Ed Cape and Zaza Namoradze

Effective Criminal Defence in Eastern Europe

Bulgaria | Georgia | Lithuania | Moldova | Ukraine

LARN LEGAL AID REFORMERS' NETWORK

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PREFACE AND ACKNOWLEDGMENTS

This book is based on a research project which was conducted under the framework of the Legal Aid Reformers Network (LARN) with financial support from the Human Rights and Governance Grants Program of the Open Society Foundations and implemented by the Soros Foundation–Moldova, in cooperation with Open Society Institute–Sofia, Open Society Georgia Foundation, International Renaissance Foundation–Ukraine, and the Open Society Justice Initiative.

In the past decade the Open Society Justice Initiative, in collaboration with national Soros foundations, has helped to initiate and implement reforms revamping the national legal aid systems in a number of countries in Central and Eastern Europe and the former Soviet Union. As a result new legal aid laws were adopted in Lithuania in 2005, Bulgaria in 2006, Georgia and Moldova in 2007, and Ukraine in 2011. The right of access to legal assistance and legal aid is a crucial safeguard for the requirements of a fair trial, and these new laws have created important foundations for broadening accessibility and improving the quality of free legal aid services for indigent criminal suspects and accused persons. However, as this book demonstrates, some important shortcomings and challenges still remain to be dealt with before effective criminal defence rights are fully realised.

LARN was created in 2009 as an international information-sharing network of organisations and individuals working to promote rights to legal aid and effective defence. LARN implemented the current research project, inspired by the 2010 research project entitled *Effective Criminal Defence in Europe*,[1] which marked a major

[1] Ed Cape, Zaza Namoradze, Roger Smith and Taru Spronken, *Effective Criminal Defence in Europe*, Antwerp: Intersentia, 2010.

development in comparative criminal law in Europe and which has been an important resource supporting reforms across Europe. Like the original research project, the current study places the suspect and accused at the centre of the enquiry and examines the question of access to effective criminal defence from their perspective. Its overall aim is to advance the European Union's legislative agenda on the rights of suspected and accused persons in criminal proceedings, to improve defence rights standards and their implementation, and to provide policymakers and practitioners in the research countries with evidence on shortcomings and recommendations for reforms.

The project management team that provided research guidance and overall project coordination consisted of: Ed Cape of the University of West of England; Nadejda Hriptievschi, a lawyer from Moldova; and Zaza Namoradze, Director of the Budapest office of the Open Society Justice Initiative. All have current or previous experience as practicing lawyers and have wide knowledge and experience of criminal justice systems in a range of jurisdictions. Ed Cape and Zaza Namoradze collaborated, together with others, on the 2010 *Effective Criminal Defence in Europe* project, which was funded by an action grant from the EU Justice, Freedom and Security Directorate and by the Open Society Institute, and which examined defence rights in eight EU member states and one accession country. Ed Cape has also carried out a number of projects concerned with defence rights and the criminal process in the EU and beyond, including an Open Society Justice Initiative publication entitled *Improving Pretrial Justice: The Roles of Lawyers and Paralegals*. Zaza Namoradze has directed a large number of projects concerning legal aid reforms, including national legal aid reform initiatives in the countries covered by the current research. Nadejda Hriptievschi, who provides overall guidance to LARN, has worked on several research projects on criminal justice in Moldova and has been actively involved in legal reform initiatives in the countries of Central and Eastern Europe and the former Soviet Union. Her enthusiasm, dedication and hard work has been critical in successfully executing the current research project.

A project of this nature inevitably relies on a large number of people. The project was governed by a Steering Committee consisting of Velislava Delcheva (Open Society Institute–Sofia), Tamuna Kaldani (Open Society Georgia Foundation), Victor Munteanu (Soros Foundation–Moldova), Roman Romanov (International Renaissance Foundation–Ukraine) and Zaza Namoradze (Open Society Justice Initiative). The project management team was given considerable assistance by a number of people, including Marion Isobel and Katalin Omboli (Open Society Justice Initiative), Vasylyna

Yavorska (International Renaissance Foundation–Ukraine) and Marcel Varmari and Tatiana Danilescu (Soros Foundation–Moldova). All of them played essential roles in its successful implementation. Steven Freeland (Professor of International Law at the University of Western Sydney, Australia) brought his considerable knowledge, skills and experience to the task of editing the country reports that are set out as chapters in Part II. The in-country researchers, of course, played a crucial role and they were: Yonko Grozev (Bulgaria), Besarion Bokhashvili (Georgia), Regina Valutyte and Inga Abramaviciute (Lithuania), Nadejda Hriptievschi (Moldova), and Gennadiy Tokarev and Arkadiy Buschenko (Ukraine). The in-country reviewers also played an important role in providing a critique of, and validating, the data provided by the in-country researchers and their names are set out in the respective chapters in Part II. The reviewers were: Roumen Nenkov (Bulgaria), Giorgi Chkheidze (Georgia), Raimundas Jurka (Lithuania), Vasile Rotaru (Moldova) and Mykola Khavroniuk (Ukraine). We also thank Tom Bass for editing the final text and extend our gratitude to all of those, both named and unnamed, who have contributed to the research project and the book.

We hope that this book, like the original study, will contribute to a deeper knowledge and understanding of the factors that influence access to effective criminal defence. Our aim is that it will be a source of inspiration for a constructive and effective programme of policies and actions for setting standards and guidelines regionally within the European Union and the Council of Europe, and nationally through mechanisms designed to make access to effective criminal defence available to all who need it. The research will be presented and the book launched at a conference in Brussels on 7 June 2012, to which many of those with responsibility for standard-setting and implementation of defence rights are invited. We trust that this book will provide them with a valuable source of information and analysis. The millions of people who are arrested, detained or prosecuted every year across Europe have the right to be dealt with fairly and justly. This right should be made a reality.

May 2012

Ed Cape
Zaza Namoradze

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BIOGRAPHIES

Ed Cape

Ed Cape is Professor of Criminal Law and Practice at the University of the West of England, Bristol, UK. A former criminal defence lawyer, he has a special interest in criminal justice, criminal procedure, police powers, defence lawyers and access to justice. He is the author of a leading practitioner text, *Defending Suspects at Police Stations* (6th edition, 2011), and is a a contributing author to the standard practitioner text, *Blackstone's Criminal Practice* (2011, published annually). He has conducted research both in the UK and elsewhere, and his research publications include: *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (2005), *Evaluation of the Public Defender Service in England and Wales* (2007), *Suspects in Europe: Procedural rights at the Investigative Stage of the Criminal Process in the European Union* (2007), and *Effective Criminal Defence in Europe* (2010). Ed Cape is also the co-editor of *Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (2008), and author of *Improving Pretrial Justice: The Roles of Lawyers and Paralegals* (2012).

Zaza Namoradze

Zaza Namoradze, Director of the Budapest office of the Open Society Justice Initiative, oversees activities on legal aid reform, legal empowerment and legal capacity development. He has been engaged with legal aid reforms in several countries, including Bulgaria, Georgia, Indonesia, Lithuania, Moldova, Mongolia, Nigeria, Sierra Leone and Ukraine and advocacy on defence rights standards with the United Nations and the European Union. He previously served as staff attorney and, later, Deputy Director

of OSI's Constitutional and Legal Policy Institute (COLPI), where he designed and oversaw projects in constitutional and judicial reforms, clinical legal education and human rights litigation capacity building throughout the former Soviet Union and Eastern Europe. He is a co-author of a research publication *Effective Criminal Defence in Europe* (2010). He has worked for the legal department of the Central Electoral Commission in Georgia and was a member of the State Constitutional Commission. He graduated from the Law Faculty of Tbilisi State University, studied in the comparative constitutional program of the Central European University and earned an LLM from the University of Chicago Law School.

Yonko Grozev

Yonko Grozev is a human rights lawyer, litigating in Bulgaria and before the European Court of Human Rights. He has filed and won a large number of cases before the European Court of Human Rights on, among others, the right to life, prohibition of torture, fair trial, freedom of speech, religion and association and the prohibition of discrimination. He was awarded the 2002 International Human Rights Award of the American Bar Association Section of Litigation. With the Centre for Liberal Strategies, a Sofia-based think tank, he has been engaged in research and advocacy on improving the Bulgarian justice system. He is also active in providing human rights litigation training and consulting to lawyers from Central and Eastern Europe and the former Soviet Union. He is a graduate of Sofia University and holds an LLM from Harvard Law School.

Roumen Nenkov

Roumen Nenkov is a criminal judge, who is presently sitting on the Bulgarian Constitutional Court. Judge Nenkov has served as a criminal judge at both trial and appeal level, for close to 30 years, prior to his election in 2009 on the Constitutional Court. He has been sitting on the Supreme Court of Cassation since 1992, and between 2002 and 2009 he was Deputy Chairman of the Supreme Court of Cassation and the Chairman of its Criminal Chamber. He has published extensively in academic journals on both substantive and procedural criminal law issues and was a member of the working group of experts, which drafted the amendments to the Criminal Procedure Code in 1999, as well as the Judiciary Act in 2000 and the Money Laundering Act. Judge Nenkov has also been active in international judicial cooperation, as a member of a European Commission expert group working on judicial reform in Montenegro.

Besarion Bokhashvili

Besarion Bokhashvili is the team leader of the EU-funded project 'Support to the Ombudsman Office of Georgia'. Before joining the project Besarion was executive director of Georgian Young Lawyer's Association (2007–2009), the largest and most influential NGO in Georgia working on human rights, good governance and rule of law issues, and he was a representative of the government of Georgia to the European Court of Human Rights (2004–2007). Mr. Bokhashvili is a local expert for the Council of Europe, the European Union, the German Foundation for International Legal Cooperation (IRZ), the Office of the High Commissioner for Human Rights and the United Nations Development Programme, conducting lectures to judges, prosecutors and lawyers. Mr. Bokhashvili graduated from the Faculty of Law, Tbilisi State University, and completed an LLM degree in International Human Rights Law at the University of Nottingham (UK). Mr. Bokhashvili was a John Smith Fellow in 2004. Mr. Bokhashvili is the author of two books on European standards on human rights established under the case law of the European Court of Human Rights (2004, 2008), and the author of numerous articles.

Giorgi Chkheidze

Giorgi Chkheidze is Deputy Chief of Party of the 'Judicial Independence and Legal Empowerment Project' (a four-year initiative implemented by East-West Management Institute and funded by USAID), and a former executive director (2009–2010) and chairman (2006–2008) of the Georgian Young Lawyers' Association (GYLA), one of the largest civil society organisations in Georgia working in the fields of the rule of law, human rights and good governance. In 2009 Mr. Chkheidze served as the Deputy Public Defender (Ombudsman) of Georgia. At present, he is a member of governing (executive) boards of the following organisations: Open Society Georgia Foundation (OSGF), GYLA, and the International Society for Fair Elections and Democracy (ISFED). Mr. Chkheidze graduated from the law faculty of Tbilisi State University and did his LLM in International Human Rights Law in University of the West of England as a British Chevening scholar. He was a John Smith Fellow in 2009. Mr. Chkheidze has served as an invited expert member of the National Preventive Mechanism Against Torture (created based on UN OPCAT). His working experience includes working for GYLA for more than nine years and acting as head of the Department of International Legal Relations of the Ministry of Justice of Georgia. Mr. Chkheidze also served as head of staff of the Legal Committee of the Parliament

of Georgia and as head of the Legal Department of the Prosecutor's Office of Georgia. Mr. Chkheidze has a number of publications in the field of human rights and gives lectures on fundamental human rights and criminal justice.

Inga Abramaviciute

Inga Abramaviciute is a private lawyer practicing criminal law in a private law office in Vilnius, Lithuania. She also works as an *ex officio* lawyer in legal aid criminal cases. She is the presiding member of the Coordination Council of the Ministry of Justice of Lithuania, responsible for the legal aid policy in Lithuania. She works also as an expert for several non-governmental human rights organisations in Lithuania. She is the member of Lithuanian Commission of journalists and publishers. She is co-author of *Manual on Trafficking in People for Law Enforcement Officers*, edited by the International Organization for Migration (2005), and co-author of *Rights of Minorities*, edited by the Lithuanian Centre for Human Rights (2006). She worked as the Lithuanian expert of the European Arrest Warrant Project of the European Criminal Bar Association, meeting in 2005 and 2006 in Maastricht, Netherlands. She graduated from the Law Faculty of Mykolas Romeris University and studied international public law at Ghent University in Belgium.

Regina Valutyte

Regina Valutyte is an associate professor at the Department of International and EU Law at Mykolas Romeris University and is currently acting as vice-dean of the Faculty of Law for International Relations and Studies. As a researcher she has a special interest in the implementation of the rights to a fair trial and the protection of the right to a defence at international, regional and national levels. She has been engaged in the national project 'Effectiveness of State-guaranteed Legal Aid' (2009–2010) implemented by the Human Rights Monitoring Institute (Lithuania) and analysed various aspects of securing of the right to fair trial in her articles on the legal consequences for non-referral by national courts for a preliminary ruling and her doctoral thesis on state liability for the decisions of courts of last instance under EU law.

Raimundas Jurka

Raimundas Jurka is the acting head of the Department of Criminal Procedure at Mykolas Romeris University. As a researcher he has a special interest in the

implementation of the right to a fair trial and the protection of convention rights at the international and national levels, especially on issues of criminal justice. He has been engaged in various projects on the protection of participants' procedural guarantees in criminal proceedings. His current research is related to international cooperation in criminal cases, protection of witnesses and victims from illegal intimidation. He is also the author or co-author of many publications concerning the optimisation and effectiveness of criminal processes and procedures.

Vasile Rotaru

Vasile Rotaru teaches criminal procedure, restorative justice and international standards in juvenile justice at Moldova State University Law School. He is also a lecturer at the Moldovan National Institute of Magistrates where he teaches juvenile justice and mediation. He was involved as an expert in several different projects related to criminal justice that were implemented by international organisations in Moldova and other CIS countries. He served as a public defence lawyer in cases involving children in conflict with the law. He is the author of a study on plea bargaining (2004) and a guide for journalists working in criminal justice (2012). He has also co-authored several other works including a guide on defence lawyer's activity in cases involving children in conflict with the law (2010), a criminal procedure textbook (2008) and a trainers' guide in juvenile justice (2006). He is currently conducting research on some aspects of fair trial and the way they are understood and applied in different jurisdictions.

Nadejda Hriptievschi

Nadejda Hriptievschi is a lawyer, researcher and co-founder of Legal Resources Centre, a Moldovan legal think tank. In this capacity she is engaged in research and advocacy for improving the Moldovan justice system. Nadejda teaches human rights at the State University of Moldova. Nadejda served as consultant on legal aid, being closely involved with legal aid reform in Moldova since 2003. She was also engaged in legal aid reforms in Bulgaria, Georgia, Lithuania, Mongolia and Ukraine and participated in the creation of the Legal Aid Reform Network – an international information-sharing network of organisations and individuals working to promote the right to legal aid (www.legalaidreform.org). Nadejda served as consultant on the judiciary, criminal justice and human rights for different national and international organisations. She

received a Master of Laws in Comparative Constitutional Law with an additional specialisation in Human Rights at the Central European University in July 2001 and a law degree at the State University of Moldova in June 2000.

Arkadiy Bushchenko

Arkadiy Bushchenko is a bar lawyer in Ukraine and in recent years has specialised in representation of applicants before the European Court of Human Rights. He successfully represented applicants in about 30 cases on Articles 3, 5 and 6 of the European Convention on Human Rights. He has an interest in criminal procedure, police powers and free legal aid. During 2007–2009 he was a member of a working group on drafting the Code of Criminal Procedure of Ukraine and a working group on the reform of Free Legal Aid in Ukraine. He is the author of *Guidelines for Lawyers on Defence of Victims of Torture* (2011), *Guidelines for Lawyers on the Protection of the Right to Liberty* (2011) and *Digests of the Case law of the European Court of Human Rights* on Articles 2, 3 and 5 of the Convention, as well as author or co-author of the sections on the prohibition of torture, rights to liberty and fair trial rights in the annual report, *Human Rights in Ukraine* (2004–2011). Since 2012 Arkadiy Bushchenko is Executive Director of the Ukrainian Helsinki Human Rights Union.

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Gennardiy Tokarev is a criminal defence lawyer from Kharkiv, Ukraine. He is interested in criminal procedure, rights of the defence at all the stages of proceedings and the criminal justice system. Since 2006 he has been engaged with the formation of a legal aid system in Ukraine. He was a member of the expert group on legal aid at the Ministry of Justice of Ukraine and took part in instituting pilot Public Defender Offices (PDOs) in Ukraine. He also was director of the first office providing criminal defence for indigent people as a model institution for a future government-funded legal aid system. Since 2007 he has been an expert engaged with the pilot PDOs, elaborated manuals for administrative procedures for their offices and dealt with the matter of quality of legal aid. In 2009–2010 he was a member of Public Council on the matter of Human Rights at the Ministry of Interior Affairs of Ukraine. He is now the project manager of a lawyers' network providing legal aid for HIV-infected, drug users and other vulnerable groups. He is also Chairman of the Board of the All-Ukrainian Charity Organisation 'Ukrainian Foundation for Legal Aid' as well as a member of the working group on improving legislation on legal aid at the Ministry of

Justice of Ukraine. He graduated from National Law Academy of Ukraine. In 2003 he conducted research at the Law Faculty of Ohio State University on the matter of human rights observance in criminal proceedings.

Mykola Khavroniuk

Mykola Khavroniuk is a professor with a PhD in Jurisprudence and an expert in criminal law. He has worked as a chief of national safety, defence, law enforcement activity and fight against criminality at the Department of Administration of the Verkhovna Rada of Ukraine (1999–2006) and as a deputy of the Supreme Court Office leader – the chief of the Supreme Court Office Legal Department (2006–2012). He is currently head of the Department of Scientific Development at the Centre for Political and Legal Reform, an NGO. He is also a senior researcher at the Institute of Criminality at the Academy of Law Sciences of Ukraine. He has several published works in the field of criminal law, such as *Criminal Legislation of Ukraine and Other European Countries: A Comparative Study of Harmonisation Issues* (2006), he is the author of manuals and methodological guidebooks on human rights (2003–2004), on criminal and administrative law (1998–2011), on law for children (2004–2010), and has submitted scientific and practical comments to the Constitution of Ukraine (Article on Human Rights and Freedoms), to the Criminal Code of Ukraine (2001–2012) and anti-corruption laws (1996–2012).

