Rights and the case law of the European Court of Human Rights, supported by principles and standards from the International Covenant on Civil and Political Rights, the UN Human Rights Committee, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, and other European and UN bodies.

December 2014

Open Society Justice Initiative

INTRODUCTION

1. The Justice Initiative has been deeply involved in legal aid reform in Europe and around the world for many years. The current negotiations for an EU Directive on Legal Aid are a momentous opportunity to establish and codify the practice on legal aid for all Member States.

2. The starting point for all negotiations will be the existing standards from the European Convention on Human Rights as interpreted by the case law of the European Court of Human Rights. The level of protection on legal aid should never fall below these minimum standards.

3. We have developed this summary to outline what these minimum standards are. We focus on the ECHR and the jurisprudence of the European Court, and we also include standards from other documents and bodies where appropriate. This includes the International Covenant on Civil and Political Rights, the UN Human Rights Committee, and the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, the European Committee for the Prevention of Torture and the UN Subcommittee on Prevention of Torture.

4. This document draws on these various European and international sources to set out the minimum standards on six aspects of legal aid:

(A) the scope of the right to legal aid through the application of the means and merits test;
(B) the State's obligation to provide legal aid during the early stages of criminal proceedings;
(C) the obligation on legal aid bodies to make decisions appointing lawyers fairly and without arbitrariness;
(D) the right of people to choose their own legal aid lawyer;

(E) the State's obligation to ensure the quality of legal aid services; and
(F) practical requirements for implementing functioning and effective legal aid systems.

5. This document has been adjusted from the original version with an intention to be a reference during the process of developing a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings. The text of this document is available in English, French, German, Spanish, Italian, Hungarian, Dutch, Polish, Russian and Albanian.

6. If you have any questions or feedback about this document, you would like a translated version of the brief in another language, or you would like to discuss the detail of these minimum standards, please contact:

Zaza Namoradze
Director, Budapest Office
Open Society Justice Initiative
zaza.namoradze@opensocietyfoundations.org
Tel: +36 1 8823100

Marion Isobel
Legal Officer
Open Society Justice Initiative
marion.isobel@opensocietyfoundations.org
Tel: +44 207 149 0277

www.justiceinitiative.org

OVERVIEW: THE RIGHT TO LEGAL AID

7. One of the fundamental procedural rights of all people accused or suspected of crimes is the right to legal assistance at all stages of the criminal process. But it is not enough to merely allow a theoretical or illusory right to legal assistance. The right must be practical and effective in the way in which it is applied. Accordingly, people charged with crimes should be able to request free legal assistance from the outset of the investigation if they cannot afford to pay for that assistance themselves. This ensures that indigent suspects and defendants are able to defend their cases effectively before the court and are not denied their right to a fair trial because of their financial circumstances.

8. Legal aid also has broader benefits for the system as a whole. A functioning legal aid system, as part of a functioning criminal justice system, can reduce the length of time suspects are held in police stations and detention centres, in addition to reducing the prison population, wrongful convictions, prison overcrowding and congestion in the courts.[1]

9. The United Nations General Assembly recently adopted the world's first international instrument dedicated to the provision of legal aid. The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems[2] ("the UN Principles and Guidelines") were approved on 20 December 2012. They enact global standards for legal aid, and invite States to adopt and strengthen measures to ensure that effective legal aid is provided across the world:

1 *The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice System*, 3 October 2012, UN Doc. A/C.3/67/L.6, Introduction at para. 3.

2 *The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice System*, 3 October 2012, UN Doc. A/C.3/67/L.6, at http://www.uianet.org/sites/default/files/RES_GA_UN_121003_EN.pdf.

> *"Recognizing that legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process, States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution".*[3]

10. The right to legal aid is established explicitly in Article 6(3)(c) of the European Convention on Human Rights ("ECHR") and in Article 14(3)(d) of the International Covenant on Civil and Political Rights ("ICCPR"). The European Court of Human Rights ("ECtHR") has developed detailed rules about how legal aid should be provided, many of which have been affirmed by the UN Human Rights Committee applying the ICCPR.

11. Other European and international bodies have also set down rules of legal aid. The European Committee for the Prevention of Torture ("CPT") and the UN Subcommittee on Prevention of Torture ("SPT") have both repeatedly emphasized the importance of legal aid as a fundamental safeguard against intimidation, ill-treatment, or torture. The CPT and SPT have identified that the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. In order to protect the vulnerable position of people in police custody, all States must develop an appropriate system of legal aid for those who are not in a position to pay for a lawyer.[4]

3 *The UN Principles and Guidelines*, Principle 1..

4 *Twelfth General Report on the CPT's activities covering the period 1 January to 31 December 2001*, 3 September 2002, at para. 41. See also: *Report on the visit to Armenia carried out by the CPT from 2 to 12 April 2006*, CPT/Inf (2007) 47, at para. 23; *Report on the visit to Armenia carried out by the CPT from 15 to 17 March 2008*, CPT/Inf (2010) 7, at para. 24; *Report on the visit to Austria carried out by the CPT from 14 to 23 April 2004*, CPT/Inf (2005) 13, at para. 26; *Report on the visit to Bulgaria carried out by the CPT from 10*

12. This document will draw on these various European and international sources to set out the minimum standards on six aspects of legal aid: (A) the scope of the right to legal aid through the application of the means and merits test; (B) the State's obligation to provide legal aid during the early stages of criminal proceedings; (C) the obligation on legal aid bodies to make decisions appointing lawyers fairly and without arbitrariness; (D) the right of people to choose their own legal aid lawyer; (E) the State's obligation to ensure the quality of legal aid services; and (F) practical requirements for implementing functioning and effective legal aid systems.

A. SCOPE OF THE RIGHT TO OBTAIN LEGAL AID

13. A person has the right to free legal aid if two conditions are met. First, if he does not have sufficient means to pay for legal assistance (the "means test"), and second when the interests of justice so require (the "merits test"). These two conditions are set out in both Article 6(3)(c) of the ECHR and Article 14(3)(d) of the ICCPR.

The Means Test

14. If a person does not have sufficient means to pay for their own lawyer, they will satisfy the first condition set down in Article 6(3) of the ECHR. The ECtHR has not provided a definition of "sufficient means". Instead, the ECtHR takes all of the particular circumstances of each case into account when determining if the defendant's financial circumstances required the granting of legal assistance.
15. The ECtHR has held, as a general rule, that it is for domestic

to 21 September 2006, CPT/Inf (2008) 11, at para. 27; *Report on the visit to Hungary carried out by the CPT from 30 March to 8 April 2005*, CPT/Inf (2006)20, at para. 23; *Report on the visit to Poland carried out by the CPT from 4 to 15 October 2004*, CPT/Inf (2006) 11, at para. 21; *Report on the visit to Poland carried out by the CPT from 26 November to 8 December 2009*, CPT/Inf (2011) 20, at para. 26.

authorities to define the financial threshold for the means test. While the ECtHR allows Member States a certain margin of appreciation in choosing how to implement means tests, there must be sufficient guarantees against arbitrariness in the determination of eligibility (discussed further below). In *Santambrogio v Italy*, the ECtHR found no violation of the Article 6(1) right of access to a court where an applicant was refused legal aid on the grounds that his means exceeded the statutory limit. The ECtHR determined that the refusal to grant legal aid was based on the law and that the Italian legal system afforded sufficient guarantees against arbitrariness in the determination of eligibility for legal aid.[5]

16. The defendant bears the burden of proving that he cannot afford to pay for legal assistance, but he does not have to prove his indigence "beyond all doubt".[6] In *Pakelli v Germany*, the ECtHR relied on "some indications" that the applicant had been unable to pay for his lawyer, including tax-related statements, and the fact that the applicant had spent the previous two years in custody while his appeal on points of law were pending. In the absence of indications to the contrary, the ECtHR was satisfied that the applicant was engaged in business on a small scale and that his financial situation was modest, in finding that he lacked the means to pay for a lawyer.[7]

17. The UN Principles and Guidelines have highlighted the importance of not applying a restrictively low or unfair means test, by urging States to ensure that "persons whose means exceed the limits of the means test but who cannot afford, or do not have access to, a lawyer in situations where legal aid would have otherwise been granted and where it is in the interests of justice to provide such aid,

5 *Santambrogio v Italy*, ECtHR, Judgment of 21 September 2004, at para. 55..
6 *Pakelli v Germany*, ECtHR, Judgment of 25 April 1983, at para. 34..
7 *Pakelli v Germany*, ECtHR, Judgment of 25 April 1983, at para. 34. See also: *Twalib v Greece*, ECtHR, Judgment of 9 June 1998, at para. 51.

are not excluded from receiving assistance".[8] The UN Principles and Guidelines also state that the criteria for applying the means test should be "widely publicized" to ensure transparency and fairness.[9]

Remittance or Reimbursement

18. While a requirement to reimburse legal aid costs may in some circumstances violate the fairness of the proceedings, the possibility that an accused may be required to repay the cost of legal aid at the end of the proceedings is not, in principle, incompatible with Article 6(3) of the ECHR. In X v Germany, the former European Commission of Human Rights found that Article 6(3)(c) does not guarantee a definitive exemption from legal aid costs. Instead, the State can pursue a defendant for reimbursement of the costs after the trial if the defendant's economic situation improves and they are able to meet the costs.[10]

19. Requiring reimbursement or remittance of legal aid costs might be incompatible with Article 6 where the amount claimed from the applicant is excessive,[11] the terms of reimbursement are arbitrary or unreasonable,[12] or where no assessment of the applicant's financial situation has been performed to ensure that their economic situation has improved and they are able to meet the costs.[13]

8 *The UN Principles and Guidelines*, Guideline 1, at para 41(a).
9 *The UN Principles and Guidelines*, Guideline 1, at para 41(b).
10 *X. v Germany*, no. 9365/81, European Commission on Human Rights Decision of 6 May 1982.
11 *Croissant v Germany,* ECtHR, Judgment of 25 September 1992, at para. 36; *Orlov v Russia*, ECtHR, Judgment of 21 June 2011, at para. 114..
12 *Morris v the United Kingdom,* ECtHR, Judgment of 26 February 2002, at para. 89.
13 *Croissant v Germany*, ECtHR, Judgment of 25 September 1992, at para. 36; *Morris v the United Kingdom*, ECtHR, Judgment of 26 February 2002, at para.89; *Orlov v Russia*, ECtHR, Judgment of 21 June 2011, at para. 114; *X. v Germany*, no. 9365/81, European Commission on Human Rights Decision of 6 May 1982.

20. However, the ECtHR will carefully examine all the facts to determine whether a requirement to reimburse costs adversely affected the fairness of the proceedings in the particular circumstances of a given case.[14] For example, in *Ognyan Asenov v Bulgaria* the ECtHR examined whether the possibility of being ordered to bear the costs of his defence in the event of a conviction had inhibited the applicant from asking the trial court to appoint a lawyer for him. The ECtHR found that the applicant had not felt inhibited and that it did not undermine his procedural rights.[15] In *Croissant v Germany*, the ECtHR held that the reimbursement order made against the applicant was not incompatible with Article 6 because the amounts claimed were not excessive, and the German system of legal aid normally remitted the greater part of the costs where they were high.[16]

The Merits Test

21. The second condition set down in Article 6(3) of the ECHR and Article 14(3(d) of the ICCPR is that "the interests of justice" must require legal aid to be provided. This means that indigent people are not guaranteed legal aid in every case. The State has some flexibility to decide when the public interest in the proper administration of justice requires that the defendant be provided with a legal aid lawyer. The ECtHR has identified three factors that should be taken into account when determining if the "interests of justice" necessitates free legal aid: the seriousness of the offence and the severity of the potential sentence; the complexity of the case; and the social and personal situation of the defendant. All the factors should be considered together, but any one of the three can warrant the need for the provision of free legal aid.

14 *Croissant v Germany*, ECtHR, Judgment of 25 September 1992, at para 36.
15 *Ognyan Asenov v Bulgaria*, ECtHR, Judgment of 17 February 2011, at para 44.
16 *Croissant v Germany*, ECtHR, Judgment of 25 September 1992, at paras. 35-37.

The Seriousness of the Offence and the Severity of the Potential Sentence

22. As a minimum guarantee, the right to legal aid applies whenever deprivation of liberty is at stake.[17] Even the possibility of a short period of imprisonment is enough to warrant the provision of legal aid. In *Benham v the United Kingdom*, the applicant had been charged with non-payment of a debt and faced a maximum penalty of three months in prison. The ECtHR held that this potential sentence was severe enough that the interests of justice demanded that the applicant ought to have benefited from legal aid.[18]

23. In situations where deprivation of liberty is not a possibility, the ECtHR will look to the particular circumstances of the case and the adverse consequences of the conviction for a defendant. The distinction between cases that require legal aid because of the severity of the potential sentence and those that do not can be very fine. In *Barsom and Varli v Sweden*, the applicants complained that they were denied legal aid in proceedings in which they faced the imposition of tax surcharges of up to 15,000 euros. The ECtHR found that the denial of legal aid was acceptable, partly because the applicants were in a financial position to pay these sums to the Tax Authority without significant hardship, and because they did not face the risk of imprisonment.[19] In contrast, in *Pham Hoang v France*, the ECtHR held that the interests of justice required legal aid to be provided to the applicant. Part of the reasoning was because "the proceedings were clearly fraught with consequences for the applicant, who had been… found guilty on appeal of unlawfully importing prohibited goods and sentenced to pay large sums to the customs authorities".[20]

17 *Benham v United Kingdom*, ECtHR, Judgment of 10 June 1996, at para. 59; *Quaranta v Switzerland*, ECtHR. Judgment of 24 May 1991, at para. 33; *Zdravka Stanev v Bulgaria*, ECtHR, Judgment of 6 November 2012, at para. 38; *Talat Tunç v Turkey*, ECtHR, Judgment of 27 March 2007, at para. 56; *Prezec v Croatia*, ECtHR, Judgment of 15 October 2009, at para. 29.

18 *Benham v United Kingdom*, ECtHR, Judgment of 10 June 1996, at paras. 59 and 64.

19 *Barsom and Varli v Sweden*, ECtHR (dec.), Decision of 4 January 2008.

20 *Pham Hoang v France*, ECtHR, Judgment of 25 September 1992, at para 40.