PART I

EFFECTIVE CRIMINAL DEFENCE IN A EUROPEAN CONTEXT

Ed Cape
Zaza Namoradze

CHAPTER 1 EFFECTIVE CRIMINAL DEFENCE AND FAIR TRIAL

1. Introduction

In 2010 a three-year study of access to effective criminal defence in nine European jurisdictions (the ECDE study) was published.[1] Eight of the countries are member states of the European Union (EU) and one an accession state, and all have acceded to the European Convention on Human Rights (ECHR). The study concluded that whilst the ECHR, and European Court of Human Rights (ECtHR) case law, have played a critical role in establishing standards in respect of effective criminal defence, there are both practical and systemic limitations on the ability of the Convention to provide detailed standards for, and to ensure compliance with, the essential components of effective criminal defence. The study found that whilst, predictably, there was wide variation across the nine jurisdictions in terms of recognition and implementation of rights essential to effective criminal defence, there were significant impediments to access to effective criminal defence in all of those jurisdictions. Some rights in respect of which ECHR standards are clear, such as the right to trial within a reasonable time, and the right to confidential lawyer/client communications, were patently breached in a minority of countries. Compliance with certain rights, which although lacking in specificity are nevertheless reasonably clear, was deficient in many of the jurisdictions; for example, the right to silence, the right to information and the right to pre-trial release. However, the majority of deficiencies in access to effective criminal defence related to rights in respect of which ECtHR case law was insufficiently detailed to provide adequate guidelines as to the requisite standards.[2]

1 Cape et al. 2010.

2 See, in particular, Cape et al. 2010, Chapters 12 and 13.

Since the ECDE study was completed, there have been a number of major developments in Europe concerning procedural rights for suspected and accused persons. Whilst the flow of applications to, and judgments of, the ECtHR has continued to grow across the range of rights covered by the ECHR, the court's judgment in *Salduz*,[3] which held that the right to legal assistance applies from the first interrogation of a suspect by the police, in particular, sent shockwaves around Europe. Amidst furious debate, a number of governments tried to limit the consequences of giving effect to the decision, arguing, in particular, that it did not give suspects the right to have a lawyer present during police interrogations. In the absence of government action, the domestic courts in some countries were equally reluctant to give effect to the decision, and it took concerted action by lawyers to persuade the appeal courts to give effect to the judgment.[4] For those states that are members of the EU there have been two further developments that have had implications for access to effective criminal defence. First, the coming into force of the Lisbon Treaty in December 2009 introduced qualified majority voting in respect of criminal matters, meaning that individual states no longer have the power of veto in relation to EU legislation in this field. Second, in the same year, the EU adopted a 'roadmap' for legislation and other actions regarding procedural rights for suspects and accused persons in criminal proceedings, which was incorporated in the Stockholm Programme 2010–2014. The roadmap was designed to establish a clearer, more detailed set of rights, which will be more directly enforceable than those provided for by the ECHR.[5]

The ECDE study provided comprehensive, and comparable, information about both the law and practice regarding procedural rights for suspects and defendants in the countries concerned. Although the EU had sponsored a number of studies of individual aspects of procedural rights, the ECDE study was the first to examine the practical implementation of the body of rights relevant to effective criminal defence from the perspective of suspected and accused persons across a range of jurisdictions. It was used as a major source of information for the impact assessments that were

3 ECtHR, Grand Chamber, 27 November 2008, *Salduz v. Turkey*, No. 36391/02, and see further Chapter 2, Section 5.3. The judgment was issued before the ECDE study was completed, but in most countries it took some time for the implications to be considered.

4 For example, in Scotland and in France.

5 See further Section 3.3 below. Again, the Lisbon Treaty came into effect, and the roadmap was adopted, before completion of the ECDE study, but no substantial action was taken prior to publication of the study and the legislative programme under the roadmap commenced after the study was completed.

commissioned by the EU to inform the consideration of the rights to be set out in the proposed Directives issued under the roadmap.[6] The study has also informed a range of activities across European jurisdictions aimed at improving procedural rights for suspects and defendants, including legal challenges to existing provisions, and government-sponsored inquiries concerned with the practical implications of implementing reforms.[7]

2. The research project and methodology

One of the objectives of the ECDE study was to develop a methodology that could be adapted and used in other jurisdictions. The Legal Aid Reformers' Network (LARN) – a network of newly established legal aid institutions, policymakers and legal aid lawyers in Bulgaria, Georgia, Lithuania, Moldova, Mongolia and Ukraine[8] – decided to adopt and develop the methodology in order to conduct a similar study of access to effective criminal defence in five of the countries in the network (those countries in the network other than Mongolia). All of the countries are former members of the Soviet bloc, and for a large part of the twentieth century shared (or had imposed) a similar approach to criminal procedure, institutions and processes. Views differ as to whether the Soviet system represented a distinctive procedural tradition,[9] but there is common agreement that criminal procedure focused on the pre-trial investigative process, which was heavily reliant on confessions rather than investigation, with trials constituting formalised, 'political' events. The principal function of all participants,

6 See *Proposal for a Framework Decision on the Right to Interpretation and to Translation in Criminal Proceedings: Impact Assessment*, Brussels, 8.7.2009 SEC (2009) 915, para. 23, *Proposal for a Framework Decision on the Right to Interpretation and to Translation in Criminal Proceedings: Impact Assessment*, Brussels 20.7.2010 SEC (2010) 907, para. 2.2.2, and *Proposal for a Directive of the European Parliament and of the Council on the Rights of Access to a Lawyer and of Notification of Custody to a Third Person in Criminal Proceedings: Impact Assessment*, Brussels, 8.6.2011 SEC (2011) 686, para. 2.2.2.

7 It was, for example, cited in evidence in the UK Supreme Court case of *Cadder v. HMA* [2010] UKSC 43, and considered in the Carloway Review of the right to legal assistance in Scottish law (Carloway 2011).

8 Further information about LARN is available at http://www.legalaidreform.org/.

9 Reichel, for example, has argued that it is possible to identify 'distinctions warranting a separate category for a socialist legal tradition', whereas Vogler regards the Soviet approach to criminal procedure as a development of inquisitorialism 'adapted for the purposes of the modern totalitarian state'. See, respectively, Reichel 2005, p. 123, and Vogler 2005, p. 64.

including prosecutors, lawyers and judges, was to serve the interests of the state. Since the collapse of the Soviet system in the late 1980s, legal and procedural reforms in many former Soviet jurisdictions have been influenced not only by liberal democratic ideology, but also by adversarial approaches to the criminal process.[10] However, effective reform of criminal justice processes is a difficult and complex process, entailing not only constitutional and legal changes, but institutional reform and innovation, and changes to professional cultures. Furthermore, the reform process is neither linear nor isolated from other developments and concerns, such as economic and fiscal trends, levels of crime and public perceptions. In fact, in many jurisdictions, the reform process is highly political and politicised.

The members of LARN, who are all engaged, in a variety of ways, in practical aspects of the criminal justice process in their own countries, were well aware of the varied, and often precarious, routes taken by the reform process in their own jurisdictions, and wanted to conduct an assessment of how effective reforms have been by reference to European standards regarding the right to fair trial in general, and access to effective criminal defence in particular. Assessing access to effective criminal defence in the five countries in the study by reference to ECHR standards is appropriate because all have, at different times, acceded to the Convention. European Union standards are relevant because Bulgaria and Lithuania are member states of the EU and the other three countries are partners of the European Neighbourhood Policy (ENP) of the EU.[11] Whilst ENP partners are not directly bound by EU Directives, the EU's vision for the ENP is to build an increasingly closer relationship between the EU and its neighbours, entailing a zone of stability, security and prosperity, and for the EU and each of the partners to reach agreement on reform objectives across a range of fields, including justice and security.

At a meeting in Tbilisi, Georgia, in September 2010, LARN members agreed to adopt a research programme, using the methodology developed by the ECDE study, to examine access to effective criminal defence in the five Eastern European jurisdictions.[12] The purpose of the programme, in addition to obtaining reliable and credible data on access to effective criminal defence in the five countries, was

10 Vogler 2005, pp. 186–190.

11 See http://ec.europa.eu/world/enp/index_en.htm for further information about the ENP.

12 The study received financial support from the Human Rights and Governance Grants Program of the Open Society Foundations, and was implemented by the Soros Foundation–Moldova, in cooperation with Open Society Institute–Sofia, Open Society Foundation–Georgia, International Renaissance Foundation–Ukraine and the Open Society Justice Initiative.

threefold: to raise awareness of the level of implementation of the procedural rights of suspects and defendants amongst governments, legal professionals and civil society groups; to raise the level of interest in such rights on the part of governments and legal professional bodies; and to identify further practical steps to be taken to implement measures to improve access to effective criminal defence.

The programme commenced in November 2010, with a projected completion date of June 2012. In-country researchers with knowledge of and experience in the criminal justice system of the relevant country were identified for each of the jurisdictions. Their initial task was twofold: to carry out a desk review, using existing sources of information, designed to elicit information about the criminal justice system in general, and the constituent elements of effective criminal defence in particular; and to produce a critical account of the criminal justice system using a structured approach. In doing so, they used research instruments that were developed in the ECDE study and refined for the current project (see Annex 1 and 2). The desk reviews and critical accounts were reviewed by the project management team,[13] and also by country reviewers who were appointed on the basis of their expertise and reputation in the country concerned. The purpose of the review was to identify: (a) whether the information in the desk review and critical account adequately covered the questions and issues raised in the research instruments, (b) whether any of the information required clarification, and (c) what empirical research might usefully be carried out.

Following revision of the desk reviews and critical accounts, a meeting was held again in Tbilisi, Georgia, in April 2011, attended by the country researchers and reviewers, as well as by the project management team. The purpose of this meeting was to discuss the main conclusions derived from the desk reviews and critical accounts, to consider any common problems and themes and to consider what empirical research might be conducted. It was recognised that empirical research, in the form of quantitatively valid fieldwork-based research, was not possible within the available timescale and, more importantly, resources. Fieldwork-based research designed to produce statistically valid quantitative data across five jurisdictions is a major, and costly, enterprise that few funders or organisations have the capacity to carry out. However, as with the ECDE study, the project team were of the view that selective interviews with key professionals could produce valid insights into how criminal justice processes work in practice.

[13] The project management team consisted of Ed Cape and Zaza Namoradze, both of whom were members of the team that managed the ECDE study.

Thereafter, the in-country researchers carried out interviews in their respective countries and, using the data obtained from those interviews, as well as from the desk reviews, compiled country reports according to an agreed structure (see Annex 3). These were, again, reviewed by the country reviewers and the project management team, in order to check for any factual errors, to make appropriate suggestions regarding the clarity of the reports, and to consider the validity of any conclusions drawn. The whole project team then met in Chișinău, Moldova, in October 2011 to discuss the draft reports, in particular to consider the appropriateness and validity of conclusions and recommendations, and also to discuss common themes arising from the country reports. Further revision of the country reports was then made by the in-country researchers, and they now appear as Chapters 3 to 7.

The final stage was the analysis, by the project management team, of the data contained in the country reports by reference to the ECHR and EU standards. This analysis forms the basis of Chapters 8 and 9.

Before introducing the approach to effective criminal defence adopted in this study, some of the challenges posed by cross-jurisdictional research of criminal procedure, which are generally accepted as being significant,[14] should be briefly noted. Most criminal processes and procedures in the jurisdictions in the study have not been the subject of empirical research, so with few exceptions the primary sources of information about how criminal justice processes work in practice are the interviews conducted by the researchers, and inferences drawn from other sources of information. The lack of empirical data was exacerbated by the fact that in most of the jurisdictions, reliable statistical data concerning many aspects of the criminal justice system, such as numbers of people arrested or prosecuted, the proportion of those prosecuted who are kept in pre-trial detention, average length of pre-trial detention or spending on criminal legal aid, is often not routinely collected or not publicly available. As a result, the researchers have had to explore all possible sources of existing information, and also make special requests for information from government ministries and other bodies. A further challenge is that, even allowing for language differences, different terms may be used to signify similar processes or, more importantly in terms of impeding understanding, similar terms may be used to signify different processes or stages.[15] The terms 'arrest', 'charge' or 'criminal offence' must, for example, be treated with care.

14 The complexities of the enterprise are well exemplified in Jackson et al. 2008.

15 Such differences have caused some difficulty for domestic courts in relation to implementation of the EU Framework Decision on the European Arrest Warrant, 2002/584/JHA. For one example, see the English case of *Neave v. Court of Rome, Italy* [2012] EWHC 358 (Admin).

The ECtHR, of course, has had to develop its own 'autonomous' meanings for many such expressions in order to enable it to apply the ECHR to specific jurisdictional contexts in a way that is consistent (see Chapter 2, Section 3).[16]

3. Effective criminal defence and fair trial

The approach of this study, in common with the ECDE study, is to place the suspected or accused person at the centre of the enquiry. In doing so, the right to fair trial is regarded as being concerned not only with outcomes, but also with process.[17] This requires some explanation. Although accurate statistics are not available in all of the countries in the study, it is clear that tens of thousands of people are arrested and/or detained by the police every year. The majority will be citizens of those countries, but a sizeable minority will be foreign nationals, and some will be from ethnic minorities. A significant proportion, probably a majority, will be poor, or relatively poor, and unable to afford legal assistance even if they are given access to it, and even if it is available. Many will not have been arrested or detained before, and for a variety of reasons – innocence, lack of evidence, diversion from the criminal process – formal criminal proceedings will not be commenced or continued against a large proportion of them. For those people, arrest and detention will comprise their full experience of the criminal process. Those against whom formal proceedings are continued may be dealt with under one of the increasingly common guilty plea or expedited hearing procedures which will often mean that there will be no (or minimal) judicial, or independent, oversight or consideration of the strength of the evidence concerning their guilt or of the legality of the procedure. Some will have been enticed to co-operate with such procedures by the prospect of release from custody, a speedier resolution or a reduced sentence. Many of those arrested will experience detention, not only for a relatively short period of time at a police station, but for extended periods either in pre-trial detention or as sentenced prisoners.

There are also other reasons for adopting a perspective that is centred on suspected or accused persons. First, the focus of the ECtHR on rights being 'real', 'practical' and 'effective'[18] is an acknowledgement of the fact that although rights may be provided

16 And see the discussion in Cape et al. 2007, pp. 15 and 16, and Cape et al. 2010, pp. 16 and 17.

17 See generally regarding the ECHR and fair trial, Trechsel 2005, Bard 2008 and Summers 2007.

18 *Artico v. Italy* (1981) 3 EHRR 1; *Airey v. Ireland* (1979) 2 EHRR 305; ECtHR 9 October 2008, *Moiseyev v. Russia*, No. 62936/00, para. 209; and ECtHR 24 September 2009, *Pishchalnikov v. Russia*, No. 7025/04, para. 66.

for constitutionally, or in codes or legislation, this does not necessarily mean that such rights are given effect so that they are experienced as rights by those most affected by them. Second, there is a danger that the concerns of those institutions and professions that have power, or 'voice', are heard above those who are the subjects of criminal investigations and proceedings, who have neither organisations to speak on their behalf nor legitimacy in the eyes of government nor, often, in the media. In many jurisdictions, the predominant political concern in recent years has been the efficient management of the criminal justice process, and (at least rhetorically) the interests of victims of crime, rather than fair trial rights and justice. Third, in those systems where there are developed systems for delivering legal aid, even when debate moves beyond proper remuneration for lawyers undertaking state-aided work, attention is rarely paid to the concerns of the 'consumers' of legal services.

From the perspective of suspects and defendants, fair trial guarantees may be of little value if they are restricted to the trial in the narrow sense of the court proceedings in which guilt or innocence is determined. Trial is a process that commences, at the latest, when a person is arrested or detained by law enforcement authorities and continues until acquittal or conviction and, thereafter, to appeal. Any particular suspect or accused person may experience the whole of that process, or only one or more of the earlier stages. To an extent, this is recognised by the ECHR in providing guarantees both in the form of a (conditional) right to liberty under Article 5, and in the form of specific fair trial guarantees that are essential elements of the right to fair trial under Article 6. Both sets of rights are crucial from the perspective of the suspected or accused person. In any particular case, there may be a fair and just outcome, but the accused may nevertheless (rightly) feel aggrieved if they have not been dealt with justly during the course of events leading to that outcome. An ultimately successful appeal against a conviction which was secured using evidence of a confession obtained by police who denied the accused access to a lawyer, which is secured following months, or even years, in pre-trial detention is likely to leave the accused dissatisfied with and untrusting of the criminal justice system as a whole. Trust is an important element of a successful criminal justice system, providing an incentive to abide by the law and to assist law enforcement agencies.[19]

However, our focus in this study is not simply on fair trial rights, but on access to effective criminal defence as a pre-condition for the enjoyment of fair trial guarantees. Fair trial, in terms of both process and outcome, without access to effective criminal

[19] See, for example, Tyler 2006.

defence, would require law enforcement agents and prosecutors to be completely neutral, and even-handed, and would require judicial authorities to take a pro-active approach, taking nothing at face value. Experience and research evidence tells us that this is not possible, and even if it were, such a system would, at best, be paternalistic and undemocratic. Thus, fair trial requires suspects and defendants to have access to effective criminal defence. Effective criminal defence involves a series of interconnected procedural rights. The most obvious is the right to legal assistance, a right that is recognised by all international conventions and instruments concerned with criminal processes. The right to legal assistance, to be effective, requires professional, committed, and appropriately trained and experienced lawyers to be available when they are required (often at short notice). It also requires suspected and accused persons to be aware of the right, to understand its significance, and to be able to exercise the right. Therefore, mechanisms need to be in place to ensure that suspects and accused persons know about the right to legal assistance and how to access it, and that legal assistance is available, as and when it is needed, and including for those who are unable to pay for it. But a right to legal assistance is not a sufficient condition to guarantee access to effective defence. However good legal assistance is, it will not guarantee fair trial if other elements of effective defence are missing. Effective criminal defence requires that a suspected or accused person is able to participate in the processes to which they are subjected; to understand what is said to them, and to be understood; to be given information regarding the suspicion or accusation; to be informed of the reasons for decisions taken; to have access to the case file; to have time and resources to enable them to respond to accusations and to prepare for trial; to be able to put forward information and evidence that is in their favour; to be dealt with in a way that does not put them at a disadvantage; and to appeal against significant decisions made against their interests.

From this perspective, it is apparent that whilst appropriate laws are necessary, they are not sufficient to ensure access to effective criminal defence. The gulf between law as it is written and law as it is experienced is nowhere greater than in the realm of criminal procedure. It is therefore necessary to approach the assessment of access to effective criminal defence in any particular jurisdiction at three levels:

(1) Whether there exists a constitutional and legislative structure that adequately provides for criminal defence rights.
(2) Whether there are in place regulations, institutions and procedures that enable those rights to be 'practical and effective'.

(3) Whether there exists a consistently competent legal profession, willing and able to provide legal assistance to suspected and accused persons, underpinned by a professional culture that recognises the primacy of clients' interests.

These three questions provided the basis for the collection and analysis of information in the five countries in the study, set out in Chapters 3 to 7. In Chapter 2 we explore relevant parts of the ECHR, relevant ECtHR jurisprudence, and the current EU Directive and proposed Directives, in order to establish appropriate standards regarding effective criminal defence. In Chapter 8 we then analyse the data on the five countries by reference to those standards.

4. Fair trial rights in an international context

In this section we outline the articles of the ECHR that are relevant to defence rights in criminal proceedings, and briefly identity some of the limitations of the Convention and jurisprudence in establishing relevant standards. We also provide a short historical account of EU activity in respect of procedural rights and, in particular, examine the implications of the Lisbon Treaty, and the procedural rights 'roadmap', for the development of procedural rights standards, and for the enforcement of those rights. However, before doing so, we briefly examine the global context.

4.1 The global context

The right to fair trial is safeguarded in all major human rights treaties and conventions.[20] Whilst for those European countries that are signatories to the ECHR the Convention provides the major source of international fair trial rights, the ECtHR itself frequently makes reference to international standards in particularising fair trial rights.[21] Often cited in the context of criminal defence rights is the Havana Declaration on the Role of Lawyers (hereafter, Havana Declaration).[22] It expands the entitlement of suspects

20 International Covenant on Civil and Political Rights, Art. 14; Universal Declaration of Human Rights, Arts. 10 and 11; American Convention on Human Rights, Art. 8 (2)(c)–(e); African Charter on Human Rights and Peoples Rights, Art. 7 (1)(c).

21 See, for instance, ECtHR 27 November 2008, Grand Chamber, *Salduz v. Turkey*, No. 3639/02. 32–44.

22 *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990: report prepared by the Secretariat* (UN publication, Sales No. E.91.IV.2).

and defendants to a lawyer, which is set out in Article 14 of the International Covenant on Civil and Political Rights (the equivalent of Article 6 of the ECHR), by making it clear that the right applies at all stages of criminal proceedings, and by setting out what states must do to make that entitlement a reality. One of these requirements is that governments must ensure the provision of sufficient funding and other resources for the poor and, as necessary, to other disadvantaged persons.[23]

The international criminal courts that have been established to try, and punish, serious violations of human rights and humanitarian law, such as the International Criminal Court for the former Yugoslavia (ICTY), the Rwanda Tribunal (ICTR) and the International Criminal Court (ICC), apply standards for effective defence that have been developed by the ECtHR and by the UN Human Rights Committee (HRC).[24] The ICC Statute specifically provides that the ICC should apply and interpret the law in accordance with internationally recognised human rights, and develop standards for effective criminal defence that are in accordance with those of the ECtHR and the HRC. A right to be informed, 'prior to questioning', of the grounds for suspicion that a person has committed an offence within the jurisdiction of the ICC, and the right of a person to have his/her lawyer present when he/she is being questioned where there are grounds to suspect that they have committed a crime within the jurisdiction of the court, is provided for in the ICC Statute.[25] The ICTY statute also acknowledges the right to have a lawyer present during interrogation,[26] and provides that if the right is violated evidence obtained should be excluded at trial.[27] Further, according to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the right to have a lawyer present during police interrogation is one of the fundamental safeguards against ill-treatment of detained persons.[28]

23 Art. 1.3. See further OSF 2012, pp. 22–27. See also the *Report of the open-ended intergovernmental expert group meeting on strengthening access to legal aid in criminal justice systems held in Vienna from 16 to 18 November 2011*, which proposed the adoption of United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. The draft Principles and Guidelines were adopted, with minor modifications, at the 21st session of the UN Commission for Crime Prevention and Criminal Justice, on 27 April 2012.