The Complexity of the Case

24. Legal aid should be granted in cases that raise complex factual or legal issues. In *Pham Hoang v France*, another factor which led the ECtHR to conclude that legal aid should have been provided to the applicant was that he intended to persuade the domestic court to depart from its established case law in the field under consideration.[21] In *Quaranta v Switzerland*, although the facts were straightforward, the range of potential sentences open to the court was particularly complex, including the possibility of activating a suspended sentence or deciding on a new sentence. This complexity also warranted the provision of a legal aid lawyer to protect the accused's interests..[22]

25. In contrast, the ECtHR has held that denial of legal aid was appropriate in cases that were factually and legally straightforward. For example, in *Barsom and Varli v Sweden*, the contentious issues primarily concerned an assessment of whether the applicant had submitted an incorrect or incomplete tax return. Given that there were no difficult legal questions to be argued, the ECtHR held that the absence of legal aid did not violate Article 6.[23]

The Social and Personal Situation of the Defendant

26. Legal aid should generally be provided for vulnerable groups and for people who, because of their personal circumstances, may not have the capacity to defend the case themselves. The ECtHR will take into account the education, social background and personality of the applicant and assess them with regard to the complexity of the case. In *Quaranta v Switzerland*, the ECtHR held that the legal issues were complicated in themselves, but they were even more so for the applicant given his personal situation:

21 *Pham Hoang v France*, ECtHR, Judgment of 25 September 1992, at para 40.
22 *Quaranta v Switzerland*, ECtHR.Judgment of 24 May 1991, at para 34.
23 *Barsom and Varli* v Sweden, ECtHR (dec.), Decision of 4 January 2008.

> *"a young adult of foreign origin from an underprivileged background, he had no real occupational training and a long criminal record. He had taken drugs since 1975, almost daily since 1983, and, at the material time, was living with his family on social security benefit".*[24]

27. Legal aid should also be provided for people who have language difficulties. In *Biba v Greece*, the ECtHR found a violation of Articles 6(1) and 6(3)(c) where an undocumented immigrant who lacked the means to retain a lawyer before the Court of Cassation was not appointed a lawyer under legal aid. The ECtHR held that it would have been impossible for the applicant to prepare the appeal in the Greek courts without assistance, because he was a foreigner who did not speak the language.[25]

28. In contrast, in *Barsom and Varli v Sweden*, the ECtHR noted that both applicants had been living in Sweden for nearly thirty years, and were businessmen who owned and ran a restaurant. The ECtHR found that it was highly unlikely that they would be incapable of presenting their case related to tax surcharges without legal assistance before the national court. The Court took particular consideration of the fact that the Swedish courts were obliged to provide directions and support to the applicants to present their case adequately.[26]

B. LEGAL AID DURING PRELIMINARY INVESTIGATION

29. If the merits and means tests are fulfilled, legal aid should be available at all stages of proceedings, from the preliminary police investigation, through the trial, and to the final determination of any appeal. In particular, it is crucial that all people accused or suspected

24 *Quaranta v Switzerland*, ECtHR, Judgment of 24 May 1991, at para. 35.
25 *Biba v Greece*, ECtHR, Judgment of 26 September 2000, at para. 29.
26 *Barsom and Varli v Sweden* ECtHR (dec.), Decision of 4 January 2008.

of crimes who are unable to afford a lawyer are provided with speedy access to legal aid during the early stages of the criminal process.[27]

30. The investigation stage is particularly important for the preparation of the criminal proceedings as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial.[28] The ECtHR has also noted "the particular vulnerability of an accused at the early stages of the proceedings when he is confronted with both the stress of the situation and the increasingly complex criminal legislation involved".[29] In order for the right to a fair trial to remain sufficiently practical and effective, Article 6(1) of the ECHR requires that suspects be given access to a lawyer, appointed by the State if necessary, before they are interrogated by the police.[30]

31. This was emphasized in the case of *Salduz v Turkey*, in which a minor was arrested, made admissions during interrogation in the absence of a lawyer, but later retracted his statement saying that it had been obtained under duress. The Grand Chamber of the ECtHR found that the applicant's lack of access to a lawyer while he was in police custody violated Article 6(1) and 6(3)(c) of the ECHR. Neither the subsequent assistance of his legal aid lawyer nor the ability to challenge the statement during the following proceedings could cure the defects which had occurred during police custody.[31]

27 See the Open Society Justice Initiative's First Template Brief on the right to early access to legal assistance, available at: http://www.opensocietyfoundations.org/briefing-papers/legal-tools-earlyaccess-justice-europe

28 *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008, at para 54.

29 *Nechiporuk and Yonkalo v Ukraine*, ECtHR, Judgment of 21 April 2011, at para. 262.

30 *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008, at paras. 54-55; *Shabelnik v Ukraine*, ECtHR, Judgment of 17 February 2009, at para. 57; *Pishchalnikov v Russia*, ECtHR, Judgment of 24 September 2009, at paras. 72-74 and 91; *Plonka v Poland*, ECtHR, Judgment of 30 June 2009, at paras. 40-42; *Adamkiewicz v Poland*, ECtHR, Judgment of 2 March 2010, at para. 89.

31 *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008, at para. 58.

32. *Salduz* has been followed in numerous subsequent rulings by the ECtHR, which form a clear and consistent line of jurisprudence that the use of evidence obtained from a suspect through interrogation or other investigative measures when the suspect does not have legal assistance – either privately funded or paid for by the State – will breach Article 6 of the ECHR.[32]

33. The UN Principles and Guidelines also highlight the critical importance of providing legal aid during the initial police investigation. They specify that whenever States apply a means test to determine eligibility for legal aid, they should ensure that "Persons urgently requiring legal aid at police stations, detention centres or courts should be provided preliminary legal aid while their eligibility is being determined".[33]

34. In some circumstances, legal aid is also required for people who are questioned by the police, but who are not formally called suspects or accused persons. In *Nechiporuk and Yonkalo v Ukraine*, the applicant had been suspected of murder, although the police arrested him for a lesser drug offence and formally placed him in "administrative detention," depriving him of a lawyer. The ECtHR held that despite his formal designation, he had in fact been treated as a criminal suspect and should have been given the rights under Article 6 of the ECHR, including unimpeded access to legal representation, assigned through official legal aid if need be.[34]

32 Salduz has been followed by over 100 ECtHR rulings against multiple countries, for example: *Brusco v France*, ECtHR, Judgment of 14 October 2010, at para. 45; *Pishchalnikov v Russia*, ECtHR, Judgment of 24 September 2009, at paras. 70, 73, 76, 79, 93; *Płonka v Poland*, ECtHR, Judgment of 31 March 2009, at paras. 35, 37, 40; *Shabelnik v Ukraine*, ECtHR, Judgment of 19 February 2009, at para. 53; *Mađer v Croatia*, ECtHR, Judgment of 21 June 2011, at paras. 149 and 154.

33 *The UN Principles and Guidelines*, Guideline 1, at para. 41(c).

34 *Nechiporuk and Yonkalo v Ukraine*, ECtHR, Judgment of 21 April 2011, at para. 262.

35. It is also clear that a person has a right to legal aid not only during any police interrogation but also in the course of other investigative acts. In *Berlinski v Poland*, the applicants' request for a legal aid lawyer was ignored by the authorities, with the result that they had no defence lawyer for more than a year. The ECtHR found that denying the applicants with legal aid for this period of the investigation, during which procedural acts including medical examinations are carried out, was a breach of Article 6(1) and 3 (c) of the ECHR.[35]

36. The requirement for provision of legal aid during the early stages is reinforced by the UN Principles and Guidelines, which explicitly require States to "endure that effective legal aid is provided promptly at all stages of the criminal process",[36] including "all pretrial proceedings and hearings".[37] Similarly, the Human Rights Committee has also found violations of Article 14(3)(d) and Article 9(1) where a suspect was not provided legal aid during initial police detention and questioning.[38]

C. CHOICE OF LEGAL AID LAWYER

37. Article 6(3)(c) of the ECHR specifically sets out that a person charged with a crime has the right to "legal assistance of his own choosing". However, the ECtHR has held that people who are given free legal aid do not always get to choose which lawyer is appointed to them. The right to be defended by a lawyer of one's own choosing

35 *Berlinski v Poland*, ECtHR, Judgment of 20 June 2002, at para. 77.

36 *The UN Principles and Guidelines*, Principle 7, at para. 27.

37 *The UN Principles and Guidelines*, Guideline 4, at para. 44(c).

38 *Butovenko v Ukraine*, UNHRC, Decision of 19 July 2001, U.N. Doc. CCPR C/102/D/1412/2005, at para. 7.6; Gunan v Kyrgyzstan, UNHRC, Decision of 25 July 2011, U.N. Doc. CCPR/C/102/D/1545/2007, at para. 6.3; *Krasnova v Kyrgyzstan*, UNHRC, Decision of 27 April 2010, U.N. Doc. CCPR/C/101/D/1402/2005, at para. 8.6; *Johnson v Jamaica*, UNHRC, Decision of 25 November 1998, U.N. Doc. CCPR/C/64/D/592/1994, at para. 10.2; *Levy v Jamaica*, UNHRC, Decision of 3 November 1998, U.N. Doc. CCPR/C/64/D/719/1996, at para. 7.2.

can be subject to limitations when the interests of justice require. In *Croissant v Germany*, the ECtHR held that the wishes of the applicant should not be ignored, but that the choice of lawyer – taking into consideration the interests of justice – is ultimately for the State:

> *"Notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes … However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice".*[39]

38. In *Ramon Franquesa Freixas v Spain*, the applicant complained that his Article 6(3)(c) rights were violated because he had been assigned a lawyer specialising in labour law to defend him in a criminal case. The ECtHR held that his complaint was manifestly ill founded, because Article 6(3)(c) did not guarantee a defendant the right to choose which lawyer the court should assign him and because the applicant had failed to present any plausible evidence to support his assertion that the lawyer was incompetent.[40]

39. In appointing a legal aid lawyer, the State should consider the special needs of the applicant such as language skills. However, the ECtHR will look to the fairness of the proceeding as a whole, instead of setting down explicit rules for the appointment of legal aid lawyers. In

39 *Croissant v Germany*, ECtHR, Judgment of 25 September 1992, at para. 29. See also: *Lagerblom v Sweden*, ECtHR, Judgment of 14 January 2003, at para. 55, holding that Article 6(3)(c) cannot be interpreted as securing a right to have public defence counsel replaced.

40 *Ramon Franquesa Freixas v Spain*, ECtHR (dec.), Decision of 21 November 2000.

Lagerblom v Sweden, the applicant, who was from Finland, requested his legal aid lawyer be replaced by a lawyer who also spoke Finnish. The domestic courts rejected his request. The ECtHR upheld the ruling, finding that the applicant had enough proficiency in Swedish to communicate with his lawyer and that he had been provided with ample interpretation services. The ECtHR thus held that he has been able to participate effectively in his trial and the domestic courts were entitled to refuse him the lawyer of his choice.[41]

40. State regulations regarding the qualification of lawyers, including restrictions on who can appear before certain courts and rules of professional conduct, may also limit a person's choice of legal aid counsel without infringing their ECHR rights. In *Meftah and Others v France*, the ECtHR held that the special nature of the French Court of Cassation justified limiting the presentation of oral arguments to specialist lawyers.[42] Similarly, in *Mayzit v Russia*, the ECtHR found that Article 6 had not been violated where the defendant was denied his request to have his mother and sister represent him in a criminal case. The ECtHR accepted the state's argument that appointment of professional lawyers rather than lay persons served the interests of quality of the defence considering the seriousness of the charges and complexity of the case.[43]

D. QUALITY OF LEGAL AID LAWYER

41. Mere appointment of a lawyer is not enough to fulfil the State's obligation to provide effective legal assistance. If the legal aid lawyer fails to provide effective representation, and this is manifest or is brought to the State authority's attention, then the State is under an obligation to intervene and rectify the failure.

41 *Lagerblom v Sweden*, ECtHR, Judgment of 14 January 2003, paras. 60-62.
42 *Meftah and Others v France*, ECtHR, Grand Chamber Judgment of 26 July 2002, at paras. 42-44.
43 *Mayzit v Russia*, ECtHR, Judgment of 20 January 2005, at paras. 70-71.

42. The principle was set down in *Kamasinski v Austria*, where the ECtHR held:

> *"a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes … It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The Court agrees with the Commission that the competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way*".[44]

43. The ECtHR has stressed that if the State's obligation was satisfied by mere appointment of a lawyer, it "would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) (art. 6-3-c) and the structure of Article 6 (art. 6) taken as a whole; in many instances free legal assistance might prove to be worthless".[45]

44. In situations where the failure is objectively manifest, the defendant does not need to actively complain or bring the failure to the State's attention. In *Sannino v Italy*, the domestic court assigned different lawyers to the applicant at each hearing, who were unprepared and unfamiliar with the case. The ECtHR held that the court had failed to ensure effective defence, even though the applicant did not complain about the situation to the court or to his lawyers.[46] These principles

44 *Kamasinski v Austria*, ECtHR, Judgment of 19 December 1989, at para. 65. See also: *Artico v Italy*, ECtHR, Judgment of 13 May 1980, at para. 36; *Sannino v Italy*, ECtHR, Judgment of 27 April 2006, at para. 49; *Czekalla v Portugal*, ECtHR, Judgment of 10 October 2002, at para. 60; *Daud v Portugal*, ECtHR, Judgment of 21 April 1984, at para. 38.

45 *Artico v Italy*, ECtHR, Judgment of 13 May 1980, at para. 33.