24 See Tuinstra 2009.

25 Art. 55.

26 Statute of the International Tribunal for the former Yugoslavia, Art. 18 (3).

27 Decision on the Defence Motion to Exclude Evidence ICTY in Zdravko Mucic, 2 September 1997, Case No. IT-96-21-T, Trial Chamber II.

28 Committee for the Prevention of Torture 1992, paras. 36–38.

4.2 The European Convention on Human Rights

Two articles of the ECHR are explicitly concerned with criminal procedure: Article 5 (the right to liberty) and Article 6 (the right to fair trial).[29] Article 5 provides that arrest and detention must be lawful and in accordance with a procedure prescribed by law, and that where effected for the purpose of bringing a person before a competent legal authority, it requires a reasonable suspicion that the person has committed an offence (or is justified by the need to prevent the person from committing an offence or fleeing after having done so) (Art. 5 (1)(c)). A person who is arrested must be informed promptly, in a language which he/she understands, of the reasons for the arrest and of any charge against them (Art. 5(2)). Any person arrested or detained in accordance with Art. 5(1)(c) must be brought promptly before a judge or other officer authorised by law to exercise judicial power, and is entitled to trial within a reasonable time or to release pending trial (which may be conditioned by guarantees to appear for trial) (Art. 5 (3)). A person deprived of his/her liberty by arrest or detention is entitled to take proceedings in order to determine the lawfulness of his/her detention, which must be decided 'speedily' by a court, and their release must be ordered if the detention is not lawful (Art. 5 (4)).

Article 6 (1) guarantees the right to a fair and public hearing, within a reasonable time, by an independent and impartial tribunal established by law. Judgments must normally be pronounced publicly, although the press and public may be excluded from all or part of a trial in limited, prescribed, circumstances. The presumption of innocence is guaranteed by Article 6 (2). Minimum procedural rights are accorded to persons charged with a criminal offence; the right to be informed promptly, in a language which he/she understands and in detail, of the nature and cause of the accusation against him/her (Art. 6 (3)(a)); the right to adequate time and facilities for the preparation of their defence (Art. 6 (3)(b)); the right to defend him/herself in person or through legal assistance of his/her own choosing or, if he/she has insufficient means to pay for it, to be given it free when the interests of justice so require (Art. 6 (3)(c)); the right to examine or have examined witness against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against them (Art. 6 (3)(d)); and the right to free assistance of an interpreter if he/she cannot understand or speak the language used in court (Art 6 (3)(e)). The guarantees in Article 6 (3) are specific aspects of the right to a

[29] Article 7 (No punishment without law) is principally concerned with substantive criminal law, and is not further considered here.

fair hearing in Article 6 (1). The ECtHR's primary concern in respect of Article 6 (1) is to evaluate the overall fairness of the proceedings. In making this assessment the Court will examine the proceedings as a whole, having regard to the rights of the defence (as set out in Article 6 (3)) but also to the interests of the public, victims and, where necessary, witnesses.[30] Derogation under ECHR Article 15 is permitted from the rights guaranteed by Articles 5 and 6, but only '[i]n time of war or other public emergency threatening the life of the nation'.

The rights encompassed by Article 6 have been expanded upon by principles developed in the jurisprudence of the ECtHR, such as those concerning equality of arms between the prosecution and the defence,[31] the privilege against self-incrimination and the right to silence,[32] the right to adversarial trial, and the immediacy principle (meaning that all evidence should normally be produced at trial in the context of adversarial argument).[33] It is a well-established principle that the Convention is designed to guarantee rights that are 'practical and effective', not merely 'theoretical and illusory',[34] and the accused must be able to exercise 'effective participation' in criminal processes.[35] Article 6 rights, especially those set out in Article 6 (3), are also applicable to pre-trial proceedings[36] and, in particular, proceedings conducted under Article 5 (4) (pre-trial detention) should meet, to the greatest extent possible in the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure.[37]

30 ECtHR, Grand Chamber, 15 December 2011, *Al-Khawaja and Tahery v. UK*, Nos. 26766/05 and 22228/06, para. 118, and ECtHR, Grand Chamber, 16 November 2010, *Taxquet v. Belgium*, No. 926/05.

31 ECtHR 15 May 2005, *Öcalan v. Turkey*, No. 46221/99, para. 140.

32 ECtHR 25 February 1993, *Funke v. France*, A 256-A, and ECtHR 19 March 2009, *Bykov v. Russia,* No. 4378/02.

33 ECtHR 28 August 1991, *Brandstetter v. Austria*, A 21, para. 67, and ECtHR 6 December 1988, *Barberà, Messegué and Jabardo v. Spain*, A 146, para. 78.

34 *Artico v. Italy* (1981) 3 EHRR 1; *Airey v. Ireland* (1979) 2 EHRR 305; ECtHR, 9 October 2008, *Moiseyev v. Russia*, No.62936/00, para. 209; and ECtHR 24 September 2009, *Pishchalnikov v, Russia*, No. 7025/04, para. 66.

35 *Ekbetani v. Sweden* (1991) 13 EHRR 504, and *Stanford v. UK* A/282 (1994).

36 ECtHR, 24 November 1993, *Imbrioscia v. Switzerland*, No 13972/88, para. 38; ECtHR, Grand Chamber, 27 November 2008, *Salduz v. Turkey*, No. 36391/02, para. 50; and ECtHR, 11 December 2008, *Panovits v. Cyprus*, No. 4268/04 para. 64.

37 ECtHR, 13 February 2001, *Garcia Alva v. Germany*, *Lietzow v. Germany* and *Schöps v. Germany*, Nos. 23541/94, 24479/94 and 25116/94; and ECtHR, 9 July 2009*, Mooren v. Germany*, No. 11364/03, paras. 124–125.

Two other articles are relevant to particular aspects of effective criminal defence. Article 3 provides that no-one shall be subjected to torture or to inhuman or degrading treatment or punishment and this, of course, applies to criminal proceedings including to the conditions of detention and interrogation. No derogation from Article 3 is permitted (Art. 15 (2)). Article 8 (1) guarantees the right of a person to respect for their private and family life, their home and their correspondence. In the context of effective criminal defence, Article 8 is particularly relevant to lawyer/client communications, access to legal assistance and to investigative acts of the police such as surveillance and entrapment. Significantly, interference with exercise of the right is permitted, provided that it is in accordance with the law and is necessary in a democratic society, *inter alia*, in the interests of national security, public safety or the prevention of disorder or crime (Art. 8(2)).

The ECHR itself does not include a right to appeal, but a right to appeal in criminal proceedings is set out in the ECHR Seventh Protocol, Article 2, which provides that a person convicted of a criminal offence by a tribunal has the right to have their conviction or sentence reviewed by a higher tribunal. The right may be made subject to exceptions in the case of minor offences, or where the person was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal. Although not all signatories of the ECHR have signed and ratified the protocol, all of the countries in the study have done so.

Although the major principles established by ECtHR jurisprudence are, for the most part, clear, it is often difficult or impossible to draw detailed, generalised conclusions from the case law because, as indicated above, whilst the Court does consider specific procedural rights, it regards its primary function as being to assess whether proceedings were fair as a whole on the particular facts of an individual case.[38] Therefore, if the breach of a procedural right is capable of being rectified or compensated for by other procedural or trial processes, it may not render the trial unfair overall. Moreover, the Court generally treats the admissibility of evidence as a matter for regulation by national law and the national courts, the Court's only concern being to examine whether the proceedings have been conducted fairly.[39] There are also

[38] ECtHR 20 November 1989, *Kostovski v. Netherlands*, No. 11454/85, para. 39; and ECtHR 6 December 1988, *Barberà, Messegué and Jabardo v. Spain* 11 EHRR 360.

[39] ECtHR, Grand Chamber, 1 June 2010, *Gäfgen v. Germany*, No. 22978/05, para. 163, and see the judgments noted therein.

some elements of effective criminal defence, such as the quality of legal assistance, which the court regards as beyond its proper, constitutional compass.[40]

Having regard to those limitations, what we endeavour to do in Chapter 2 is not only to identify minimum standards that can be derived from the ECtHR jurisprudence concerning defence rights most relevant to access to effective criminal defence, but also to identify the gaps and uncertainties that still remain with regard to those rights. Some of those gaps and uncertainties may be filled by the developing EU law on procedural rights for suspects and defendants, a subject to which we now turn.

4.3 The European Union and procedural rights in criminal proceedings

The European Union (EU) is a relatively new player in the field of procedural rights in Europe. Although the European Court of Justice (ECJ) held as long ago as 1991 that fair trial rights should be respected,[41] there was no European Community instrument on fair trial. However, the approach of the EU to procedural rights was developed in a series of treaties and other instruments over the next two decades. The Maastricht Treaty of 1992[42] provided that matters in the newly created field of Justice and Home Affairs were to be dealt with in compliance with the ECHR. This was followed by the Amsterdam Treaty of 1997,[43] which amended the Treaty on European Union (TEU), strengthening the EU's competence in police and judicial co-operation in criminal matters by creating an area of freedom, security and justice. The Conclusions of the Council of Ministers meeting in Tampere, Finland in 1999 (the Tampere Conclusions[44]) requested the European Council and the Commission to adopt a programme of measures to implement the principle of mutual recognition, including the development of common minimum standards necessary to facilitate the application of the principle of mutual recognition, and which respected the fundamental legal

40 ECtHR 24 November 1993, *Imbriosca v. Switzerland*, No. 13972/88.

41 Case C-49/88 *Al-Jubail Fertilizer Co. and Saudi Arabian Fertilizer Co. v. Council* [1991] ECR I-3187. In the earlier case of *Hoechst AG v. Commission* [1989] ECR 2859, the ECJ held that '... regard must be had in particular to the rights of the defence, a principle whose fundamental nature has been stressed on numerous occasions ...'

42 The Treaty on European Union, signed at Maastricht on 7 February 1992.

43 The Treaty of Amsterdam: Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, signed at Amsterdam on 2 October 1997.

44 Commission of the European Communities, Presidency Conclusions, Tampere European Council 15 and 16 October 1999, SI (1999).

principles of member states.[45] The EU embarked on a series of measures concerning investigative and judicial co-operation, which strengthened existing mechanisms and institutions and developed new ones,[46] but divergent standards for the procedural rights of those suspected and accused in EU member states hindered the full acceptance of the principle of mutual recognition.[47] In 2003 the European Commission issued proposals for procedural safeguards for suspects and defendants in criminal proceedings throughout the EU.[48] However, despite significant support from across the EU, a draft framework decision issued by the Commission in 2004[49] and a revised, more limited draft issued by the German Presidency in 2007, ultimately failed to obtain consensus amongst member states. Although there was a range of reasons for this, the ostensible reason was that a minority of member states took the view that the EU was not competent to legislate in respect of purely domestic proceedings. On this view, any legislation would have to be confined to cross-border cases.[50]

The EU position on procedural rights for suspects and defendants was transformed by two developments in 2009 – the coming into force of the Lisbon Treaty, and the adoption of the procedural rights 'roadmap' under the Stockholm Programme.

4.3.1 The Lisbon Treaty

The Treaty of Lisbon, which entered into force on 1 December 2009,[51] abolished the requirement for unanimity in EU decision-making, and provides for the sharing of decision-making power between the European Parliament and national governments in the Council.[52] This means that individual states will not be able to prevent the

45 On the link between mutual recognition and procedural safeguards, see Vermeulen and van Puyenbroeck 2010.

46 See generally Mitsilegas 2009 and Klip 2012.

47 See Vernimmen-Van Tiggelen and Surano 2008 and Vernimmen-Van Tiggelen, Surano and Weyembergh 2009.

48 *Green Paper from the Commission: Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, COM (2003) 75 final.

49 COM/2004/0328 final.

50 Press Notice, Justice and Home Affairs Council, 12–13 June 2007.

51 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, 2007/C 306/01. For the consolidated versions of the treaties as amended by the Treaty of Lisbon, see the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), No. 2008/C 115/01, *Official Journal of the European Union*, C 115, Volume 51, 9 May 2008. For Judicial Cooperation in Criminal Matters, see Chapter 4 of the Treaty on the Functioning of the European Union (TFEU).

adoption of measures relating to procedural rights for suspects and defendants. In the area of criminal law the Treaty underlines the principle of mutual recognition, requiring a court in one EU country to recognise and enforce a criminal conviction from another.[53] It provides for police cooperation involving all police and specialised law enforcement agencies,[54] including in respect of the collection, storage, processing, analysis and exchange of relevant information. The Treaty also allows for the creation of a European Public Prosecutor if all national governments agree to create such an office.[55]

In relation to procedural rights, the Treaty empowers the European Parliament and the Council to issue Directives designed to establish minimum rules concerning, *inter alia*, the rights of individuals in criminal proceedings and the rights of victims of crime. This is qualified by the requirement that such measures be necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension.[56] Despite this qualification, the implications for criminal procedure at the national level should not be underestimated. For example, regulations concerning the gathering of evidence for the purposes of a European Evidence Warrant (EEW) cannot be limited to cross-border cases. Since, in particular, it may not be known at the time that evidence is being gathered whether the case will involve the issuing of a European Arrest Warrant (EAW), evidence gathering

52 There are, however, negotiated exceptions to these arrangements. The presumption is that no new or amending provision in the area of justice and home affairs will apply to the UK or Ireland and those states have three months to decide whether to opt in to the provision. Denmark has opted-out of Justice and Home Affairs matters. In addition to these opt-in/opt-out arrangements, any EU member state can apply an 'emergency brake' if it feels that the measures proposed will affect fundamental aspects of its criminal justice system. This provision applies both to mutual recognition and to substantive law reform. Once applied, the emergency brake will halt the legislative process whilst the matter is referred to the European Council. The European Council has four months to refer the draft back to the Council of Ministers, thus terminating the suspension. If there is no agreement on referral back then, within the same time frame, if at least nine EU states wish to go ahead with the proposal, they can do so under a procedure called 'enhanced co-operation'.

53 Art. 82 TFEU.

54 Art. 87 TFEU.

55 Art. 86 TFEU.

56 Art 82(2) TFEU. In addition, the European Parliament and Council has competence to issue Directives concerning mutual admissibility of evidence between member states. See the *Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate upon Arrest – Revised text*, 2011/0154 (COD).

in all cases will have to comply with relevant EU requirements or there will be a risk of non-compliance if an EAW is subsequently issued. A similar argument may be made in respect of the procedural rights of suspects and defendants. This is clearly the case in relation to such rights at the investigative stage of the criminal process since, again, it will be not be known at that stage whether a cross-jurisdictional dimension will subsequently arise. But it is also true of the subsequent stages of the criminal process, since an EAW may be sought after sentence has been passed. Furthermore, compliance with regulations on procedural rights may be relevant to actions taken under other mutual recognition instruments.[57]

The Lisbon Treaty amended the TEU Article 6 to provide for recognition of the Charter of Fundamental Rights, which was originally proclaimed by EU institutions at the Nice Inter-Governmental Conference in December 2000.[58] In the area of civil rights, the Charter expressly sets out the right to a fair trial, the presumption of innocence until proved guilty, and the right not to be punished more than once for the same offence. The Charter thus became legally binding, with the result that the fundamental rights that it contains become operational in respect of EU legislation and in relation to the implementation of EU law in national law. This means that, for the first time, the EU has set out in one place fundamental rights from which every EU citizen can benefit. In addition, the TEU Article 6(3) now expressly states that fundamental rights, as guaranteed by the ECHR as they result from the constitutional traditions common to the member states, shall constitute general principles of the Union's law. Finally, the Lisbon Treaty has opened the way to accession of the EU to the ECHR.[59] This will mean that the EU and its institutions will be accountable to the ECtHR in respect of matters governed by the ECHR in the same way that EU member states are currently bound in respect of domestic matters. As a consequence,

57 For example, *Council Framework Decision on the Application of the Principle of Mutual Recognition to Judgments in Criminal Matters Imposing Custodial Sentences or Measures Involving Deprivation of Liberty for the Purpose of Their Enforcement in the European Union*, 27 November 2008, 2008/909/JHA; and *Council Framework Decision on the Application of the Principle of Mutual Recognition to Financial Penalties*, 24 February 2005, 005/214/JHA.

58 Art. 6 (1) TEU states, 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'.

59 See *Eighth working meeting of the CDDH informal working group on the accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission: Draft legal instruments on the accession of the European Union to the European Convention on Human Rights*, CDDH-UE (2011) 16.

EU institutions will be directly subject to the ECHR, and the ECJ will be able to directly apply the ECHR as part of EU law and EU law will have to be interpreted in the light of the ECHR.[60]

The Lisbon Treaty also enhanced the role of the European Court of Justice (ECJ) in relation to procedural rights. Even before the coming into force of the Treaty the ECJ has ruled on defence rights in criminal proceedings,[61] and whilst doing so has often referred to case law of the ECtHR.[62] With ratification of the Lisbon Treaty the ECJ will play a part, in parallel to the ECtHR, in developing case law on the rights of individuals in criminal proceedings. Moreover, the ECJ jurisdiction is now bound by TFEU Article 82, which establishes the competence of the EU to issue regulations. Article 6 (3) of the TEU now expressly states that fundamental rights, as guaranteed by the ECHR as they result from the constitutional traditions common to the member states, shall constitute general principles of the Union's law. As a result, these principles may also be invoked in domestic proceedings that have no direct cross-border component.

This opens the way to the enforcement mechanisms of the TFEU, which have a different character and impact than the *ex post* complaint procedure of the ECHR Article 34, and which could be of complementary significance to the ECtHR enforcement mechanisms. Although the ECHR has proved to be the most effective international system of human rights protection ever developed,[63] it is commonly accepted that the ECtHR faces major challenges, especially as regards its case load,[64]

60 It should be noted that the jurisdiction of the ECJ, with respect to acts adopted before the Lisbon Treaty came into force, does not extend to Justice and Home Affairs for five years (Protocol 36, Article 10) and then, if the UK notifies the Council six months before the end of the period that it does not accept the increased powers, those acts will cease to apply to the UK.

61 See Klip 2009, Part II, para. 2.2, which contains extensive reference to case law of the ECJ with regard to fair trial and the rights of the defence, the right to be informed of the charge, access to the file, the right to remain silent, the right to privacy and the inviolability of the home, the right to be present and to be represented, free choice of counsel, the lawyer-client privilege, the right to be tried within a reasonable time, the right to an effective remedy, to an independent and impartial tribunal and to a reasoned decision.

62 See, for instance, ECJ 26 June 2007, C-305/05, Ordre des barreaux francophones et germanophone, *Ordre francais des avocats du barreau de Bruxelles v. Conseil des Ministres*, ECR 2007 I-535, para. 31, and the *Pupino* case, ECJ 16 June 2005, C-105/03 ECR 2005 I-5285, paras. 59–60.

63 See the speech of Mr. Wildhaber, President of the European Court on Human Rights, on the occasion of the opening of the Judicial Year in 2006.