46 *Sannino v Italy*, ECtHR, Judgment of 27 April 2006, at para. 51.

have been adopted and affirmed by the Human Rights Committee, applying Articles 9 and 14 of the ICCPR.[47]

Failure to Act or Absenteeism

45. Absenteeism will generally be considered to be a failing that is manifest to the State. In *Artico v Italy*, the lawyer appointed to the applicant declined to represent him from the outset of the case, on the basis of his other commitments and his ill-health. Despite that, the Government failed to substitute the appointed lawyer with another legal representative. In finding a breach of Article 6(3), the ECtHR held that when an appointed lawyer is prevented from performing his duties and the authorities are aware of the situation, they have an obligation either to replace him or to make sure he fulfils his obligations.[48]

46. Silence and failure to undertake basic functions can also be a manifest failure warranting State intervention. In *Falcao dos Santos v Portugal*, the lawyer attended court but remained silent; he did not cross-examine witnesses or otherwise intervene on the applicant's behalf.[49] The applicant repeatedly complained about his poor legal representation to the authorities. The ECtHR found that the authorities failed to guarantee real assistance, as opposed to mere "appointment" of the lawyer, and that they had a duty to intervene.[50]

47. Similarly, in the Human Rights Committee decision of *Borisenko v Hungary*, the Committee found a breach of Article 14(3) of the ICCPR where the legal aid lawyer failed to appear at the applicant's interrogation or his detention hearing. The Committee stated that it was incumbent upon the state party to ensure that legal representation was effective.[51]

47 *Aleksandr Butovenko v Ukraine*, UNHRC, Decision of 19 July 2001, U.N. Doc. CCPR/C/102/D/1412/2005 (2011), at para. 4.14.

48 *Artico v Italy*, ECtHR, Judgment of 13 May 1980, at para. 33.

49 *Falcao dos Santos v Portugal*, ECtHR, Judgment of 3 July 2012, at paras. 12-18.

50 *Ibid*, at para. 45.

51 *Borisenko v Hungary*, UNHRC, Decision of 14 October 2002, U.N. Doc.

Conflicts of Interest

48. If the legal aid lawyer is acting under a conflict of interest, this will usually be a manifest failure warranting State intervention. In *Moldoveanu v Romania*, three codefendants were represented by the same State appointed lawyer, despite the fact that their interests were contradictory: two of the defendants had confessed, while the third (the applicant to the ECtHR) had pleaded not guilty. Although the applicant did not complain about the ineffective legal aid, it did not relieve the authorities from their duty to ensure effective legal assistance.[52]

Dissatisfaction with Performance of Lawyer

49. Mere dissatisfaction with the manner in which the lawyer runs the case, or minor errors or defects in the lawyer's work, are unlikely to lead to a situation in which the State is obliged to intervene. In *Kamasinski v Austria*, the applicant complained about the quality of his legal aid lawyer. However, unlike the lawyer in the *Artico* case, who "from the very outset ... stated that he was unable to act",[53] the applicant's lawyer took a number of steps prior to the trial, including visiting the applicant in prison, lodging a complaint against the decision to remand in custody, and filing motions for the attendance of witnesses.[54] Although the lawyer's work could be criticized, the ECtHR held that the circumstances of his representation did not reveal a failure to provide legal assistance as required by Article 6(3) or a denial of a fair hearing under Article 6(1) of the ECHR.[55]

CCPR/C/76/D/852/1999, at para. 7.5. See also: *Saidova v Tajikistan*, UNHRC, Decision of 8 July 2004, UN Doc. CCPR/C/76/D/852/1999, at para. 6.8; *Collins v Jamaica*, UNHRC, 25 March 1993, U.N. Doc. CCPR/C/47/D/356/1989, at para. 8.2. Compare with: *Bailey v Jamaica*, UNHRC, 17 September 1999, U.N. Doc. CCPR/C/66/D/709/1996, at para. 7.2.

52 *Moldoveanu v Romania*, ECtHR, Judgment of 19 June 2012, at para. 75.

53 *Artico v Italy*, ECtHR, Judgment of 13 May 1980, at para. 33.

54 *Kamasinski v Austria*, ECtHR, Judgment of 19 December 1989, at para. 66.

55 *Kamasinski v Austria*, ECtHR, Judgment of 19 December 1989, at paras. 70-71.

50. However, in certain circumstances the ECtHR has held that the poor or defective work of the lawyer can amount to a "manifest failure". In *Czekalla v Portugal*, the legal aid lawyer failed to comply with a "simple and purely formal" rule when lodging an appeal. As a result the appeal was dismissed. The applicant was in a particularly vulnerable position, as a foreigner who did not speak the language of the courts, and he faced a lengthy prison sentence. The ECtHR held that:

> *"The State cannot be held responsible for any inadequacy or mistake in the conduct of the applicant's defence attributable to his officially appointed lawyer … however … in certain circumstances negligent failure to comply with a purely formal condition cannot be equated with an injudicious line of defence or a mere defect of argumentation. That is so when as a result of such negligence a defendant is deprived of a remedy without the situation being put right by a higher court."*[56]

51. The ECtHR held that the lawyer's failure to comply with the rule when lodging the appeal was a manifest failure which called for positive measures by the State. The ECtHR further explained that "The Supreme Court could, for example, have invited the officially appointed lawyer to add to or rectify her pleading rather than declare the appeal inadmissible".[57]

52. Similar rules have been set down by the Human Rights Committee applying Article 14(3) of the ICCPR. In *Smith and Stewart v Jamaica*, the Committee held that the State party cannot be held accountable for lack of preparation or alleged errors made by defence lawyers unless it has denied the complainant and his lawyer time to prepare the defence (see below), or unless it should have been manifest to the court that the lawyers' conduct was incompatible with the interests of justice.[58]

56 *Czekalla v Portugal*, ECtHR, Judgment of 10 October 2002, at para. 65.
57 *Czekalla v Portugal*, ECtHR, Judgment of 10 October 2002, at para. 68.
58 *Smith and Stewart v Jamaica*, UNHRC, Decision of 8 April 1999, U.N. Doc.

Adequate Time to Prepare Defence

53. The failure of the State to ensure sufficient time and facilities for an officially appointed lawyer to prepare for a case violates Article 6(3) of the ECHR. In *Daud v Portugal*, the legal aid lawyer was only appointed three days prior to the trial for a serious, complex case. The ECtHR held that it was manifestly evident to the State authorities that the legal aid lawyer did not have time to prepare for the trial, and that they should have intervened to ensure the quality of the defence.[59]

54. Similarly, in *Bogumil v Portugal*, the applicant was represented by a legal aid lawyer who took no action in the proceedings other than to ask to be released from the case three days before the trial. A replacement lawyer was assigned on the day the trial began and had only five hours in which to study the case file.[60] The ECtHR held that when a problem with legal representation is evident, the courts must take the initiative and solve it, for example, by ordering an adjournment to allow a newly appointed lawyer to acquaint himself with the case-file.[61]

55. The Human Rights Committee has similarly affirmed this principle in numerous cases. In G*eorge Winston Reid v Jamaica*, a case in which the defendant faced the death penalty, the legal aid lawyer was not present during the preliminary hearings and had met the complainant only ten minutes before the start of the trial. The Committee held this was a manifest failure in violation of Article

CCPR/C/65/D/668/1995, at para. 7.2. See also: *Beresford Whyte v Jamaica*, UNHRC, Decision of 27 July 1998, U.N. Doc. CCPR/C/63/D/732/1997, at para. 9.2; *Glenn Ashby v Trinidad and Tobago*, UNHRC, Decision of 21 March 2002, U.N. Doc. CCPR/C/74/D/580/1994, at para. 10.4; *Bailey v Jamaica*, UNHRC, 17 September 1999, U.N. Doc. CCPR/C/66/D/709/1996, at para. 7.1, *Rastorguev v Poland*, UNHRC, 28 March 2011, U.N. Doc. CCPR/C/101/D/1517/2006, at para. 9.3.