64 At 30 November 2011 the total number of pending applications was 152,800. See http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+data.

but also because of the weakness of the enforcement mechanisms once violations of the convention have been established. A large proportion of the cases in which the ECtHR finds violations originated in failures to comply with the ECHR that have already been identified by the court.[65] The EU enforcement mechanisms operate in a different way. Article 267 of the TFEU provides for the general competence of the ECJ concerning questions of interpretation of the Treaty.[66] In national criminal proceedings every court or tribunal may request the ECJ to give a preliminary ruling on a relevant issue. Where such a question is raised with regard to a person in custody, the ECJ has created a procedure for hearing applications on an urgent basis.[67] Given the changes brought about by the Lisbon Treaty, the ECJ will be required to rule on a preliminary question taking into account relevant EU legislation, relevant case law of the ECtHR, and the general principles of criminal procedure that the ECJ has independently developed.[68]

In addition, the Commission has the power to bring a case against a member state that it considers has failed to fulfil an obligation under the TEU or TFEU.[69] This will be especially relevant when directives on procedural safeguards have been adopted. A finding that a member state has not fulfilled its obligations under the Treaties requires that state to bring its national legislation into compliance. In addition, the Commission may request the ECJ to impose financial penalties if the member state does not comply with Court's judgment.

4.3.2 The procedural rights 'roadmap'

Shortly before the Lisbon Treaty came into force, the Swedish Presidency again took up the issue of procedural safeguards in July 2009 by presenting a step-by-step 'roadmap' for strengthening the procedural rights of suspected and accused persons in criminal

65 In 2010 the ECtHR delivered 1,499 judgments of which 32.5 per cent were classed as importance level 1 or 2. See European Court of Human Rights, *Annual Report 2010*, Strasbourg: Registry of the ECtHR, 2011, p. 77, at http://www.echr.coe.int.

66 Before the Lisbon Treaty the ECJ had jurisdiction to make preliminary rulings on the interpretation of Third Pillar legal instruments based on Art. 35 TEU. The most notable example is the *Pupino* ruling ECJ 16 June 2005, C-105/03 ECR 2005 I-5285.

67 Art. 33–42 Court of Justice Information Note on references from national courts for a preliminary ruling (2009/C 297/01), *Journal of the European Union*, 5 December 2009, C 297/1.

68 See Klip 2009, Part. II, para. 2 and Part IV, para. 10.

69 Art. 258, TFEU.

proceedings.[70] The Presidency subsequently presented a Draft Resolution to the European Council, which was adopted in November 2009.[71] The roadmap was incorporated into the Stockholm Programme for the period 2010–2014,[72] which was adopted by the European Council on 11 December 2009.[73] An Action Plan for implementation of the roadmap was published by the European Commission in April 2010, setting out a programme of legislation and other measures to be completed by 2014.[74]

The need for European Union standards for the protection of procedural rights for suspected and accused persons was explained by the Swedish Presidency in terms of the need to ensure the fairness of criminal proceedings in the context of an increase in cross-border criminality, resulting from the removal of internal borders and the increasing exercise of the rights of freedom of movement and residence. It was recognised that fostering the protection of procedural rights would facilitate mutual recognition by enhancing mutual trust, and enhance the confidence of citizens that the EU will protect and guarantee their rights. It was also recognised that whilst a lot of progress had been made by the EU in respect of judicial and police co-operation, and measures that facilitate prosecution, this had not been matched by measures protecting the procedural rights of individuals.[75] A step-by-step approach would ensure overall coherence, and allow 'focused attention [to] be paid to each individual measure, so as to enable problems to be identified and addressed in a way that will give added value to each measure'.[76] The legislative measures to be adopted under the roadmap should not only be coherent, but also consistent with the minimum standards set out in the ECHR and protocols as interpreted by the ECtHR.[77] Significantly, given the

70 *Roadmap with a View to Fostering Protection of Suspected and Accused Persons in Criminal Proceedings*, 1 July 2009, 11457/09 DROIPEN 53 COPEN 120. For a fuller account of the origins, and initial phase, of the roadmap see M. Jimeno-Bulnes 2010.

71 *Resolution of the Council on a Roadmap for Strengthening Procedural Rights of Suspect or Accused Persons in Criminal Proceedings*, 24 November 2009, 15434/09, DROIPEN 149 COPEN 220.

72 See the *Annex to the Presidency, Note of the Council of the EU 2 December 2009, The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens*, 17024/09, para 2.4.

73 *European Council 10/11 December 2009 Conclusions*, EUCO 6/09.

74 *Delivering an Area of Freedom, Security and Justice for Europe's Citizens: Action Plan Implementing the Stockholm Programme*, Brussels 20 April 2010, COM (2010) 171 final.

75 'Although one of the aims of police and judicial co-operation is that it should respect human rights and fundamental freedoms, EU criminal justice has seemed almost exclusively preoccupied with measure designed to facilitate the investigation, prosecution, and sentence of offenders.' (Hodgson 2011, p. 616).

76 *Roadmap with a View to Fostering Protection of Suspected and Accused Persons in Criminal Proceedings*, 1 July 2009, 11457/09 DROIPEN 53 COPEN 120, para. 11.

qualification in Article 82 (2) that 'such measures be necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension', the roadmap did not explicitly deal with the issue of whether obligations regarding minimum rights would apply in all cases, or be confined to those cases that clearly have a cross-border dimension, but implementation of the roadmap has proceeded on the basis that they apply in all criminal proceedings, with special provision for EAW cases.

The roadmap consists of six 'Measures': Measure A: Translation and interpretation; Measure B: Information on Rights and Information about the Charges; Measure C: Legal Aid and Legal Advice; Measure D: Communication with Relatives, Employers and Consular Authorities; Measure E: Special Safeguards for Vulnerable Persons; and Measure F: A Green Paper on the Right to Review of the Grounds for Detention. It was envisaged that all measures, other than Measure F, would be implemented by means of a Framework Decision. Framework Decisions, as a legislative act, were replaced by Directives under the Lisbon Treaty.

A Directive on the Right to Interpretation and Translation in Criminal Proceedings (Directive on Interpretation and Translation), giving effect to Measure A, was adopted by the European Parliament and the Council on 20 October 2010.[78] In summary, this requires member states to ensure that suspected and accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, free of charge, with interpretation during those proceedings and interpretation of essential documents (Arts. 2 and 3). Member states are also required to take concrete measures to ensure that interpretation and translation is of a sufficient quality to safeguard the fairness of the proceedings (Art. 5), and to request those responsible for the training of judges, prosecutors and judicial staff 'to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication' (Art. 6). Member states must bring into force laws, regulations and administrative provisions necessary to comply with the Directive by 27 October 2013.

77 Para. 12.

78 *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*. Each proposal for a Directive under the roadmap is preceded by an impact assessment. See, in respect of this Directive, the *Proposal for a Council Framework Decision on the Right to Interpretation and Translation in Criminal Proceedings Accompanying the Proposal for a Framework Decision on the Right to Interpretation and to Translation in Criminal Proceedings: Impact Assessment*, Brussels, 8.7.2009 SEC (2009) 915.

A proposal for a Directive on the Right to Information in Criminal Proceedings (proposed Directive on the Right to Information), to give effect to Measure B, was issued on 20 July 2010, and is expected to complete the legislative process in 2012.[79] In summary, the proposed Directive provides for three discrete rights: the right to information about rights (Art. 3), reinforced by a right to written information about rights on arrest (the letter of rights) (Art. 4); the right to information about the charge (Art. 6); and the right of access to the case file (Art. 7). In addition, Article 5 provides for a right to written information about rights in European Arrest Warrant proceedings. The rights of which a suspect or accused person must be informed, referred to in Article 3 are, as a minimum, the right of access to a lawyer, the right to be informed of the charge (and, where appropriate, to be given access to the case file), the right to interpretation and translation, and the right to be brought promptly before a court if the suspected or accused person is arrested. In addition, it provides that member states must ensure that a procedure is in place to ascertain whether a suspect or accused person has received all of the information to which they are entitled (Art. 8), and that relevant officials have sufficient knowledge of the rights in order to safeguard appropriate transmission of information on the rights (Art. 9).

A proposal for a Directive on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate upon Arrest (proposed Directive on Access to a Lawyer) was issued on 8 June 2011.[80] Measure C had indicated that the right to legal advice and the right to legal aid would be dealt with together, and the

79 *Proposal for a Directive of the European Parliament and of the Council on the Right to Information in Criminal Proceedings*, Brussels 20.7.2010 COM (2010) 392 final. For the impact assessment, see *Impact Assessment Accompanying the Proposal for a Directive of the European Parliament and of the Council on the Right to Information in Criminal Proceedings*, 20.7.2010 SEC (2010) 907. The proposed Directive was adopted, with some modifications, by EU Justice Ministers on 27 April 2012, shortly before the text of this book was finalised. The proposed Directive on the Right to Information, as originally published, is referred to throughout the book but the reader should check the provisions of the adopted version where necessary. In particular, Art. 3 is modified to require that suspects or accused persons are informed of any entitlement to free legal advice, and of the right to remain silent, but the requirement to inform them of the right to be produced promptly before a court is removed.

80 *Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate upon Arrest*, Brussels 8 June 2011, COM (2011) 326 final. For the impact assessment, see *Impact Assessment Accompanying the Proposal for a Directive of The European Parliament and of the Council on the Rights of Access to a Lawyer and of Notification of Custody to a Third Person in Criminal Proceedings*, Brussels, 8.6.2011, SEC (2011) 686.

right to communication was dealt with separately in Measure D. In the event, the right to legal advice and the right to legal aid were severed, with the intention that the latter will be dealt with later in the roadmap programme,[81] so that the proposed Directive covers the right to legal advice together with the right to communication. Broadly, the proposed Directive provides for a right of access to a lawyer from the time that a person is made aware that they are suspected or accused of having committed a criminal offence, including a right to have a lawyer present during any questioning or hearing (subject to derogations in certain circumstances), with guarantees concerning lawyer/client confidentiality (Arts. 2, 3, 4, 7 and 8). In EAW proceedings, it is proposed that the subject of the proceedings has a right to a lawyer in the executing and issuing member state (Art. 11). Persons other than suspects and accused persons who are 'heard' by the police or other law enforcement authority would also have the right of access to a lawyer (Art. 10). In addition, it is proposed that suspects and accused persons who are deprived of their liberty have a right to communicate with at least one named person (and in the case of a child, that their legal representative or another adult is informed of the deprivation of liberty), and that non-nationals have a right to have consular or diplomatic informed and a right to communicate with them (Art. 6). In the case of breach of a right covered by the Directive, it is proposed that there be an effective remedy which has the effect of placing the person in the same position that they would have been in had there not been a breach (Art. 13).

Despite the fact that legal aid was not included in the proposed directive, the proposal has proved controversial with member states differing over the point at which the right to legal advice arises, whether it should apply to persons who have not been arrested ('volunteers' or witnesses), the respective responsibilities of state officials and suspects/defendants in exercising the right, and remedies for breach of the right.[82] In view of the ongoing discussions on the proposed Directive, reference will be made to the proposed Directive as originally published in the following analysis.

81 The legal aid element of Measure C is currently the subject of an impact assessment.

82 See, for example, *Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate upon Arrest – State of Play*, Brussels, 21 October 2011, 2011/0154 (COD), *Draft Report on the Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate on Arrest*, 7.2.2012, 2011/0154 (COD), and *Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate upon Arrest – Preparation of Coreper*, Brussels, 11 April 2012, 8032/12.

Measure E, which concerns special safeguards for suspects and accused persons who are children or who are otherwise vulnerable (for example, persons who are mentally ill, or otherwise mentally vulnerable), is currently the subject of an impact assessment that has yet to be published. A Green Paper on detention was issued by the European Commission, pursuant to Measure F, in June 2011 but it is not yet clear what action the EU intends to take in respect of pre-trial detention.[83]

5. Conclusions

Research in the field of criminal justice and, in particular, on procedural rights for those suspected of or accused of crime is often controversial. Views on and approaches to appropriate ways of dealing with those accused of contravening criminal laws are often closely linked to perceptions of, and attitudes towards, national identity and concepts of nationhood. Criminal justice systems and processes are pre-eminently a dynamic product of histories and cultures that are highly specific to nations or jurisdictions.[84] One consequence of this is that criminal procedures in foreign jurisdictions are often perceived as being 'strange', if not 'unfair', perceptions that are often based upon partial information and stereotypical views of national characteristics.[85] Conversely, from within a jurisdiction, criminal procedures are often regarded as 'natural' and 'proper', reflecting longstanding norms and values that in turn reflect accepted understandings of national character. A common consequence of this familiarity is a lack of critical thinking, and critical research, concerning criminal justice phenomena and processes. By using European standards as the measure, and by devising a methodology designed to be as rigorous as possible within the constraints of time and resources, the research project described in this book has sought to avoid these pitfalls. Criminal justice systems and processes are, however, complex, value-laden and, at least superficially, ever-changing. As a result, some of our findings may be contested and contestable. This, in our view, is a positive attribute. We hope that our analysis, conclusions and recommendations will generate argument and debate. This is a necessary process

83 *Strengthening Mutual Trust in the European Judicial Area – A Green Paper on the Application of EU Criminal Justice Legislation in the Field of Detention*, Brussels, 14 June 2011, COM (2011) 327 final.

84 There is an extensive literature in this regard but see, for example, Delmas-Marty and Spencer 2002, especially Chapter 1, and Hodgson 2005.

85 See, in particular, Field 2006, p. 525.

in developing a better understanding of the phenomena which we describe, and in achieving changes that will result in the improvement of procedural rights and, thereby, a better standard of justice.

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Ed Cape
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CHAPTER 2 STANDARDS FOR EFFECTIVE CRIMINAL DEFENCE

1. Introduction

Our approach to effective criminal defence is set out in Chapter 1, where we argue that effective criminal defence is an integral aspect of the right to fair trial. An essential pre-requisite of effective criminal defence in any particular jurisdiction is a constitutional and legislative structure that, as a minimum, complies with the standards established by the ECHR and the jurisprudence of the ECtHR, and with the standards emerging from the EU's programme of legislation on procedural rights for suspects and defendants in criminal proceedings. Furthermore, we argue that in order to ensure access to effective criminal defence, the constitutional and legislative structure must be complemented by regulations and practices that enable those rights to be 'practical and effective'. The purpose of this chapter is to examine the ECHR and EU standards applicable to the defence rights which, we argue, are essential in ensuring access to effective criminal defence, and which were explored in the five jurisdictions that are the subject of this study.

2. Analysing effective criminal defence standards

In analysing the ECHR and EU standards relating to effective criminal defence a number of approaches may be taken to structuring the analysis. The ECHR identifies fair trial as the primary right, with the separate rights identified in Article 6 (3) being constituent elements which are taken into account in the overall assessment of whether the trial, as a whole, was fair. Rights arising on arrest or detention are

separately set out in Article 5 although the principles of fair trial, and in particular the presumption of innocence, also apply to the determination of whether a person should be held in custody pending trial.[1] Article 6 rights may also arise on arrest or detention, and sometimes apply even in the absence of arrest or detention (see Section 3 below). The EU Charter of Fundamental Rights provides for a right to fair trial (Art. 47) and for the presumption of innocence (Art. 48), but is generally less specific than the ECHR in articulating other rights. The EU 'roadmap' (see Chapter 1, Section 4.3.2) is explicitly concerned with raising standards concerning the procedural rights of suspected and accused persons in order to ensure the fairness of criminal proceedings, and with a view to increasing mutual trust and confidence. Legislation under the roadmap sets out the rights in some detail, including minimum requirements for giving effect to them.

Since we are seeking to identify and explore the relevant standards relating to discrete elements of effective criminal defence, as distinct from fair trial *per se*, the analysis in this chapter is structured in such a way as to emphasise those discrete elements. We commence with an analysis of the right to information, including information about rights, information about the reason for arrest and detention, and information about the evidence (the case file). Articles 5 (2) and 6 (3)(a) impose certain obligations in relation to the first and third of these but do not explicitly refer to the third which is, however, to be found in the proposed EU Directive on the Right to Information. We then examine the right of a person to defend himself/herself, including the right to legal assistance and the right to legal aid. These rights are dealt with separately from the other rights considered, partly because they form the subject matter of two of the proposed EU Directives, but more importantly because we regard them as being fundamental to ensuring effective criminal defence. A person who does not know of his/her rights cannot effectively exercise those rights even if such rights are, in themselves, adequate. A person who cannot defend themselves, or who does not have access to legal advice and assistance (in real, and not merely theoretical terms) does not have access to effective criminal defence – however fair other aspects of the criminal process may be.

The next stage of the analysis is to assess standards concerning what we have identified as procedural rights: the right to be presumed innocent and the right to silence; the right to release from custody pending trial; the right to be tried in one's presence and to participate; the right to reasoned decisions; and the right to appeal. It might be objected, in particular, that the right to be presumed innocent

1 ECtHR 6 February 2007, *Garycki v. Poland*, No. 14348/02, paras. 71–72.

is a fundamental right and not 'merely' procedural, which is demonstrated by the fact that it is dealt with as a separate right in ECHR Article 6 (2). The fact that we have identified it here as a procedural right is not because we believe that it is not a fundamental right. Rather it is because we analyse it largely in procedural terms – the practical implications of the presumption for other procedural rights.

The third and final stage of the analysis is an examination of the standards relating to rights that promote, or enhance the quality of, effective defence in criminal proceedings. Here we examine the right of the suspect or accused to investigate the case, the right to adequate time and facilities for the preparation of the defence, the right to equality of arms in calling and examining witnesses, and the right to interpretation and translation.

3. 'Criminal proceedings' and 'criminal charge'

For the purposes of the research we have largely accepted each jurisdiction's classification of proceedings as being criminal proceedings, and have not explored proceedings that are not so classified. However, whether proceedings amount to criminal proceedings in terms of compliance with the relevant standards is an important question for a number of reasons. Member states of the EU, and signatory states of the ECHR, take a variety of approaches to defining proceedings as criminal. Some make a formal distinction between criminal and administrative proceedings, whilst others have adopted a 'third way' approach whereby certain procedures having some of the characteristics of criminal proceedings are classified domestically as civil proceedings. In the case of children, the age of criminal responsibility differs as between jurisdictions, but most jurisdictions have mechanisms for dealing with 'criminal' conduct committed by children under the age of criminal responsibility that has some of the characteristics of criminal proceedings.

The EU roadmap refers to 'procedural rights of suspected or accused persons in criminal proceedings' without defining the term, and the Directive and proposed Directives issued to date take the same approach.[2] However, the Treaty on European Union (TEU) Article 6 (3) provides that '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States,

[2] Although see recital 21 of the EU Directive on the Right to Information adopted on 27 April 2012. The TFEU Art. 82 also refers to 'criminal matters' and 'criminal procedure' without defining the terms.

shall constitute general principles of the Union's law'. The importance of the ECHR in the interpretation of EU legislation is further reinforced by accession of the EU to the ECHR. The Charter of Fundamental Rights of the European Union confers rights on persons 'charged',[3] and also refers to 'criminal proceedings'.[4] Furthermore, Article 52 (3) of the Charter provides that '[i]n 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'. Therefore, if and when the European Court of Justice is required to interpret the meaning of 'criminal proceedings' and cognate terms for the purposes of the EU Directives or the Charter, it will be required to do so in a way that is consistent with the ECtHR jurisprudence.[5]

The ECHR does not use the term 'criminal proceedings'. Article 6 (1) provides for the right to a fair and public hearing in the determination of 'any criminal charge', and similarly the presumption of innocence and the specific rights set out in Article 6 (3)(c) apply to everyone 'charged with a criminal offence'. Thus the ECtHR has had to consider two separate, but interconnected questions – what is meant by 'criminal' and what is meant by 'charge'. The need to determine whether an 'offence' (and proceedings in relation to that 'offence') is properly to be regarded as criminal, and the problems inherent in the task, is exemplified by the court's judgment in *Ozturk*.[6]

> The Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law and drawing the dividing line, but it does not follow that the classification thus made by the States is decisive for the purposes of the Convention.
>
> By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual… as well as the needs of the proper administration of justice, in particular in so far as the judicial authorities are thereby relieved of the task of prosecuting and punishing contraventions – which are numerous but of minor importance – of road traffic rules. The Convention is not opposed to the moves towards "decriminalisation" which are taking place – in extremely varied forms

3 For example, Art. 48 (1) provides that 'Everyone who has been charged shall be presumed to be innocent until proved guilty according to law'.

4 Art. 50 provides 'No-one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'.

5 Although Art. 52 (3) states that the meaning and scope shall be 'the same as' ECHR rights, it goes on to state that 'provision shall not prevent Union law providing more extensive protection'.

6 ECtHR 21 February 1984, *Ozturk v. Germany*, No. 8544/79, para. 49.

> – in the member States of the Council of Europe. The Government quite rightly insisted on this point. Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as "regulatory" instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7), the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.

Thus the domestic classification of an 'offence', whilst important, is not determinative of whether or not it is to be classified as criminal for the purpose of compliance with the ECHR. As Trechsel has commented, 'the Court will not accept any "tricks" a domestic legislator could be tempted to try in order to avoid the application of Article 6'.[7] In its judgment in *Engels*,[8] which has since been consistently followed, the court set out three factors that must be taken into account in determining whether a person is the subject of a *criminal* charge:

- the domestic classification, that is, how it is classified in the jurisdiction concerned,
- the nature of the 'offence', and
- the nature and degree of severity of any possible penalty.

It will be seen, therefore, that determining whether a charge (and proceedings in respect of that charge) in any particular jurisdiction is 'criminal' for the purpose of compliance with the ECHR (and, as argued above, with the procedural rights instruments of the EU), is not necessarily a straightforward task, requiring a significant degree of interpretation both of the relevant factors and the relationship between them. Nevertheless, whilst the analysis is not pursued further here, determining whether or not a charge (or proceedings) is criminal is a crucial factor in considering whether the law and processes in a particular jurisdiction are compliant with the standards under the ECHR and the EU procedural rights instruments.[9]

In adopting the term 'criminal proceedings', the EU procedural rights instruments issued to date have largely avoided using 'criminal *charge*' as a trigger for procedural rights.[10] However, under the ECHR criminal *charge* is the precondition

7 Trechsel 2006, p. 15.

8 (1979–80) 1 EHRR 706.

9 For a more detailed analysis, see Trechsel 2006, pp. 14–31.

10 The proposed Directive on the Right to Information Art 6. provided for a right to information about the 'charge', but in the version adopted on 27 April 2012 this was replaced by the word 'accusation'.

for all of the fair trial rights in Article 6 (2) and (3). This is problematic because, even allowing for the difficulties inherent in translation of a word, the term 'charge' is given different meanings in different jurisdictions. Furthermore, as the court has explicitly recognised, if a trial is to be fair, it is necessary for some rights to take effect prior to 'charge' in the sense recognised domestically in most, if not all, jurisdictions. As a result, the ECtHR has developed its own, autonomous, definition of the term 'charge' which has been consistently adopted for many years.

> "Charge", for the purposes of Article 6 par. 1 (Art. 6–1), may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected".[11]

Thus the fair trial rights of Article 6 apply once this point has been reached whether or not the person has been 'charged' in the sense defined in any particular jurisdiction. This is not to say, however, that all of the fair trial rights are immediately applicable nor that they necessarily apply in the same way irrespective of the stage of the criminal process. For example, in determining that there had been no breach of the right to legal assistance under Article 6 (3)(c) where a driver was questioned by police at a roadside check, the court in *Zaichenko*[12] held that 'the manner in which the guarantees of [Article 6 (1) and (3)(c)] are to be applied in pre-trial proceedings depends on the special features of those proceedings and the circumstances of the case assessed in relation to the entirety of the domestic proceedings conducted in the case'.[13] This will be examined further, as necessary, when considering effective criminal defence standards.

4. The right to information[14]

The provision of information to a suspect or defendant is critical to their ability to effectively participate in the criminal process. Three dimensions can be identified.

11 ECtHR 15 July 1982, *Eckle v. Germany*, No. 8130/78, para. 73.

12 ECtHR 18 February 2010, *Zaichenko v. Russia*, No. 39660/02.

13 Para. 45.

14 Note that the remainder of the chapter is informed, to a large extent, by Cape et al. 2010, Ch. 2, which was originally drafted by Professor Taru Spronken. However, the text has been restructured and updated, and also incorporates (where relevant) the Directive and proposed Directives issued under the EU procedural rights roadmap.

First, there is the issue of information about procedural rights. If a person does not know what their rights are, then either they will be unable to exercise them, or it will be a matter of chance whether they are able to take advantage of them or not. The ECHR does not explicitly provide for a right to information about rights in criminal proceedings, although such a right is set out in the proposed Directive on the Right to Information in criminal proceedings. Second, there is the issue of information about arrest and/or charge (or the nature and cause of the accusation). Such a right is provided for by the ECHR Articles 5 (2) and 6 (3)(a), and also by the proposed Directive Article 6, although they are not expressed in identical terms. Third, there is the issue of access to information about the material evidence (sometimes referred to as access to the case file). This is not explicitly provided for in ECHR article 6, although there is clear ECtHR jurisprudence on the issue, and it is explicitly provided for in the proposed Directive Article 7.

4.1 Information regarding rights

As noted above, a right to information about procedural rights is not explicitly referred to in the ECHR, but there is ECtHR case law that requires judicial authorities to take positive measures in order to ensure effective compliance with Article 6.[15] This is specifically reflected in the decisions in *Padalov* and *Talat Tunc*, in which the Court required the authorities to adopt an active approach to informing suspects of their right to legal aid.[16] In *Panovits* it was held that the authorities have a positive obligation to provide suspects with information on the right to legal assistance and legal aid if the conditions relating to them are fulfilled.[17] It is not sufficient for this information to simply be given in writing. The Court stressed that authorities must take all reasonable steps to ensure that the suspect is fully aware of his/her rights of defence and, as far as possible, understands the implications of his/her conduct under questioning.[18]

15 ECtHR 13 May 1980, *Artico v. Italy,* No. 6694/74, para. 36 and ECtHR 30 January 2001, *Vaudelle v. France*, No. 35683/97, paras. 52, 59 and 60.

16 ECtHR 10 August 2006, *Padalov v. Bulgaria*, No. 54784/00, and ECtHR 27 March 2007, *Talat Tunc v. Turkey*, No. 32432/96.

17 ECtHR 11 December 2008, *Panovits v. Cyprus*, No. 4268/04, paras. 72–73.

18 ECtHR 11 December 2008, *Panovits v. Cyprus*, No. 4268/04, paras. 67–68. See also ECtHR 31 March 2009, *Plonka v. Poland*, No. 20310/02, paras. 37–38, and ECtHR 24 September 2009, *Pishchalnikov v. Russia*, No. 7025/04, paras. 79–80.

Research conducted in recent years has shown that the way in which, and the extent to which, suspects or accused persons are informed of their procedural rights varies widely across European jurisdictions, and that in a majority of them information on procedural rights is provided only orally, decreasing the effectiveness of the information and making it more difficult to monitor.[19] In this context, the proposed EU Directive on the Right to Information makes explicit provision for a right to information about rights, articulating the right more clearly and more extensively than the ECtHR jurisprudence. First, Article 3 provides that a person who is suspected or accused of having committed a criminal offence must be provided promptly, and in simple and accessible language, with information about, at least:

- the right of access to a lawyer, where necessary free of charge;
- the right to be informed of the charge and, where appropriate, to be given access to the case file;
- the right to interpretation and translation; and
- the right to be brought promptly before a court if they are arrested (but see Chapter 1, footnote 79).

In addition, Article 4 provides that where a person is arrested, they must be promptly provided with written information about their procedural rights (the letter of rights), and must be given an opportunity to read it and to keep a copy whilst deprived of their liberty. A model letter of rights is included as an annex to the proposed Directive, and Article 4 also makes provision for explanation of the rights to those who might not be able to read them or to understand them (Art. 4(3) and (4)).

4.2 Information about arrest, the nature and cause of the accusation, and charge

The ECHR Article 5 (2) provides that a person who is arrested must be informed promptly, in a language which they understand, of the reasons for their arrest and of any charge against them. ECHR Article 6 (3)(a) provides that information must be provided to a person charged with a criminal offence, in the same manner, regarding the nature and cause of the accusation. Taken together, and given the meaning of 'charge' explained in Section 3 above, they place an obligation on the relevant authorities to inform a person who has been arrested or detained of (a) the reasons for

[19] See Spronken et al. 2009, pp. 92–98, and Cape et al. 2010, p. 555.

their arrest or detention, (b) the reasons for any charge, and (c) the nature and cause of any accusation. Mere recitation of the legal authority for arrest or detention, or for the charge, is not enough.[20] Furthermore, it is not sufficient for the relevant authorities to simply make the information available on request. The duty to inform the suspected or accused person of the nature and cause of the accusation rests entirely on the authority's shoulders and cannot be complied with passively by making information available without bringing it to the attention of the suspect or accused.[21]

The rationale of Articles 5 (2) and 6 (3)(a) is to enable the suspected or accused person to fully understand the allegations with a view to challenging the lawfulness of their detention[22] or to preparing a defence.[23] Even though both articles are fairly specific in the information they require, the obligations are limited to factual information concerning the reasons for the arrest, the nature and cause of the accusation, and the legal basis for both.[24] The level of information that has to be communicated to the suspect or accused under the ECHR is strongly dependant on the nature and complexity of the case, which is always assessed by the ECtHR in the light of the right to prepare a defence (Art. 6 (3)(b))[25] and, more generally, the right to a fair trial (Art. 6 (1)).[26] The proposed Directive on the Right to Information does not provide for a right to information on being arrested, but does provide that where a person is arrested, he/she or his/her lawyer must be granted access to those documents in the case file which are relevant to the determination of the lawfulness of the arrest or detention (Art. 7 (1)). By Article 7 (3), access must be granted in sufficient time to enable the suspected or accused person to challenge pre-trial decisions, which presumably includes arrest. Article 6 of the proposed Directive sets out the information that must be provided regarding charge: the information must include a description of the circumstances in which the (alleged) offence was committed, including the time, place and degree of participation in the offence by the accused person, and the nature and legal classification of the (alleged) offence (Art. 6 (3)). Such information must be provided promptly and in a language that the suspected or accused person understands (Art. 6 (2)).

20 ECtHR 21 April 2011, *Nechiporuk and Yonkalo v. Ukraine*, No. 42310/04, para. 209.
21 ECtHR 25 July 2000, *Mattoccia v. Italy*, No. 23969/94, para. 65.
22 ECtHR 30 August 1990, *Fox, Campbell and Hartley,* A 182, para. 40.
23 ECtHR 25 July 2000, *Mattoccia v. Italy*, No. 23969/94, para. 60.
24 ECtHR 16 December 1992, *Edwards v. UK*, No. 13071/87, paras. 35–38.
25 See Section 7.2 below.
26 ECtHR 25 March 1999, *Pélissier and Sassi v. France*, No. 25444/94, para. 54 and ECtHR 25 July 2000, *Mattoccia v. Italy*, No. 23969/94, paras. 60 and 71.

Articles 5 (2) and 6 (3)(c) of the ECHR do not give any indication as to the means by which the required information should be given, although the authorities should take appropriate steps in order to ensure that the suspected or accused person effectively understands the information provided.[27] In *Kamasinski* the ECtHR decided that the accused should, in principle, be provided with a written explanation of the indictment in case they do not understand the language used in it, but on the facts the Court accepted that an oral explanation was sufficient to comply with Article 6 (3)(a).[28] The proposed Directive on the Right to Information, in contrast to the obligation to provide information about rights in writing, does not require that information about the charge be provided in written form. However, it does specifically provide that in the case of a child, information about the charge must be provided in a manner adapted to their age, level of maturity and intellectual and emotional capacities (Art. 6 (2)).

4.3 Information regarding material evidence/the case file

It is established case law of the ECtHR that the prosecution authorities should disclose to the defence all material evidence for or against the accused,[29] and that both the prosecution and the accused are entitled to have disclosed, and have the opportunity to comment upon, the observations and evidence of the other party.[30] It is an element of the principle of equality of arms, and is also regarded as an aspect of the right to 'adequate time and *facilities*' under ECHR Article 6 (3)(b). In *Natunen* the Court ruled that disclosure obligations must include the opportunity for the suspect to acquaint him/herself, for the purposes of preparing his/her defence, with the results of investigations carried out throughout the proceedings.[31] The proposed Directive on the Right to Information, Article 7 (2), provides that the accused person or his/

27 ECtHR 19 December 1989, *Brozicek v. Italy*, No. 10964/84, para. 41; ECtHR 25 July 2000, *Mattoccia v. Italy*, No. 23969/94, para. 65; and ECtHR 30 January 2001, *Vaudelle v. France*, No. 35683/97, para. 59.

28 ECtHR 19 December 1989, *Kamasinksi v. Austria*, No. 9783/82, para. 79; ECtHR 25 March 1999, *Pélissier* and *Sassi v. France*, No. 25444/94, para. 53.

29 ECtHR 16 December 1992, *Edwards v. United Kingdom*, No.13071/87, para. 36.

30 ECtHR 28 August 1991, *Brandstetter v. Austria*, Nos. 11170/84, 12876/87, 13468/87, para. 66; ECtHR 16 February 2000, *Jasper v. United Kingdom*, No. 27052/95, para. 51; and ECtHR 6 September 2005, *Salov v. Ukraine,* No. 65518/01, para. 87.

31 ECtHR 31 March 2009, *Natunen v. Finland*, No. 21022/04, para. 42, and ECtHR 15 November 2007, *Galstyan v. Armenia*, No. 26986/03, para. 84.

her lawyer must be granted access to the 'case file', which is not defined. This term is familiar to most, if not all, jurisdictions that have an inquisitorial tradition, but is not used in common law systems. Since in inquisitorial traditions the case file should include all material obtained during an investigation, it should encompass not only material that tends to incriminate the accused, but also material that is either neutral or which is, or may be, exculpatory.

The right to disclosure is, however, not absolute either under ECtHR jurisprudence or under the proposed Directive on the Right to Information. ECtHR case law provides that disclosure can be restricted for a legitimate purpose such as the protection of national security or sources of information, to protect witnesses at risk of reprisals, or to keep police methods of crime investigation secret.[32] Any such restriction must be strictly necessary and be remedied in the subsequent proceedings.[33] For example, non-disclosure of certain material should be counterbalanced by making the information accessible at the appeal stage and by giving the defence sufficient time to respond to it.[34] The ECtHR also requires that the (non-)disclosure of information should always be scrutinised by the trial judge since he/she is in the best position to make an assessment of the need for disclosure. On the other hand, the ECtHR has held that the person requesting that specific documents be disclosed is required to give specific reasons for the request.[35] Exceptions to the right of access to the case file in the proposed Directive are more limited: access to certain documents can be refused by a competent judicial authority where such access may lead to a serious risk to the life of another person, or may seriously harm the security of the state. Where access is so limited, the accused or their lawyer may request an index of documents contained in the case file provided that this is in the interests of justice (Art. 7 (2)). Presumably this means that the index can always be requested, and that it must then be provided if it is in the interests of justice to do so

Whilst the proposed Directive on the Right to Information, Article 7, provides that access to the case file must be granted 'once the investigation of the criminal offence is concluded' (Art. 7 (2)), and in sufficient time for preparation of the defence

32 ECtHR 16 February 2000, *Jasper v. United Kingdom*, No. 27052/95, para. 43, and ECtHR 24 June 2003, *Dowsett v. United Kingdom*, No. 39482/98, para. 42.

33 ECtHR 16 February 2000, *Jasper v. United Kingdom*, No. 27052/95, para. 43, and ECtHR 16 December 1992, *Edwards v. United Kingdom*, No.13071/87, para. 39.

34 ECtHR 16 December 1992, *Edwards v. United Kingdom*, No.13071/87, paras. 35–37, and ECtHR 18 March 1997, Foucher v. France, No. 22209/93, paras. 35–38.

35 ECtHR 24 February 1992, *Bendenoun v. France,* No.12547/86, para. 52.

(Art. 7 (3)), there is no specific case law under ECHR Article 6 clarifying at what point in proceedings material evidence should be disclosed. The ECtHR, in the context of the ECHR Article 5 (4) has, however, given some indication of both the stage at which material should be disclosed and the extent of that disclosure. In cases relating to pre-trial detention hearings the Court has ruled that the principle of equality of arms requires defence access to those documents in the investigation file that are essential in order to effectively challenge the lawfulness of pre-trial detention.[36] This is reflected in the proposed Directive Article 7 (1). According to the ECtHR this means that the accused be given a sufficient opportunity to take account of statements and evidence underlying them, such as the results of police and other investigations, irrespective of whether the accused is able demonstrate the relevance to his/her defence of such information. Although the Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that some information should be kept secret in order to prevent suspects from interfering with evidence or undermining the course of justice, this legitimate goal cannot be pursued at the expense of substantial restrictions on the defence. Therefore, information that is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer.[37] In addition the Court has ruled that abstracts of the case file do not suffice, and neither does an oral account of facts and evidence. Authorities should facilitate the consultation of files at times when this is essential for the defence, and should not be over-formalistic in doing so.[38]

Again, recent research shows that practice regarding disclosure or access to the case file varies widely across member states. In most states, neither accused persons nor their lawyers have a right to information concerning the evidence relating to the alleged offence during the investigative stage. However, most member states do provide for a right to information by the accused person or their lawyer concerning the evidence at the trial or trial preparation stage, although the precise formulation of the right varies enormously and, in particular, depends upon whether the jurisdiction has an inquisitorial or adversarial tradition.[39] Some jurisdictions make a charge for copies

36 ECtHR 13 February 2001, *Garcia Alva v. Germany*, *Lietzow v. Germany* and *Schöps v. Germany*, Nos. 23541/94, 24479/94 and 25116/94, and ECtHR 9 July 2009, *Mooren v. Germany*, No. 11364/03, paras. 124–125.

37 ECtHR 13 February 2001, *Garcia Alva v. Germany*, No. 23541/94, paras. 41–42, and ECtHR 9 July 2009, *Mooren v. Germany*, No. 11364/03, paras. 121–124.

38 ECtHR 13 February 2001, *Schöps v. Germany,* no. 25116/94, paras. 47–55, and ECtHR 9 July 2009, *Mooren v. Germany*, No. 11364/03 paras. 121–125.

39 Spronken et al. 2009, p. 94.

of documents in the case file.[40] The proposed Directive on the Right to Information provides that access to the case file must be given free of charge (Art. 7 (3)). It remains to be seen whether this will be interpreted to mean that access (in the sense of being allowed to read it) to the file must be given free, or whether it extends to copies of the file or documents therein.

5. The right to defence and legal aid

This section deals with two separate, but related, rights – the right of a suspected or accused person to defend himself/herself, and the right to legal advice, assistance and representation. Both are essential pre-requisites for access to effective criminal defence, and are internationally recognised human rights norms.[41] The ECHR Article 6 (3)(c) grants a person charged with a criminal offence both the right to defend themselves in person and the right to be assisted by a lawyer. The proposed Directive on Access to a Lawyer[42] deals only with the latter. The two rights are not equivalent alternatives. Both forms of defence have their own procedural function: the suspect contributes his/her personality and his/her knowledge of facts and circumstances, and the lawyer his/her legal knowledge, skills and professional experience. Examining the right to legal assistance entails a number of questions. First, there is the question of the point, or stage, of the criminal process that the right arises and, in particular, whether it include a right to have a lawyer present during interrogation by the police or other law enforcement agents. This is an issue that has caused the ECtHR some difficulty, and which has proved controversial amongst some member states. Second, given that a suspect or accused person is, by definition, suspected or accused of criminal activity, there is the question of whether the state should be permitted to conduct surveillance of lawyer/client communications. Third, given that in all jurisdictions many, if not most, suspected and accused persons lack significant means, there is question of whether, and the extent to which, states should provide financial resources to enable to the right to legal assistance to be effective. Finally, there are questions concerning the role of lawyers assisting a suspected or accused person, and the standards to which they should be expected to perform that role.

40 For example, Belgium. See Cape et al. 2010, p. 77.

41 OSF 2012, para. 2.1.

42 Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate upon Arrest, Brussels, 8 June 2011, COM (2011) 326 final. See Chapter 1, Section 4.3.2.