59 *Daud v Portugal*, ECtHR, Judgment of 21 April 1984, at para. 42.

60 *Bogumil v Portugal* , ECtHR, Judgment of 7 October 2008, at para 27.

61 *Bogumil v Portugal* , ECtHR, Judgment of 7 October 2008, at para 49.

14(3)(b) of the ICCPR.[62] In contrast, in *Hill v Spain*, the trial had been adjourned to allow the lawyer to prepare sufficiently, and the Committee thus held that there was no breach of Article 14(3).[63] The UN Principles and Guidelines also provide guidance on what is required for adequate time to prepare, stipulating that the effective legal aid requires "unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case file and adequate time and facilities to prepare their defence".[64]

E. APPOINTMENT OF LEGAL AID LAWYERS

56. Although Article 6 of the ECHR does not apply directly to proceedings relating to domestic applications for legal aid, the ECHR is relevant to those proceedings to the extent that serious deficiencies in these proceedings may have a decisive impact on the right of access to a court.[65]

Diligence

57. In dealing with legal aid requests, the responsible authorities or courts should act diligently. In *Tabor v Poland*, the ECtHR found a violation of Article 6(1) where the regional court rejected the applicant's request for legal aid in making a cassation appeal. The ECtHR found that the applicant's request for legal aid was not handled with the requisite degree of diligence since the regional court did not provide reasons for the rejection and issued its decision one month

62 *George Winston Reid v Jamaica*, UNHRC, Decision of 14 July 1994, U.N. Doc. CCPR/C/51/D/355/1989, at para 14.2. See also *Robinson v Jamaica*, UNHRC, 30 March 1989, U.N. Doc. CCPR/C/35/D/223/1987, at paras. 10.2-10.3. *Glenford Campbell v Jamaica*, UNHRC, Decision of 7 April 1992, U.N. Doc. CCPR/C/44/D/248/1987, at para 6.5.

63 *Hill v Spain*, UNHRC, Decision of 2 April 1997, U.N. Doc. CCPRC/59/D/526/1993 (1997), at para. 14.1.

64 *The UN Principles and Guidelines*, Principle 7, at para. 28.

65 *Gutfreund v France*, ECtHR, Judgment of 12 June 2003, at para. 44.

after the deadline for lodging a cassation appeal.[66] It made a similar finding in *Wersel v Poland* where the legal aid board communicated their refusal two days before the expiry of the time-limit for the submission of the applicant's appeal.[67]

Free from Arbitrariness

58. The ECtHR also looks at whether the body responsible for appointing legal aid, as a whole, offers individuals "substantial guarantees to protect them from arbitrariness". The legal aid system may be considered to be arbitrary where the decisions of the legal aid body are unreviewable, or where the criteria and method of selection of cases eligible for the legal aid is unclear.[68] It may also be arbitrary if the composition of the body could be said to be biased.[69] In *Del Sol v France*, the ECtHR upheld the system for deciding legal aid cases because the Legal Aid Office was composed of judges, lawyers, civil servants and members of the public, as that "diversity ensured that it had due regard to the demands of the proper administration of justice and the rights of the defence".[70]

Prospects of Success

59. When the domestic legal aid authority is determining if the merits of the case require legal aid to be provided, it is generally not acceptable for them to consider the applicant's prospects of success in the case. In *Aerts v Belgium*, the ECtHR found a violation of Article 6(1) where the applicant's request for legal aid was rejected because

66 *Tabor v Poland*, ECtHR, Judgment of 27 June 2006, at paras. 44-46. See also: *A.B. v Slovakia*,ECtHR, Judgment of 4 March 2003, at para. 61.

67 *Wersel v Poland* , ECtHR, Judgment of 13 September 2011, at para. 52. See also: *R.D. v Poland*, ECtHR, Judgment of 18 December 2001, at paras. 50-52.

68 *Santambrogio v Italy*, ECtHR, Judgment of 21 September 2004, at para. 54.

69 *Santambrogio v Italy*, ECtHR, Judgment of 21 September 2004, at para. 55. See also: *Del Sol v France*, ECtHR, Judgment of 26 February 2002, at para. 26.

70 *Del Sol v France*, ECtHR, Judgment of 26 February 2002, at paras. 17 and 26.

his appeal was ruled "ill founded" by the domestic Legal Aid Board. In that case, it was mandatory for the applicant to be represented by a lawyer for an appeal; he did not have the standing to submit the appeal himself. The ECtHR found that it was not for the Legal Aid Board to assess the applicant's prospects of success; rather, it was for the Court of Cassation to determine the issue. The ECtHR further found that by refusing the application on the ground that the appeal did not appear to be well founded, the Legal Aid Board impaired the very essence of the applicant's right to a tribunal.[71]

60. However, in limited circumstances during the appeals stage, the ECtHR has made exceptions to this rule. In *Monnell and Morris v United Kingdom*, the ECtHR held that the interests of justice do not automatically require free legal assistance whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6. Notably, in this case the likelihood of success was assessed by the lawyer who had represented the applicant at the trial. He advised that there were no reasonable prospects of successfully appealing, but both applicants ignored his advice. The ECtHR found no breach because the applicants had benefited from free legal assistance both at first instance trial and in being advised as to whether he had any arguable grounds of appeal.[72]

F. PRACTICAL REQUIREMENTS FOR FUNCTIONAL LEGAL AID SYSTEMS

61. Recognizing the right to legal aid in legislation is not enough to ensure that the right is protected in daily practice. The right is underpinned by adequate funding, safeguards of independence, equity in the provision

71 *Aerts v Belgium*, ECtHR, Judgment of 30 July 1998, at para. 60. Following the judgment Belgium changed its standard to "manifestly ill founded."

72 *Monnell and Morris v the United Kingdom*, ECtHR, Judgment of 2 March 1987, at paras. 63 and 67.

of legal aid, and strong partnerships with other criminal justice actors. The ECtHR and the Human Rights Committee have, on occasion, set down minimum standards about the practicalities of implementing a functional legal aid system. To complement this, the UN Principles and Guidelines provide detailed guidance, and the European Committee for the Prevention of Torture ("CPT") and the UN Subcommittee on Prevention of Torture ("SPT") have gone further than any international or regional judicial body in providing practical recommendations for an efficient and well-designed legal aid system.

Adequate Funding and Resources

62. States should ensure that their legal aid systems are well funded, have adequate financial and staffing resources, and have budgetary autonomy. The CPT and SPT have noted with concern the numerous examples of national legal aid management bodies being understaffed and under resourced, noting that excessive workloads and low fees for services have a discouraging effect on the legal aid lawyers.[73] Indeed, the SPT has noted complaints that legal aid lawyers in some States would not appear during the investigation unless paid an additional fee by their client, because of the low official fees for such services.[74] The SPT and CPT have recommended States review their funding arrangements to ensure that enough money is provided to ensure the system operates effectively.[75] The Human Rights Committee has also pointed out

73 Fifth Annual Report of the SPT covering the period January-December 2011, 19 March 2012, U.N. Doc. CAT/C/48.3, at para. 78. See also: Report on the visit to Croatia carried out by the CPT from 1 to 9 December 2003, CPT/Inf (2007) 15, at para. 24; Report on the visit to Hungary carried out by the CPT from 5 to 16 December 1999, CPT/Inf (2001) 2, at para. 32.

74 Report on the visit to Croatia carried out by the CPT from 1 to 9 December 2003, CPT/Inf (2007) 15, at para. 24.

75 *Report on the visit to Croatia carried out by the CPT from 1 to 9 December 2003*, CPT/Inf (2007)15, at para. 24; *Report on the visit to Croatia carried out by the CPT from 4 to 14 May 2007*, CPT/Inf (2008) 29, at para. 19; *Report on the visit to Hungary carried out by the CPT from 30 March to 8 April 2005*,

that "legal aid should enable counsel to prepare his client's defence in circumstances that can ensure justice", one of such circumstances being "provision for adequate remuneration for legal aid".[76]

63. The UN Principles and Guidelines go into detail about what measures a State should take to ensure adequate and sustainable funds are provided for legal aid throughout the country. These include "allocating a percentage of the State's criminal justice budget to legal aid services", identifying and putting in place "incentives for lawyers to work in rural areas and economically and socially disadvantaged areas", and ensuring that the money provided to prosecution and legal aid agencies is "fair and proportional".[77] As for human resources, the UN Principles and Guidelines recommend that States "make adequate and specific provision" for staffing the legal aid system and that where there is a shortage of lawyers, to support non-lawyers or paralegals to provide legal aid".[78]

Independence

64. States should pay particular attention to ensuring the independence of legal aid lawyers from the police and prosecution. The UN Principles and Guidelines have stressed the importance of legal aid lawyers being able to do their job "freely and independently" without State interference.[79] The Principles and Guidelines recommend setting up a national body to coordinate legal aid, specifying that it must be "free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and should not be subject to the direction or control or financial intimidation of any

CPT/Inf (2006) 20, at para. 23; *Report on the visit to Poland carried out by the CPT from 8 to 19 May 2000*, CPT/Inf (2002) 9, at para. 23.

76 *Reid v Jamaica*, UNHRC, Decision of 20 July 1990, U.N. Doc. CCPR/C/39/D/250/1987, at para. 13.

77 *The UN Principles and Guidelines*, Guideline 12.

78 *The UN Principles and Guidelines*, Guideline 13.

79 *The UN Principles and Guidelines*, Principle 2 at para. 16 and Principle 12 at para. 36.

person or authority in the performance of its functions, regardless of its administrative structure".[80] They also recommend development of quality assurance mechanisms to ensure effectiveness, transparency and accountability in providing legal aid services.

65. The CPT has noted particular complaints that legal aid lawyers were "taking the side of the police, e.g. by trying to convince their clients to admit everything they were being suspected of".[81] The SPT has also highlighted the importance of States having a legal framework that allows for legal aid lawyers to have "functional independence and budgetary autonomy to guarantee free legal assistance for all detainees who require it".[82]

Equity in Legal Aid

66. Legal aid should be available for people accused or suspected of a crime, irrespective of the nature of the particular crime. The ECtHR has stressed that legal assistance is particularly crucial for people suspected of serious crimes, "for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to be the highest degree by democratic societies".[83] In addition, the CPT has recommended States abolish their systems whereby people who are charged under particular classes of criminal offences (for example, minor offences) are not entitled to legal aid.[84] Given the autonomous meaning of a "criminal charge" under the ECHR,[85] all people who are

80 *The UN Principles and Guidelines*, Guideline 59.

81 *Report on the visit to Armenia carried out by the CPT from 2 to 12 April 2006*, CPT/Inf (2007) 47, at para. 23; *Report on the visit to Croatia carried out by the CPT from 4 to 14 May 2007*, CPT/Inf (2008), 29 at para. 19.

82 *Fifth Annual Report of the SPT covering the period January-December 2011*, 19 March 2012, U.N.Doc. CAT/C/48.3, at para. 78.

83 *Salduz v Turkey*, ECtHR, Grand Chamber Judgment of 27 November 2008, at para 54.

84 *Report on the visit to the Netherlands carried out by the CPT from 10 to 21 October 2011*, CPT/Inf (2012) 21, at para. 18.

85 *Engel and Others v the Netherlands*, ECtHR, Judgment of 8 June 1976, at para.

charged with crimes, even if minor, should have the right to apply for legal aid and address the means and merits tests rather than excluding whole categories of offences from the legal aid system.

67. Women, children and groups with special needs may also need special measures to ensure their access to legal aid is meaningful. The UN Principles and Guidelines require legal aid to be provided on a non-discriminatory basis, and be tailored to address the needs of these groups, as well as people living in rural or disadvantaged areas.[86] In *Anakomba Yula v Belgium*, the applicant was restricted from accessing legal aid because she was not a Belgian national. The ECtHR found this to be discriminatory and a violation of Article 6 in conjunction with Article 14 of the ECHR.[87]

Partnerships

68. States should work with a number of different criminal justice actors to ensure that legal aid is implemented in a practical and effective way. The UN Principles and Guidelines recommend that States establish partnerships with bar or legal associations to provide legal aid, as well as other legal service providers, such as universities, civil society and other groups and institutions.[88] The CPT has, in numerous Reports to Government, made recommendations to States to develop a "fully fledged and properly funded system of legal aid"[89]

82, 83. Seel also: *Ezeh and Connors v the United Kingdom*, ECtHR, Grand Chamber Judgment of 9 October 2003, at para. 82. *Deweer v Belgium*, ECtHR, Judgment of 27 February 1980, at para. 42 and 46; *Eckle v Germany*, ECtHR, Judgment of 15 July 1982, at para. 73; *Öztürk v. Germany*, ECtHR, Judgment of 21 February 1984, at para. 46-53.

86 *The UN Principles and Guidelines*, Principle 10.

87 *Anakomba Yula v Belgium*, ECtHR, Judgment of 10 March 2009, at paras. 37-39 (civil case).

88 *The UN Principles and Guidelines*, Principle 14, Guideline 11(d), Guideline 16.

89 *Report on the visit to Armenia carried out by the CPT from 2 to 12 April 2006*, CPT/Inf (2007) 47, at para. 23; *Report on the visit to Austria carried out by the CPT from 14 to 23 April 2004*, CPT/Inf (2005) 13, at para. 26; *Report on the visit*

and noted that "this should be done in co-operation with the relevant bar associations".[90] The CPT has also recommended that in order to avoid delays, lawyers could be "chosen from pre-established lists drawn up in agreement with the relevant professional organisations".[91]

69. Furthermore, the UN Principles and Guidelines specifically place accountability on police, prosecutors and judges, stating that it is their responsibility "to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid".[92]

CONCLUSION ON THE RIGHT TO LEGAL AID

70. Legal aid is a fundamental right of all people accused or suspected of crimes. It is particularly important for people during the early stages of criminal proceedings, as people in police custody are in a vulnerable position and are in most need of assistance. The ECtHR has set down detailed rules on when the interests of justice require legal aid to be provided, including the basic minimum rule that all people facing any period of imprisonment, however short, must be provided with legal aid. In addition, legal aid must be provided to people involved in serious or complex cases, as well as people who may not have the capacity to defend the case themselves because of their personal circumstances or vulnerability.