5.1 Right to self-representation

The right of a suspected or accused person to defend him/herself may be regarded as a paramount right which, in addition to the ECHR Article 6 (3)(c), is recognised in many international human rights instruments.[43] It means that a person who is suspected or accused of a criminal offence is entitled to defend his/her interests, to act to his/her own advantage, to suggest lines of enquiry and evidence, to challenge decisions, to make procedural motions, to question the credibility of witnesses and so on.[44] It is thus the central element of the right of a suspected or accused persons to participate in the criminal process. However, whilst apparently straightforward, the right of a person to defend themselves, as distinct from their right to defend themselves through a lawyer, is a complex issue raising questions as to whether they can, or should always be able to, defend themselves in person and whether it is consistent with fair trial rights to assign a lawyer to them against their will.

ECtHR jurisprudence is clear that a person charged with a criminal offence is entitled to be present at his/her own trial and to participate in the proceedings.[45] However, this is not an absolute right, but 'has to be reconciled, through the striking of a "reasonable balance", with the public interest and notably the interests of justice'.[46] The ECtHR has ruled that states enjoy a wide margin of appreciation in this respect, and may require compulsory appointment of a lawyer if the interests of justice so require.[47] The Court accepted in *Croissant* that these circumstances can include the subject matter of the case, the complexity of the factual and legal issues, and the

43 For example, the International Covenant on Civil and Political Rights, Art. 14 (3), and the American Convention on Human Rights, Art. 8 (2).

44 Trechsel 2006, p. 244.

45 ECtHR 12 February 1985, *Colozza v. Italy*, No. 9024/80, para. 27, and ECtHR 16 December 1999, *T. v. United Kingdom,* paras. 88–89.

46 *Colozza v. Italy*, para 29, and see ECtHR 5 July 1977, *X. v. Austria*, No. 7138/75, and ECtHR 25 September 1992, *Croissant v. Germany*, No. 13611/88, para. 29. This issue has frequently been raised before the International Criminal Tribunals. In the *Karadzic* case the ICT decided that that the right to self-representation can be restricted when the accused substantially and persistently obstructs the proper and expeditious conduct of his trial, thereby confirming previous case law: ICTY 5 November 2009, *Prosecutor v. Radovan Karadzic,* no.IT-95/18-T. See Tuinstra 2009, ch. VII.

47 ECtHR 5 July 1977, *X. v. Austria*, No. 7138/75, ECtHR 25 September 1992, *Croissant v. Germany*, No.13611/88, para. 27; ECtHR 15 November 2001, *Correia de Matos v. Portugal*, No. 48188/99; and ECtHR 14 January 2003, *Lagerblom v. Sweden*, No. 26891/95.

personality of the accused,[48] and has also held that it is legitimate to require legal assistance where an appeal is lodged.[49] This implies that in certain circumstances it is considered to be in the accused's best interests to have the assistance of a lawyer so as to be better informed of his/her rights and in order that his/her defence be effective.

It remains questionable, however, whether forcing a lawyer upon an unwilling client can be considered to be in compliance with a right to a fair trial. The International Criminal Tribunal for the former Yugoslavia (ICTY) argued in the *Seselj* case that the phrase 'in the interests of justice' potentially has a broad scope:

> It includes the right to a fair trial, which is not only a fundamental right of the Accused, but also a fundamental interest of the Tribunal related to its own legitimacy. In the context of the right to a fair trial, the length of the case, its size and complexity need to be taken into account. The complex legal, evidential and procedural issues that arise in a case of this magnitude may fall outside the competence even of a legally qualified accused, especially where that accused is in detention without access to all the facilities he may need. Moreover, the Tribunal has a legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions.[50]

It is clear from this that imposing legal assistance in such cases can be justified by reference to the interests of the tribunal, and in order to assure an expeditious trial, rather than being in the interests of the accused. In practice it has proved extremely difficult in cases of compulsory defence for counsel, in the absence of instructions from the client and without the client's assertions as to what he/she believes to be the truth and his/her understanding of events, to effectively represent the accused. As the US Supreme Court stated in *Faretta v. California*:

> [t]his Court's past recognition of the right of self-representation, the federal-court authority holding the right to be of constitutional dimension, and the state constitutions pointing to the right's fundamental nature form a consensus not easily ignored. […] We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.

48 ECtHR 25 September 1992, *Croissant v. Germany*, No. 13611/88, para. 30.

49 ECtHR 24 November 1986, *Gillow v. United Kingdom*, No. 9063/80, para. 69.

50 ICTY 9 May 2003, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his defence, *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67-PT, para. 21.

The Court found that:

> [t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defence tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master, and the right to make a defence is stripped of the personal character upon which the Amendment insists.[51]

5.2 The right to legal assistance

The right to legal assistance is a key aspect of the procedural rights of suspected and accused persons. A suspect who is assisted by an effective lawyer is in a better position with regards to the enforcement of all of their other rights, because they will be better informed of those rights, and because the lawyer is able to assist them in ensuring that their rights are respected.[52] In addition, as a result of their knowledge and skills, a lawyer will be able to represent the interests of the suspected or accused person more effectively than if they are unrepresented. In recognition of this, the ECHR Article 6 (3)(c) provides that a person charged with a criminal offence has a right to 'defend himself ... through legal assistance'. The proposed Directive on Access to a Lawyer provides that member states must ensure 'that suspects and accused persons are granted access to a lawyer as soon as possible' and 'in such a time and manner as to allow the suspect or accused person to exercise his rights of defence effectively' (Art. 3 (1) and (2)).

An important issue that arises in respect of the right to legal assistance is whether a suspected or accused person is entitled to waive that right. The question of waiver is related to that of compulsory legal assistance (discussed above), since the latter would not be relevant if a suspected or accused person was unable to waive their right. The wording of ECHR Article 6 (3)(c) – a person has the right to 'defend himself in person or through legal assistance' – implies that waiver is possible and the proposed Directive assumes this (Art. 9).[53] The emphasis of both the ECtHR jurisprudence and

51 *Faretta v. California,* 422 U.S. 806 (1975), at 807.

52 Green Paper, Section 4.1.

53 Article 9 does not explicitly provide for a right of waiver, but provides for safeguards in the event of waiver, and also provides that any waiver is subject to 'national law that requires the mandatory presence or assistance of a lawyer' (Art. 9 (1)).

of Article 9 of the proposed Directive is the provision of suitable safeguards in respect of waiver. Thus, in *Pishchalnikov* the ECtHR emphasised that a waiver 'must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Art. 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be'.[54] In the Court's view a valid waiver cannot be established by showing only that a suspect responded to further police-initiated interrogation even if he/she has been advised of his/her rights. An accused who has expressed his/her desire to participate in investigative steps only through a lawyer should, according to the ECtHR, not be subject to further interrogation by the authorities until legal assistance has been made available to him/her, unless the accused him/herself initiates further communication, exchanges or conversations with the police or prosecution.[55]

The proposed Directive on Access to a Lawyer explicitly provides that waiver is conditional on:

a) the suspected or accused person having received prior legal advice on the consequences of waiver, or having otherwise obtained full knowledge of the consequences;
b) the person having the necessary capacity to understand the consequences; and
c) the waiver being given voluntarily and unequivocally.

In addition, any waiver and the circumstances in which it is given must be recorded, and is revocable at any stage of the proceedings (Art. 9 (2) and (3)).[56]

54 ECtHR 24 September 2009, *Pishchalnikov v, Russia*, No. 7025/04 para. 76. See also ECtHR 31 March 2009, *Plonka v. Poland*, No. 20310/02, and ECtHR 1 April 2010, *Pavlenko v. Russia*, No. 42371/02, para. 102.

55 ECtHR 24 September 2009, *Pishchalnikov v. Russia*, No. 7025/04, para. 79.

56 In the UK Supreme Court decision in *McGowan v. B* [2011] UKSC 54 it was held that in order to comply with Article 6 (3)(c), legal advice on the consequence of waiver was not normally required, although 'people who are of low intelligence or are vulnerable for other reasons or who are under the influence of drugs or alcohol may need to be given more than the standard formulae if their right to a fair trial is not to be compromised'.

5.3 The point at which the right to legal assistance arises

The ECHR Article 6 (3)(c) makes no direct reference to the precise point, or stage, at which the right to legal assistance arises. Whilst the right applies to a person 'charged with a criminal offence', and therefore clearly applies after charge or formal commencement of proceedings, it was noted in Section 3 above that the term has been interpreted as meaning 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence'. For many years the ECtHR held that the right to legal assistance arises immediately upon arrest.[57] Where the suspect has to make decisions during police interrogation that may be decisive for the future course of the proceedings he/she has the right to consult a lawyer prior to the interrogation.[58] Although the ECtHR acknowledged that in certain circumstances the physical presence of a lawyer could provide the necessary counterbalance to pressure used by the police during interviews,[59] until recently it stated that a right to have a lawyer present during police interrogation could not be derived from ECHR article 6(3)(c).[60] This approach did not accord with that of either the ICTY[61] or the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), [62] both of which acknowledged that the right to have a lawyer present during police interrogation is one of the fundamental safeguards against ill-treatment of detained persons.

57 ECtHR 8 February 1996, *John Murray v. UK*, No. 18731/91, and ECtHR 6 June 2000 *Magee v. UK*, No. 28135/95.

58 ECtHR 6 June 2000, *Averill v. UK*, No. 36408/97.

59 ECtHR 6 June 2000, *Magee v. UK*, No. 28135/95, and ECtHR 2 May 2000, *Condron v. UK*, No. 35718/97: 'The fact that an accused person who is questioned under caution is assured access to legal advice, and in the applicants' case the physical presence of a solicitor during police interview must be considered a particularly important safeguard for dispelling any compulsion to speak which may be inherent in the terms of the caution. For the court, particular caution is required when a domestic court seeks to attach weight to the fact that a person who is arrested in connection with a criminal offence and who has not been given access to a lawyer does not provide detailed responses when confronted with questions the answers to which may be incriminating.' (para. 60).

60 ECtHR 6 October 2001, *Brennan v. UK*, No. 39846/98, and ECtHR 14 December 1999, *Dougan v. UK*, No. 44738/98.

61 Art. 18(3) Statute of the International Tribunal for the former Yugoslavia (ICTY). Decision on the Defence Motion to Exclude Evidence from ICTY in *Zdravko Mucic*, 2 September 1997, Case No. IT-96-21-T, Trial Chamber II.

62 Second General Report (CPT/Inf (92) 3), Sections 36–38, at http://www.cpt.coe.int.

The approach of the ECtHR to the point at which the right to legal assistance arises changed significantly with the Grand Chamber decision in *Salduz*, in which it stated that:

> The Court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective' Art. 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (para. 55).[63]

The Court justified the decision by reference to the importance of preserving the privilege against self-incrimination, and as a necessary safeguard against ill-treatment:

> Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination ... In this connection, the Court also notes the recommendations of the CPT (paragraphs 39–40 above), in which the committee repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies (para. 54).

This new interpretation of the right to legal assistance under the Convention, which has come to be referred to as the *Salduz* doctrine, has been confirmed in many subsequent judgments.[64] Despite the justification that legal assistance is a necessary safeguard in respect of the right against self-incrimination, the Court has held that the *Salduz* doctrine applies even if the suspect, in fact, exercises their right to silence.[65] As the judgment makes clear, although access to legal assistance prior to the first interrogation is to be regarded as the norm, it is not an absolute right. However, it

63 ECtHR, Grand Chamber, 27 November 2008, *Salduz v. Turkey*, No. 36391/02. See also ECtHR 11 December 2008, *Panovits v. Cyprus*, No. 4268/04.

64 See, for example, ECtHR 10 March 2009, *Böke and Kandemir v. Turkey*, Nos. 71912/01, 26968/02 and 36397/03; ECtHR 3 March 2009, *Aba v. Turkey,* Nos. 7638/02 and 24146/04); ECtHR 17 February 2009, *Aslan and Demir v. Turkey*, Nos. 38940/02 and 5197/03; and ECtHR 17 February 2009, *Oztürk v. Turkey*, No. 16500/04, ECtHR 24 December 2009, *Pishchalnikov v. Russia*, No. 7025/04.

65 ECtHR 13 October 2009, *Dayanan v. Turkey,* No. 7377/03, para. 33, and ECtHR 26 July 2011, *Huseyn and Others v. Azerbaijan*, Nos. 35485/05, 45553/05, 35680/05 and 36085/05, para. 171.

may be restricted only if, in the circumstances of the case, there are compelling reasons to do so.[66] Furthermore, even if there are such reasons for restricting the right, use of material obtained in an interrogation conducted in the absence of legal assistance at trial may compromise the right to fair trial.

> Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (para. 55).

Generally, failure to comply with the right to legal assistance cannot be compensated for by other procedural protections, such as subsequent assistance by a lawyer or the adversarial nature of subsequent proceedings.[67]

A further issue is whether the right to legal assistance may apply prior to arrest, or prior to the first interrogation. In *Zaichenko*[68] the applicant was stopped in his vehicle at a roadside check and asked questions without being arrested. The Court found that although he was not free to leave, the circumstances disclosed 'no significant curtailment of the applicant's freedom of action, which could be sufficient for activating a requirement for legal assistance already at this stage of the proceedings' (para. 48). Thus, it would seem that the right to legal assistance may apply in the absence of, or before, arrest where a person's freedom of action has been significantly curtailed.[69] The Court has held that the right will apply where a person held in administrative detention is in fact treated as a criminal suspect.[70] Similarly, the Court has also held that the right applies where a person, who was in police custody, was ostensibly treated as a witness although in fact regarded as a suspect.[71]

66 The court has not yet had the opportunity to expand on what is meant by 'compelling reasons'.

67 ECtHR, Grand Chamber, 27 November 2008, *Salduz v. Turkey*, No. 36391/02, para. 58, and see ECtHR 13 October 2010, *Demirkaya v. Turkey*, No. 31721/02, para 16.

68 ECtHR 18 February 2010, *Zaichenko v. Russia*, No. 39660/02.

69 The UK Supreme Court, following this decision, has held that asking questions of a person slumped in a car, and who appeared to have been drinking, whether they had or intended to drive, did not give rise to the right to legal assistance. Conversely, questioning a person during the execution of a search warrant at his home who, whilst he had not been arrested was handcuffed, did trigger the right to legal assistance (*Ambrose v. Harris; HMA v. G.; HMA v. M.* [2011] UKSC 43).

70 ECtHR 21 April 2011, *Nechiporuk and Yonkalo v. Ukraine*, No. 42310/04, para. 264.

71 ECtHR 14 October 2010, *Brusco v. France*, No. 1466/07.

The proposed Directive on Access to a Lawyer is stated to apply 'from the time a person is made aware by the competent authorities ... by official notification or otherwise, that he is suspect or accused of having committed a criminal offence until the conclusion of the proceedings ...' (Art. 2 (1)). Article 3 specifically provides that the right of access to a lawyer applies to suspected or accused persons as soon as possible, and in any event:

(a) before the start of any questioning by the police or other law enforcement authorities;
(b) upon carrying out any procedural or evidence-gathering act at which the person's presence is required or permitted as a right in accordance with national law, unless this would prejudice the acquisition of evidence;
(c) from the outset of deprivation of liberty (Art. 3 (1)).

Although expressed in different terms, this is consistent with the ECtHR jurisprudence providing for the right to legal assistance from the moment that there is any significant curtailment of a suspects' freedom of action. Whether it goes further must be considered by reference to both Article 2 (1) and Article 3 of the proposed EU Directive on Access to a Lawyer. For example, Article 3 (1)(b) would seem to give the right to legal assistance to a person during a police search of their house, irrespective of whether they were subjected to a significant restriction of their liberty, provided that they were made aware that they were suspected of having committed a criminal offence. Similarly, it would seem to apply to a person questioned in the street (or elsewhere) without being arrested, but again only provided that they were made aware that they were suspect of having committed a criminal offence. The question arises whether the right to legal assistance would be avoided if the person was not so informed.[72] Article 10 of the proposed EU Directive on Access to a Lawyer provides that a person who is not a suspect 'who is heard by the police or other enforcement authority in the context of a criminal procedure' has a right of access to a lawyer 'if, in the course of questioning ... he becomes suspected ... of having committed a criminal offence' (Art. 10 (1)). Although it is not explicitly stated in the proposed Directive, it is arguably implicit that once a person is in fact suspected, they should be informed of that fact. If that were not to be the case, the police or other authorities could avoid the right to legal assistance having effect by questioning a person without informing them of their suspect status and without detaining them. However, even if the person is so informed, the right to legal assistance only applies once the suspicion arises, which

72 Which, in effect, was the position in *Brusco*.

may be a consequence of their answers to questions put to them before the suspicion arose. In such circumstances, Article 10 (2) provides that any such answers may not be used against them.

Article 3 (right of access to a lawyer) of the proposed EU Directive on Access to a Lawyer, in common with Article 4 (1)–(3) (that is, the right of a suspected or accused person to meet with their lawyer, and to have the lawyer present during any interrogation, hearing or any investigative or evidence-gathering procedure),[73] may only be derogated from in exceptional circumstances, and any derogation must:

(a) be justified by compelling reasons pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person;
(b) not be based exclusively on the type or seriousness of the alleged offence;
(c) not go beyond what is necessary;
(d) be limited in time as much as possible and in any event not extend to the trial stage; and
(e) not prejudice the fairness of the proceedings (Art. 8).

This, in effect, articulates in greater detail the requirement of 'compelling reasons' for denying access to a lawyer developed in ECtHR jurisprudence (see above). However, in requiring that a derogation not only be reasoned, but be determined by a judicial authority on a case-by-case basis, the proposed Directive goes further than ECtHR case law.

5.4 Legal assistance during interrogation

Whilst the *Salduz* decision made clear that the right to legal assistance applies 'as from the first interrogation', it did not, in clear terms, specify that the right includes a right to have the lawyer *during* any interrogation.[74] A number of subsequent ECtHR decisions strongly indicated that the right did extend that far,[75] and the decisions in *Mader*[76] and

73 And Articles 5 (right to communicate upon arrest) and 6 (right to communicate with consular or diplomatic authorities).

74 As a result, the governments of a number of member states, such as the Netherlands, maintained that it did not extend that far.

75 For example, ECtHR 14 October 2010, *Brusco v. France*, No. 1466/07, and ECtHR 13 October 2009, *Dayanan v. Turkey*, No 7377/03.

76 ECtHR 21 June 2011, *Mader v. Croatia*, No. 56185/07.

Sebalj[77] put the matter beyond doubt. In *Mader* the Court found a breach of Article 6 (1) and 6 (3)(c) where the 'applicant was questioned by the police and made his confession without consulting with a lawyer or having one present'.[78] In *Sebalj* the applicant had complained 'about the lack of legal assistance during his initial police questioning',[79] and the Court again decided that '[a]gainst this background the Court finds that there has been a violation of Article 6 (1) and 6 (3)(c) of the Convention on account of the applicant's questioning by the police on 9 November 2005 without the presence of a defence lawyer'.[80]

The proposed Directive on Access to a Lawyer, Article 4 (2), explicitly provides for a right to a lawyer during police interrogations in the following terms:

> The lawyer shall have the right to be present at any questioning and hearing. He shall have the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law.

In addition, Article 4 (3) provides that the lawyer also has the right to be present at any other investigative or evidence-gathering act at which the suspected or accused person's presence is required or permitted as of right, unless this would prejudice the acquisition of evidence. It should be noted that whereas the ECtHR jurisprudence, following the general approach of the ECHR, frames the issue in terms of a right of the suspect, the proposed Directive grants the right to be present in interrogations and so on to the lawyer who is assisting the suspect. Although the implications of the different approaches is not pursued here, the provisions in the proposed Directive raise important questions about the inter-relationship between the right of the suspect to waive their right to legal assistance and the right of the lawyer to be present during interrogations.