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to Hungary carried out by the CPT from 30 March to 8 April 2005, CPT/Inf (2006) 20, at para. 23; *Report on the visit to Poland carried out by the CPT from 4 to 15 October 2004*, CPT/Inf (2006) 11, at para. 21; *Report on the visit to Poland carried out by the CPT from 26 November to 8 December 2009*, CPT/Inf (2011) 20, at para. 26.

90 *Report on the visit to the Slovak Republic carried out by the CPT from 24 March to 2 April 2009*, CPT/Inf (2010) 1, at para. 28; *Report on the visit to Armenia carried out by the CPT from 2 to 12 April 2006*, CPT/Inf (2007) 47, at para. 23.

91 *Second General Report on the CPT's activities covering the period 1 January to 31 December 1991*, 13 April 1992, at para. 37.

92 *The UN Principles and Guidelines*, Principle 3, at para. 23.

71. In appointing a legal aid lawyer, the State must be diligent, fair, and should consider the wishes of the suspect or accused person, and any special needs they might have. The State should pay close attention to the quality of the legal aid lawyer they appoint, because if the lawyer fails to provide effective representation, and this is manifest or is brought to the State's attention, then the State is under an obligation to intervene and rectify the failure.

72. The UN Human Rights Committee, applying the ICCPR, has affirmed that the right of legal aid is a universal standard afforded to all people accused or suspected of crimes. The European Committee for the Prevention of Torture and the UN Subcommittee on Prevention of Torture have both repeatedly emphasized that a functioning and efficient legal aid system is a fundamental safeguard against intimidation, ill-treatment and torture.

73. On a practical level, the UN Principles and Guidelines are particularly useful for setting down specific recommendations as to how States can create and maintain an efficient legal aid system. States should ensure that their legal aid systems have adequate financial and staffing resources and have budgetary autonomy. Independence is crucial, both of the legal aid lawyers and of the managing legal aid authorities. Legal aid should be guaranteed for all people accused or suspected of a crime, irrespective of the nature of the particular crime, and special measures may be required to ensure groups with special needs have meaningful access to legal aid. A functioning and well-designed legal aid system requires the commitment of all of the actors in the criminal justice system, including lawyers, police, prosecutors, and judges.

ANNEX II. GOOD PRACTICE ON CRIMINAL LEGAL AID: KOSOVO

1. Appointment of criminal legal aid lawyers

Under the law of the Republic of Kosovo, the provision of legal aid in criminal proceedings is regulated and monitored by the Kosovo Agency for Free Legal Aid, a de-centralized organ with regional offices distributed throughout the country, in close cooperation with the Kosovo Chamber of Advocates (KCA).

A crucial element in the seamless cooperation between the two bodies is a memorandum setting out their respective obligations: under the terms of the memorandum, the list of criminal legal aid lawyers is drafted and approved by the KCA, on the basis of the criteria it has adopted while the KCA's Steering Council is endowed with the exclusive competence of nominating state-appointed lawyers in each case. For its part, the Agency for Free Legal Aid effectively undertakes to ensure the daily administration and management of the legal aid scheme, including the remuneration of the lawyers on the criminal legal aid list as well as reviewing the requests for legal assistance.

In order to ensure the fair distribution of cases, the list with the names of the criminal legal aid lawyers is updated on Monday every week. The list is then forwarded to the relevant institutions, namely

the police, the prosecution and the courts. In order to preempt instances where officials could ignore the list, both the Prosecutorial and Judicial Councils of Kosovo have enacted decisions obliging their respective members to first, use only the official list of criminal legal aid lawyers and second, to contact the KCA when they consider that the nomination of the state-appointed lawyers is necessary; failure to follow the prescribed process of designating a state-appointed lawyer constitutes a disciplinary offence. Similarly, the KCA has instructed its members to adhere to the appointment procedure and refuse any direct nomination as state-appointed lawyers from prosecutors / judges or the police; failure to do so constitutes a violation of the Lawyer's Code of Ethics.

An important element underpinning the scheme's success is its simplicity. Thus should the police, the prosecution or a judge consider that a detainee / defendant should be provided with legal aid, they merely place a phone call with the KCA which operates a 24/7 legal aid help-desk and which then will proceed to appoint a legal aid lawyer.

The smooth functioning of the criminal legal scheme effectively rests on the use of four different forms drawn up by the KCA and covering the entire range and scope of legal assistance in criminal proceedings.

Form No. 1 is effectively the legal aid application form, in which applicants for legal aid indicates the kind of legal assistance they want to be provided with.

Form No. 2 is filled out by the legal aid lawyers. The lawyers have to set out some general information about the legal aid beneficiary, the type of legal service provided, any requests / legal action undertaken by them as well as indicate in which stage of the proceedings the case is.

Form No. 3 is filled in by the legal aid beneficiaries at the end of the proceedings in their case. It is effectively an evaluation form of the legal aid lawyer's work, with the beneficiaries being called to assess the quality of legal assistance they received, by responding to questions regarding the availability of the lawyer to meet and consult wit them, the lawyer's professional abilities, whether they were active in defending their case and the final outcome of the case. The legal aid beneficiaries can also use the form in order to complaint about a violation by the lawyer of the Lawyer's Code of Ethics.

Form No. 4 is effectively the remuneration form for services rendered by the legal aid lawyers. The lawyers are asked to indicate which actions they undertook in order to ensure the proper calculation of their remuneration. The form is submitted to the finance office of the court or the prosecutor's office, depending on the phase of the proceeding that legal aid was provided.

2. Transparency in the appointment of criminal legal aid lawyers

In order to inspire confidence both in its members as well as in the general public regarding the transparent operation of the legal aid scheme, the KCA publishes on its official web page the weekly list of on-duty legal aid lawyers.

Moreover, the KCA compiles and publishes comprehensive statistics on different aspects of the scheme, such as the distribution of cases among the legal aid lawyers and so forth.

3. Continuous training of criminal legal aid lawyers

In addition to the Agency for Free Legal Aid which organizes general trainings for legal aid providers (e.g. CSOs, mediators etc), the KCA organizes trainings on different issues / fields of law in order to keep its members always informed of recent legal developments. Providing

continuing education / training to lawyers and legal practitioners is crucial towards improving their professional abilities and their knowledge base, thus ensuring that they will be in a position to offer a legal service of high quality.

4. Disciplinary proceedings against criminal legal aid lawyers

The memorandum between the KCA and the Agency for Free Legal Aid also provides that the latter authority shall be competent to receive disciplinary complaints against a lawyer. Thus if a legal aid beneficiary who is being assisted by a state-appointed lawyer is dissatisfied with the service he received, staff from the Agency for Free Legal Aid will assist him in filling in Form No. 3 referred to above. The form will then be forwarded to the Disciplinary Office of the National Chamber of Advocacy where the complaint will be reviewed by the Disciplinary Prosecutor's Office.

After carrying out an investigation, the Prosecutor can decide to either launch disciplinary proceedings (in which case the file will be forwarded to the Review Committee of the KCA which will decide as to the disciplinary measure to be imposed) or, if he finds that there is no case to answer, reject the complaint. In the latter case, the complainant can file an administrative appeal before the Review Committee.

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