5.5 The right to private consultation with a lawyer

An essential condition for effective legal assistance is the confidentiality of the lawyer/client relationship, which includes the right to confidential communication and unrestricted access by the lawyer to the client. This means that there is a need for

77 ECtHR 28 June 2011, *Sebalj v. Croatia*, No. 4429/09.
78 ECtHR 21 June 2011, *Mader v. Croatia*, No. 56185/07, para. 153.
79 ECtHR 28 June 2011, *Sebalj v. Croatia*, No. 4429/09, para. 256.
80 Para. 257.

guarantees that lawyers are able to visit and speak with their clients in confidence, without surveillance by third parties.[81] Whilst the proposed Directive on Access to a Lawyer contains an explicit provision on the confidentiality of lawyer/client communications (Art. 7), there are no explicit provisions in the ECHR. However, the ECtHR has considered both Article 6 and Article 8 (the right to private life) when considering lawyer/client confidentiality. The landmark decision is *Niemietz* in which the ECtHR stated in general terms that 'where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by article 6 of the Convention'.[82] Similarly, in *Ocalan* the court held that intercepting lawyer/client communications violates 'one of the basic requirements of a fair trial in a democratic society'.[83] In other decisions the Court has referred to rights as guaranteed by Article 6 (3), such as the right to seek advice pending criminal proceedings. In *Schönenberger and Durmaz* correspondence sent by the lawyer to his detained client was stopped because the authorities had learned from its contents that Mr. Durmaz had given his client advice to make use of his right to silence. The Court found a violation, reaffirming the right to remain silent as being a right enshrined in Article 6, and that therefore the interference was not in accordance with Article 8 (2) because it was not necessary in a democratic society.[84] However, whilst lawyer/client confidentiality is fundamental to a fair trial, it is not an absolute right. Communications may be intercepted in exceptional circumstances where there is a reasonable belief that confidentiality is being abused. Thus whilst routine interception of communications is contrary to fair trial rights, interception may be permissible where, for example, there are reasonable grounds for believing that the contents of the communication would endanger prison security, the safety of others or further a criminal purpose.[85]

Some states have provisions enabling lawyer/client consultations to be intercepted or to be subjected to surveillance,[86] and the case law of the ECtHR in this respect shows that safeguards to protect lawyer–client privilege are left to variable local or

81 ECtHR 27 November 2007, *Zagaria v. Italy*, No. 58295/00, para. 30.

82 ECtHR 16 December 1992, *Niemietz v. Germany*, A 251-B, para. 37.

83 ECtHR 12 May 2005, *Öcalan v.* Turkey, No. 46221/99.

84 ECtHR 20 June 1988, *Schönenberger and Durmaz v. Switzerland*, No. 11368/85. See also *S. v. Switzerland* (1992) 14 EHRR 670.

85 ECtHR 9 October 2008, *Moiseyev v. Russia*, No. 62936/00, para. 210. See also, ECtHR, 25 March 1992, *Campbell v. United Kingdom*, No. 13590/88, para. 48.

86 See, for example, in respect of Poland, Cape et al. 2010, p. 482.

national customs and often are not in accordance with the requirements of Article 8 of the Convention.[87]

5.6 Choice and free provision of legal assistance

The wording of Article 6 (3)(c) makes it clear that suspected and accused persons have a right to choose their lawyer if they are paying for the lawyer's services privately. However, it is ambiguous where legal assistance is to be provided free of charge. The ECtHR has held that whilst the relationship of confidence between a lawyer and client is important, the right of choice is not absolute. In particular, it may be subject to limitation where free legal assistance is provided. Whilst the authorities must have regard to the wishes of the suspect or accused person when appointing a lawyer, their wishes may be overridden 'when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice'.[88]

Article 6 (3)(c) provides that free legal assistance must be provided where two conditions are satisfied: the person does not have sufficient means to pay (the means condition); and the interests of justice so require (the merits conditions). As noted in Chapter 1, Section 4.3.2, whilst it is anticipated under the EU roadmap that a Directive will be issued in respect of legal aid in criminal proceedings, a proposed Directive has not yet been published. The proposed Directive on Access to a Lawyer, Article 12 (2) merely provides that member states must not apply less favourable provisions on legal aid than those currently in place in respect of access to a lawyer provided pursuant to the Directive. States face significant procedural and practical problems in devising and implementing appropriate mechanisms for determining whether the means and merits conditions are satisfied in any particular case, especially at the early stages of the criminal process when decisions need to be made at short notice.[89] However, whilst under the ECHR states have a significant margin of appreciation in determining how free legal assistance is to be provided, the system adopted must ensure that the

87 See ECtHR 25 March 1998, *Kopp v. Switzerland*, No. 23224/94; ECtHR 25 November 2004 *Decision as to the Admissibility of Aalmoes and 112 Others v. The Netherlands*; ECtHR 27 September 2005, *Petri Sallinen and Others v.* Finland, No. 50882/99; ECtHR, 7 June 2007, *Smirnov v. Russia,* No. 71362/01; and ECtHR 28 June 2007, *The Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, No. 62540/*00*. See also Spronken and Fermon 2008.

88 ECtHR 25 September 1992, *Croissant v. Germany*, No. 13611/88, para. 29, and ECtHR 14 January 2003, *Lagerblom v. Sweden,* No. 26891/95, para. 54.

89 See Cape et al. 2010, p. 590 for the difficulties faced in a number of EU jurisdictions.

right to legal assistance is 'practical and effective'. Thus in *Wersel*, which involved a cassation appeal, the ECtHR held that it was 'incumbent on that court to handle the applicant's application for legal assistance in a way that would have enabled him to prepare his cassation appeal properly and to put his case before the Supreme Court'.[90] Thus although ECtHR jurisprudence is extremely limited on this point, it is tolerably clear that the mechanisms for providing legal assistance free of charge must be such that they do not significantly interfere with the rights under Article 6 (1) and 6 (3)(c).

With regard to the means condition, the ECtHR has held that whilst the burden of proving lack of means falls on the person who claims it (that is, the suspected or accused person),[91] the suspect does not have to prove 'beyond all doubt' that he/she lacks the means to pay for his/her defence.[92] Again, ECtHR jurisprudence on the issue is limited, and there is little consideration of what is meant by 'insufficient means' in general, and how it might be interpreted in the context of any particular jurisdiction.

The merits condition has been more extensively considered by the ECtHR, although marginally so, and it indicates that three factors that should be taken into account in determining eligibility:[93]

(a) the seriousness of the offence and the severity of the potential sentence;
(b) the complexity of the case; and
(c) the social and personal situation of the defendant.

The case law shows that the merits condition is, in principle, satisfied whenever deprivation of liberty is at stake,[94] although this amounts to a relatively narrow definition of 'interests of justice'. Further, denying legal aid during periods in which procedural acts, including questioning and medical examinations, are carried out is unacceptable.[95] However, there is little further guidance from the jurisprudence on how the various factors are to be interpreted in any particular case.

90 ECtHR 13 September 2011, *Wersel v. Poland*, No. 30358/04, para. 52, and also ECtHR 14 September 2010, *Subicka v. Poland,* No. 29342/06.

91 ECtHR 25 September 1992, *Croissant v. Germany*, No. 13611/88, para. 37, and ECtHR 21 June 2011, *Orlov v. Russia*, No. 29652/04, para. 114.

92 ECtHR 25 April 1983, *Pakelli v. Germany*, No. 8398/78.

93 ECtHR 24 May 1991, *Quaranta v. Switzerland*, No. 12744/87, para. 35.

94 ECtHR 10 June 1996, *Benham v. UK*, No. 19380/92, para. 59.

95 ECtHR 20 June 2002, *Berlinski v. Poland*, Nos. 27715/95 and 30209/96.

Existing research shows that the provision of legal aid is the Achilles heel in many EU member states. Only a bare majority of states have a standard legal aid merits test, and there is a considerable variation in approaches to assessing means, and to the level of means for the purposes of determining inability to pay. In many states there is no standard means test. Application procedures are often vague and it is frequently unclear how the determining authorities reach their decisions. In fifty per cent of EU states there is no legally established time limit for determining legal aid applications, and many states do not allow for choice where a lawyer is provided under legal aid.[96]

Remuneration for defence lawyers providing legal aid services varies widely among EU member states, and information provided by governments on criminal legal aid expenditure indicates that in practice there must be problems in compliance with the requirement of ECHR Article 6 (3)(c) resulting from low levels of remuneration.[97] However, this is not apparent from ECtHR case law, which has not dealt with the issue of remuneration.

5.7 The role, independence and standards of lawyers

The ECHR does not contain any explicit provision regarding the role, independence or standards of criminal defence lawyers. The proposed Directive on Access to a Lawyer sets out certain functions that a lawyer acting for a suspected or accused person must be permitted to perform (Art. 4),[98] but contains no provisions regarding independence or standards.[99] The Havana Declaration[100] provides that governments must ensure that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference (Art. 16) and also

96 Spronken et al., para. 3.2. See also Bowles and Perry 2009, and Cape et al. 2010.

97 See the Report of the European Commission for the Efficiency of Justice (CEPEJ) European Judicial Systems – 2008, Council of Europe September 2008, fig. 18 on p. 46, and Spronken et al. 2009, p. 71.

98 For example, to be present at interrogations, hearings, certain investigative or evidence-gathering procedures, and to check the conditions in which their client is held.

99 This may be contrasted with the Directive on the Right to Interpretation and Translation in Criminal Proceedings, 20 October 2010, Art. 5 of which imposes a duty on member states to take concrete measures to ensure that interpretation and translation meets the quality standards set out in Arts. 2 (8) and 3 (9).

100 The Havana Declaration on the Role of Lawyers, agreed at the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990.

provides that lawyers must not be identified with their clients or their clients' causes (Art. 18). However, there is nothing that equates with this in the ECHR.

The proper role of the defence lawyer may be discerned from a number of ECtHR judgments. One of the basic obligations of a lawyer is to assist his/her client, not only in the preparation for the trial itself, but also in ensuring the legality of any measures taken in the course of the proceedings.[101] With regard to the investigative stage of criminal proceedings, the ECtHR has underlined the importance of legal assistance in giving effect to the privilege against self-incrimination and the right to silence, in particular by preventing coercion or oppression.[102] In *Dayanan* the Court went further, stating that the principle of equality of arms requires that a suspect, including at the police interrogation stage, be afforded the complete range of interventions that are inherent to legal assistance, such as discussion of the case, instructions by the accused, the investigation of facts and search for favourable evidence, preparation for interrogation, the support of the suspect and the control of the conditions under which the suspect is detained.[103]

With regard to independence, national authorities have a certain margin of appreciation under the ECHR in assessing the necessity of any interference with the performance of the lawyer's role, but this margin is subject to supervision as regards both the relevant rules and the decisions applying them. Where criticism of a judge or prosecutor by a lawyer is confined to the courtroom the margin of appreciation is narrower than where that criticism is publicly voiced, for example, in the media.[104] In *Nikula*[105] the ECtHR held that 'the threat of an *ex post facto* review of counsel's criticism of another party to criminal procedure (the prosecutor) is difficult to reconcile with defence counsel's duty to defend their clients' interests zealously'. The freedom of a

101 ECtHR 12 July 1984, *Can* (B 79), and ECtHR 4 March 2003, *Öcalan v. Turkey*, No. 63486/00.

102 ECtHR, Grand Chamber, 27 November 2008, *Salduz v. Turkey*, No. 3639/10, para. 54, and ECtHR 1 April 2010, *Pavlenko v. Russia*, No. 42371/02, para. 101.

103 ECtHR 13 October 2009, *Dayanan v. Turkey*, No. 7377/03, para. 32: 'En effet, l'équité de la procédure requiert que l'accusé puisse obtenir toute la vaste gamme d'interventions qui sont propres au conseil. A cet égard, la discussion de l'affaire, l'organisation de la défense, la recherche des preuves favorables à l'accusé, la préparation des interrogatoires, le soutien de l'accusé en détresse et le contrôle des conditions de détention sont des éléments fondamentaux de la défense que l'avocat doit librement exercer.'

104 See ECtHR 21 March 2002, *Nikula v. Finland*, No. 31611/96, para. 46, ECHR 2002-II; *Schöpfer v. Switzerland*, judgement of 20 May 1998, *Reports of Judgements and Decisions* 1998-III, pp. 1053–54, para. 33, and ECtHR 17 July 2008, *Schmidt v. Austria*, No. 513/05.

105 ECtHR 21 March 2002, *Nikula v. Finland,* No. 31611/96.

lawyer to defend his/her client as he/she sees fit has also been assessed by the Court by reference to Article 10 (freedom of expression). In *Nikula* the Court held that it would not exclude the possibility that, in certain circumstances, an interference with counsel's freedom of expression in the course of a trial could also raise an issue under Article 6 with regard to the right of an accused client to receive a fair trial. Equality of arms and other considerations of fairness militate in favour of a free and even forceful exchange of argument between the parties. The basic approach of the ECtHR in this respect is that lawyers are certainly entitled to comment in public on the administration of justice, but their criticism must not overstep certain limits. Account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession.

According to the ECtHR, legal assistance must be effective, and the state is under an obligation to ensure that the lawyer has the information necessary to conduct a proper defence.[106] If the particular lawyer is ineffective the state is obliged to provide the suspect with another lawyer.[107] However, the Court has been reluctant to hold states liable for the failures of lawyers who, as members of independent liberal professions, should regulate themselves. The ECtHR has frequently held that:

> A state cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes ... [States are] required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention.[108]

This applies whether the lawyer is the lawyer of choice, or one appointed under legal aid.[109] In relation to legal assistance during police interrogation, the ECtHR has been willing to critically assess the effectiveness of the assistance given by a lawyer acting under legal aid to his client in police custody in preventing a breach of the

106 ECtHR 9 April 1984, *Goddi (A 76)*, and ECtHR 4 March 2003, *Öcalan v. Turkey*, No. 63486/00.

107 ECtHR 13 May 1980, *Artico v. Italy* (A 37).

108 EctHR 24 November 1993, *Imbrioscia v. Switzerland*, No. 13972/88. See also EctHR 19 December 1989, *Kamasinski v. Austria*, No. 9783/82; ECtHR 10 October 2002, *Czekalla v. Portugal*, No. 38830/97, para. 65; ECtHR 7 October 2008, *Bogumil v. Portugal*, No.35228/0317/168; ECtHR 21 April 1998 *Daud v. Portugal*, No. 22600/93, para. 38; ECtHR 14 January 2003, *Lagerblom v. Sweden,* No. 26891/95, para. 56; ECtHR 26 January 2010, *Ebanks v. UK*, No. 36822/06, paras. 73 and 84–82; and ECtHR 21 June 2011, *Orlov v. Russia,* No. 29652/04, para. 108.

109 ECtHR 1 April 2010, *Pavlenko v. Russia*, No. 42371/02, para. 99.

privilege against self-incrimination and in facilitating the effective exercise of the right to remain silent. In *Pavlenko* the court held that the police had a responsibility for keeping a close eye on the (in)effectiveness of the lawyer.[110] However, this was in the context of the applicant having specifically rejected the legal aid lawyer appointed to assist him, preferring the lawyer who had been appointed by his mother, and where the police had carried out informal 'talks' with the applicant in the absence of a lawyer.

6. Procedural rights

6.1 Right to be presumed innocent and the right to silence

6.1.1 The presumption of innocence

The presumption of innocence is guaranteed by ECHR Article 6 (2), and according to ECtHR jurisprudence it consists of three separate but related requirements.[111] First, judicial authorities must not presume that the accused has committed the offence with which he/she is charged. The presumption of innocence will be violated if, without the accused having been proved guilty according to the law and, notably, without him/her having had the opportunity of exercising his/her rights of defence, a judicial decision concerning him/her reflects an assumption that he/she is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty.[112] Thus in *Paskal* an interview allegedly given by the trial judge to a news journal at the beginning of a trial, indicating that the judge believed the defendant to be guilty, was held to have compromised the defendant's right to a fair trial.[113] Article 6 (2) governs criminal proceedings in their entirety 'irrespective of the outcome of the prosecution'.[114] However, once an

110 ECtHR 1 April 2010, *Pavlenko v. Russia*, No. 42371/02, paras. 108–114.

111 ECtHR 6 December 1988, *Barberà, Messegué and Jabardo v. Spain*, No. 10590/83, para. 77.

112 ECtHR 21 February 1983, *Minelli v. Switzerland*, No. 8660/79, para. 37. This reasoning also applies to proceedings that concern the confiscation of assets: ECtHR 1 March 2007, *Geerings v. the Netherlands*, No. 30810/03, paras. 41–51; or compensation after an acquittal or stay of criminal proceedings: ECtHR 25 August 1993, *Sekanina v. Austria*, No. 13126/87, para. 30; ECtHR 13 January 2005, *Capeau v. Belgium,* No. 42914/98, paras. 21–26; and ECtHR 15 May 2008, *Orr v. Norway*, No. 31283/04, paras. 50–55.

113 ECtHR 15 September 2011, *Pavlenko v. Ukraine*, No. 24562/04, para. 69.

114 ECtHR 21 February 1983, *Minelli v. Switzerland*, No. 8660/79, para. 30.

accused has been found guilty, the presumption, in principle, ceases to apply in respect of any allegations made during the subsequent sentencing procedure.[115] The presumption of innocence also affects public officials and can be violated if a statement of a public official concerning a person charged with a criminal offence reflects an assumption that he/she is guilty before this has been proved according to law.[116] In this regard the Court has emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence.[117]

Second, the presumption of innocence has fundamental implications for evidential rules: the burden of proof is on the prosecution and any doubt should be resolved in favour of the accused (*in dubio pro reo*).[118] Furthermore, it implies that a court's judgment must be based on the evidence put before it and not on mere allegations or assumptions.[119] In *Telfner*, the question was whether the national courts could base a conviction for causing injury by negligence in a car accident solely on a report of the local police that the applicant was the main user of the car and had not been home on the night of the accident. The ECtHR reasoned that these elements of evidence, which were not corroborated by evidence given at the trial in an adversarial manner, were not sufficient to constitute a case against the accused and that the burden of proof was shifted unjustly from the prosecution to the defence.[120] The presumption of innocence is, however, not absolute and may be restricted as long as the authorities are able to strike a fair balance between the importance of what is at stake and defence rights.[121] Accordingly, presumptions of fact or of law are, in principle, not prohibited under the Convention as long as they respect defence rights, implying that the presumption must be rebuttable by the suspect.[122] As a consequence the suspect might have to bear a part of the burden of proof.

115 ECtHR 5 July 2001, *Phillips v. United Kingdom*, No. 41087/98, paras. 28–36.

116 ECtHR 10 October 2000, *Daktaras v. Lithuania*, No. 42095/98, para. 41, and ECtHR 26 March 2002, *Butkevičius v. Lithuania*, No. 48297/99, paras. 46–54. Accordingly, the principle of the presumption of innocence may be infringed not only by a judge or court but also by other public authorities including prosecutors.

117 ECtHR 10 February 1995, *Allenet de Ribemont v. France*, No. 15175/89, para. 35.

118 ECtHR 6 December 1988, *Barberà, Messegué and Jabardo v. Spain*, No. 10590/83, para. 77.

119 ECtHR 20 March 2001, *Telfner v. Austria*, No. 33501/96, para. 19.

120 ECtHR 20 March 2001, *Telfner v. Austria*, No. 33501/96, paras. 15–20.

121 ECtHR 19 October 2004, *Falk v. Netherlands,* No. 66273/01.

122 ECtHR 7 October 1988, *Salabiaku v. France*, No. 10519/83, para. 28.

Third, the presumption requires that the prosecution inform the accused of the accusation so that he/she may prepare and present his/her defence accordingly.[123] This illustrates the connection between the presumption of innocence and the need for effective and practical defence rights.[124]

6.1.2 The privilege against self-incrimination and the right to silence

In contrast to the right to be presumed innocent, the right to remain silent is not explicitly mentioned in the ECHR Article 6, although they are closely linked.[125] It is, however, settled case law of the ECtHR that the right to silence, and the right not to incriminate oneself, are fundamental features of the concept of fair trial, being 'generally recognised international standards which lie at the heart of the notion of a fair procedure' under the ECHR Article 6.[126] Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6.[127] The right not to incriminate oneself presupposes that the prosecution in a criminal case must seek to prove their case against the accused without resort to evidence obtained through coercive methods or oppression in defiance of the will of the accused.[128]

123 ECtHR 6 December 1988, *Barberà, Messegué and Jabardo v. Spain*, No. 10590/83, para. 77.

124 See, for example, the right to information in Section 4.2 above.

125 ECtHR 17 December 1996, *Saunders v. UK*, No. 19187/91, para. 68; ECtHR 21 December 2000, *Heaney and McGuinness v. Ireland*, No. 34720/97, para. 40; and ECtHR 21 April 2009, *Marttinen v. Finland*, No. 19235/03, para. 60.

126 In *Funke* the Court held for the first time that the right to silence and the *nemo tenetur* principle are part of the fair trial concept of ECHR Art. 6 (1): ECtHR 25 February 1993, *Funke v. France*, No. 10828/84, paras. 41–44. See also ECtHR 17 December 1996, *Saunders v. UK*, Reports 1996-VI, para. 68; ECtHR 8 February 1996, *John Murray v. UK*, No. 18731/91, para. 45; ECtHR 21 December 2000, *Heaney and McGuinness v. Ireland*, No. 34720/97, para. 40; and ECtHR 22 July 2008, *Getiren v. Turkey*, No. 10301/03, para. 123.

127 ECtHR, Grand Chamber, 27 November 2008, *Salduz* v. Turkey, No. 36391/02, paras. 54–55.

128 See, *inter alia*, ECtHR 17 December 1996, *Saunders v. UK*, No. 19187/91, para. 68; ECtHR 21 December 2000, *Heaney and McGuinness v. Ireland*, No. 34720/97, para. 40; ECtHR 3 May 2001, *J.B. v. Switzerland*, No. 31827/96, para. 64; and ECtHR 5 November 2002, *Allan v. UK*, No. 48539/99, para. 44.

Despite its fundamental nature, the right to remain silent can be restricted provided that the authorities can invoke good cause.[129] The ECtHR adopts a rather strict attitude towards accepting justifications, and the right will be violated if the very essence of the right is destroyed.[130] However, a distinction can be made between an attempt to compel the accused to give certain evidence[131] and the drawing of inferences from a person's silence.[132] In both situations all the circumstances of the case must be taken into account in order to determine whether the right to remain silent has been breached.[133] Factors to which the Court will have regard in determining whether there has been a violation include the nature and degree of compulsion, the existence of any relevant safeguards, and the use of the material so obtained in subsequent proceedings.[134]

With regard to the application of the right to remain silent and the prohibition of self-incrimination, the finding of a violation does not depend on the allegedly incriminating evidence obtained by coercion or in contravention of the right to silence or self-incrimination actually being used in criminal proceedings. Thus a violation may be found even though no proceedings were subsequently brought or the person was subsequently acquitted.[135]

Despite the importance placed on the privilege against self-incrimination and the right to silence, ECtHR case law on the question of whether a suspected or accused person should be informed of the right is scant.[136] Furthermore, the proposed EU Directive on the Right to Information does not require member states to include it in the information about rights that must be given under Articles 3 and 4 of the

129 ECtHR 8 February 1996, *John Murray v. UK,* No. 18731/91, para. 47, and ECtHR 21 December 2000, *Heaney and McGuinness v. Ireland*, No. 34720/97, para. 47.

130 ECtHR 21 December 2000, *Heaney and McGuinness v. Ireland*, No. 34720/97, paras. 57–58; ECtHR 10 March 2009, *Bykov v. Russia*, No. 4378/02, para. 93; and ECtHR 4 October 2010, *Pavlenko v. Russia,* No. 42371/02, para. 100.

131 ECtHR 25 February 1993, *Funke v. France*, No. 10828/84, paras. 41–44.

132 ECtHR 8 February 1996, *John Murray v. UK*, No. 18731/91, para. 45. See also ECtHR 29 June 2007, *O'Halloran and Francis v. UK*, Nos. 15809/02 and 25624/02, paras. 45–46.

133 ECtHR 29 June 2007, *O'Halloran and Francis v. the United Kingdom*, Nos. 15809/02 and 25624/02, para. 53, and ECtHR 2 May 2000, *Condron v. the United Kingdom*, No. 35718/97, paras. 59–63.

134 ECtHR 5 November 2002, *Allan v. UK*, No. 48539/99, para. 44. See also ECtHR 21 December 2000, *Heaney and McGuinness v. Ireland*, No. 34720/97, para. 55, and ECtHR 11 July 2006, *Jalloh v.* Germany, No. 54810/00, paras. 112–123.

135 ECtHR 21 April 2009, *Marttinen v. Finland*, No. 19235/03, para. 64.

136 See Trechsel 2006, p. 352.

proposed Directive.[137] However, the ECtHR has indicated in a number of cases that information about the right must be given when the right arises.[138] It is important to note that the privilege against self-incrimination and the right to silence apply from the moment that a person is 'charged' with a criminal offence which, as noted in Section 3 above, has been interpreted to mean when 'the situation of the [person] has been substantially affected'.[139] In *Zaichenko* the Court considered that, on the facts of the case, police suspicion of theft should have been aroused at the time that the applicant was stopped at a roadside check and was not able to produce proof that he had purchased the diesel found in his car. Although he was not accused at that moment, the Court found that it was incumbent on the police to inform the applicant of the privilege against self-incrimination and the right to remain silent before asking him for further 'explanation'.[140]

The ECtHR has closely linked the privilege against self-incrimination and the right to silence to the right to legal assistance. It has frequently stated that 'early access to a lawyer is part of the procedural safeguards to which the court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination'.[141] At the investigative stage, the suspect is in a particularly vulnerable position, and 'this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself'.[142]

6.2 The right to release from custody pending trial

The presumption of innocence and the right to silence are closely related to the question of whether a person should be released pending trial. Until guilt is established according to law, an accused person must be presumed to be innocent, and keeping them in custody pending trial is *prima facie* contrary to that presumption. Furthermore, keeping a person in custody, especially if it is for an extended period, may have the effect of undermining their right to silence by a form of coercion.

137 Note that the revised draft of the proposed Directive as approved by the European Parliament (see Chapter 1, footnote 79) does require a suspected or accused person to be notified of their right to remain silent as it applies under national law (Art. 3 (1)).

138 ECtHR 18 February 2010, *Zaichenko v. Russia*, No. 39660/02, para. 52.

139 ECtHR 17 December 1996, *Saunders v. the United Kingdom*, No. 19187/91, paras. 67 and 74, and ECtHR 19 February 2009, *Shabelnik v. Ukraine*, No. 16404/03, para. 57.

140 ECtHR 18 February 2010, *Zaichenko v. Russia*, No. 39660/02, paras. 42 and 52–60.

141 See, for example, ECtHR 24 September 2009, *Pishchalnikov v. Russia*, No. 7025/04, para. 69.

142 ECtHR, Grand Chamber, 27 November 2008, *Salduz v. Turkey*, No. 36391/02, para. 54.

Rights relating to pre-trial detention are governed by ECHR Article 5 (3) which provides:

> Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

A person detained in accordance with Article 5 (1)(c) is a person who, *inter alia*, has been arrested or detained for the purpose of bringing them before the competent legal authority on reasonable suspicion that they have committed an offence. Article 5 (3) is concerned with two separate stages that raise different considerations: the period following arrest when a person is taken into the power of the authorities; and the period pending eventual trial before a criminal court.[143]

As far as the first stage is concerned, the requirement of prompt production before a judicial authority is directed at avoiding arbitrary detention and upholding the rule of law. It is also an important safeguard against ill-treatment or torture of suspects who are detained by the police or other law enforcement agents.[144] If produced before an officer authorised by law to exercise judicial power, as opposed to a judge, in order to comply with the provisions of Article 5 (3) the officer 'must nevertheless have some of the latter's attributes ... that is to say he must satisfy certain conditions each of which constitutes a guarantee for the person arrested'.[145] They must be independent of the executive and the parties, must hear representations from the arrested person, and must decide whether the circumstances of the case justify detention or release in accordance with established legal criteria.[146] For the purpose of determining whether the person is promptly produced, time starts when the person is first deprived of his/her liberty under Article 5 (1)(c).[147] The court has been reluctant to determine a time limit for the purpose of evaluating promptness, holding that it

143 ECtHR 21 December 2010, *Michalko v. Slovakia*, No. 35377/05, para. 143.

144 See, for example, ECtHR 29 April 1999, *Aquilina v. Malta,* No. 25642/94; ECtHR 18 December 1996, *Aksoy v. Turkey,* No. 21987/93; and ECtHR 29 November 1988*, Brogan and Others v. UK,* No. 11209/84.

145 ECtHR 4 December 1979, *Schiesser v. Switzerland,* No. 7710/76, para. 32.

146 ECtHR 24 October 1979, *Winterwerp v. Netherlands*, No. 6301/73, para. 60, and ECtHR 18 January 1978, *Ireland v. UK*, No. 5310/71, para. 99.

147 ECtHR 31 July 2000, *Jecius v. Lithuania*, No. 34578/97, para. 84.

must be assessed according to the particular features of each case.[148] In the *Brogan* case the ECtHR decided that, as a general rule, four days should be regarded as the maximum period, and even in terrorism cases periods longer than this have been held to be in breach of the 'promptly' requirement.[149] Since the relevant period for determining whether production is prompt for the purposes of Article 5 (3) is fact specific, arguably production within four days may nevertheless, in a particular case, breach the requirement.[150] However, there is little guidance from the jurisprudence on how to judge what length of time, within four days, is acceptable.

With regard to the second stage of Article 5 (3), the reference to 'trial within a reasonable time or to release pending trial' does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him/her provisional release pending trial. Whilst release pending trial is not an absolute right, unless and until the accused person is convicted they must be presumed innocent, and the 'presumption is in favour of release'.[151] In determining whether an accused is to be held in pre-trial detention the ECtHR requires that the relevant judicial authority must examine all facts for or against the existence of a genuine requirement of public interest justifying deprivation of liberty, and to exercise 'special diligence' in the conduct of the proceedings.[152] A departure from the rule of respect for individual liberty can only be justified with due regard to the principle of the presumption of innocence, and courts have to set this out in their decision when refusing an application for release.[153] The ECtHR has underlined the need for convincing and consistent justifications for detention,[154] and for assessments to be made *in concreto*.[155]

The existence of reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the validity of continued detention but, after a

148 ECtHR 29 November 1988*, Brogan and Others v. UK,* No. 11209/84, para. 59.

149 See, for example, ECtHR 18 December 1996, *Aksoy v. Turkey,* No. 21987/93, para. 78; ECtHR 29 November 1988*, Brogan and Others v. UK*, No. 11209/84, para. 62; and ECtHR 16 October 2001, *O'Hara v. UK*, No. 37555/97, para. 46.

150 See Trechsel 2006, p. 513 for an argument that in 'normal' cases it should be considerably shorter than four days.

151 ECtHR 16 December 2011, *Borotyuk v. Ukraine*, No. 33579/04, para. 62.

152 ECtHR 23 September 1998, *I.A. v. France*, No. 28213/95, para. 102.

153 ECtHR 26 October 2000, *Kudla v. Poland*, No. 30210/96, paras. 110–117; ECtHR 12 March 2009, *Aleksandr Makarov v. Russia*, No. 15217/07, paras. 117–118; and ECtHR 12 June 2008, *Vlasov v. Russia*, No. 78146/01, para. 104.

154 ECtHR 23 September 1998, *I.A. v. France*, No. 28213/95, paras. 108, 110 and 111.

155 ECtHR 12 March 2009, *Aleksandr Makarov v. Russia*, No. 15217/07, para. 116, and ECtHR 12 June 2008, *Vlasov v. Russia*, No. 78146/01, para. 103.

certain period of time, it no longer suffices.[156] Continued deprivation of liberty must be justified on other grounds, which may include the risk of absconding or re-offending, the risk of collusion, or the fear that the evidence will be destroyed.[157] The gravity of the charge cannot, in itself, justify a long period of detention.[158] Any decision to hold a person in pre-trial detention must be regularly reviewed by reference to whether grounds for detention continue to exist.[159] For example, the danger of perverting the course of justice ceases to be a justification after the evidence has been collected.[160]

It is incumbent on judicial authorities to always consider alternatives to pre-trial detention.[161] For example, a deposit of bail security may be an appropriate alternative measure to secure the accused person's appearance at trial or to prevent them from interfering with evidence, and such measures must be considered by the determining authority.[162] As the ECtHR stated in *Borotyuk*, '[w]henever the danger of absconding can be avoided by bail or other guarantees, the accused must be released',[163] and this must equally apply to other legitimate concerns which could be adequately dealt with by appropriate conditions or arrangements, such as the fear of further offending or of interference with the course of justice.

The European Commission, in furtherance of its obligation under Measure F of the procedural rights 'roadmap', issued a Green Paper on pre-trial detention in June 2011, and the consultation closed in November 2011.[164] It is too early to say whether this will result in a Directive on Detention. However, it should be noted that the European Supervision Order, which provides for mutual recognition of decisions on supervision measures as an alternative to provisional detention, must be implemented by member states by 1 December 2012.[165] This will enable non-custodial supervision

156 ECtHR 5 April 2005, *Nevmerzhitsky v. Ukraine,* No. 54825/00, para. 135.

157 ECtHR 24 April 2003, *Smirnova v. Russia*, Nos. 46133/99 and 48183/99, para. 59.

158 ECtHR 23 September 1998, *I.A. v. France*, No. 28213/95, para. 104.

159 Well established case law since ECtHR 27 June 1968, *Neumeister v. Austria*, A 8, p. 37, para. 4.

160 ECtHR 26 October 2000, *Kudla v. Poland*, No. 30210/96, para. 114; ECtHR 12 March 2009, *Aleksandr Makarov v. Russia*, No. 15217/07, para. 117; and ECtHR 15 September 2009, *Jamrozy v. Poland*, No. 6093/04, paras. 36–41.

161 ECtHR 23 September 2008, *Vrencev v. Serbia*, No. 2361/05, para. 76.

162 ECtHR 21 December 2000, *Jablonski v. Poland*, No. 33492/96, para. 83; ECtHR 5 April 2005, *Nevmerzhitsky v. Ukraine,* No. 54825/00, para. 137; and ECtHR 28 July 2005, *Czarnecki v. Poland*, No. 75112/01, paras. 37–44.

163 ECtHR 16 December 2011, *Borotyuk v. Ukraine*, No. 33579/04, para. 62.

164 See Chapter 1, Section 4.3.2.

165 Council Framework Decision 2009/829/JHA of 23 October 2009.

measures to be 'transferred' from the state where a non-resident is suspected of having committed an offence to the state where they are normally resident.

6.3 The right to be tried in one's presence and to participate

In principle the accused has the right to be present at hearings and to actively participate in the process.[166] This presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty that may be imposed. The defendant should be able, *inter alia*, to explain his/her version of events and indicate any statements with which he/she disagrees. This can be done by his/her lawyer if he/she is legally represented, with whom the suspect must be able to discuss those facts which should be put forward in his/her defence,[167] but the presence of the lawyer cannot compensate for the absence of the accused.[168]

An accused person is not, however, required to actively co-operate with the judicial authorities.[169] A trial in absentia is not in itself incompatible with ECHR Article 6 as long as the accused may subsequently obtain, from a court which has heard him/her, a fresh determination of the merits of the charge where it has not been established that he/she has waived his/her right to appear and to defend him/herself.[170] If the suspect has received a summons and deliberately does not attend trial, a retrial may be refused.[171] Although the Court has stressed the prime importance of the accused appearing at his/her trial, the absence of the suspect should not be punished by depriving him/her of the right to legal assistance.[172] A lawyer who attends a trial for the apparent purpose of defending the accused in his/her absence must be given the opportunity to do so.[173]

166 ECtHR 12 February 1985, *Colozza v. Italy*, No. 9024/80, paras. 27–33; ECtHR 16 December 1999, *T. v. United Kingdom*, paras. 88–89; and ECtHR 18 October 2006, *Hermi v. Italy*, No. 18114/02, paras. 58–67.

167 An overview of the case law in this respect can be found in ECtHR 14 October 2008, *Timergaliyev v. Russia*, No. 40631/02, paras. 51–56.

168 ECtHR 16 December 1999, *T. v. United Kingdom*, para. 88, and ECtHR 25 November 1997, *Zana v. Turkey*, No. 18954/91, paras. 67–72.

169 ECtHR 10 December 1982, *Corigliano v. Italy,* No. 8304/78, para. 42, and ECtHR 15 July 1982, *Eckle v. Germany*, No. 8130/78, para. 82.

170 ECtHR 12 February 1985, *Colozza v. Italy*, No. 9024/80, paras. 27–33, and ECtHR 1 March 2006, *Sejdovic v. Italy*, No. 56581/00, paras. 82–84.

171 ECtHR 14 June 2001, *Medenica v. Switzerland*, No. 20491/92, para. 59.

172 ECtHR 23 November 1993, *Poitrimol v. France*, No. 14032/88, para. 35.

173 ECtHR 22 September 1994, *Lala v. the Netherlands*, No. 14861/89 paras. 30–34, and ECtHR 21 January 1999, *Van Geyseghem v. Belgium*, No. 26103/95, paras. 33–34.

In appeal or cassation proceedings the right to be present can be restricted if the proceedings are limited to questions of law and do not review the facts.[174] A relevant factor is whether the presence of the suspect would add value to the trial. Thus, whether there is a need for a public hearing in the presence of the suspect depends on the nature of the appeal system, the scope of the court of appeal's powers and the manner in which the applicant's interests are presented and protected.[175]

6.4 The right to reasoned decisions

The rationales for the requirement that decisions be reasoned are manifold. A reasoned decision demonstrates to the parties that they have been heard in a fair and equitable way, it provides for the possibility that the decision may be reviewed by an appellate body, and it allows a convicted person to prepare for an appeal.[176] Moreover, it permits public scrutiny of the proper administration of justice, thus making the judicial process more transparent and, therefore, accountable.[177]

According to the ECtHR, it follows from the fair trial requirement that courts must indicate with sufficient clarity the grounds on which they base their decisions.[178] Most cases that the Court has dealt with concern situations where national courts did not give reasons for rejecting a defence argument, for refusing to allow documents to be added to the case file, or for rejecting evidence. The obligation to provide adequate reasons does not imply that courts must provide detailed answers to every argument.[179] The extent of the obligation will vary according to the nature of the decision and a possible violation thereof, and is consequently always to be considered in light of the circumstance of the case.[180]

Even though courts enjoy a certain margin of appreciation in choosing between arguments in a particular case and in admitting evidence, the authorities are obliged

174 ECtHR 10 February 1996, *Botten v. Norway*, No. 16206/90, para. 39.

175 ECtHR 29 October 1991, *Fejde v. Sweden*, No. 12631/87, para. 27.

176 ECtHR 1 July 2003, *Suominen v. Finland*, No. 37801/97, para. 37, and ECtHR 11 January 2007, *Kuznetsov and Others v. Russia*, No. 184/02, para. 85.

177 ECtHR 27 September 2001, *Hirvisaari v. Finland*, No. 49684/99, para. 30.

178 ECtHR 16 December 1992, *Hadjianastassiou v. Greece*, No.12945/87, para. 33.

179 ECtHR 19 April 1994, *Van de Hurk v. Netherlands*, No. 16034/90, para. 61, and ECtHR 8 April 2008, *Gradinar v. Moldova*, No. 7170/02, para. 107.

180 ECtHR 9 December 1994, *Ruiz Torija v. Spain*, No. 18390/91, para. 29; ECtHR 9 December 1994, *Hiro Balani v. Spain*, No. 18064/91, para. 27; and ECtHR 21 May 2002, *Jokela v. Finland*, No. 28856/95, para. 72.

to justify their decisions by giving reasons.[181] The notion of fair trial requires courts at least to address the essential issues that have been submitted to them, and findings reached by a lower court should not simply be endorsed without further explanation.[182] Where an appellate court dismisses an appeal on the basis of reasons given in the lower court, it must be verified whether the reasons given by the lower court enabled the parties to make effective use of their right of appeal.[183] National courts may not avoid the essence of complaints and should always undertake an examination of the merits of those complaints.[184]

Since ECtHR case law on reasoned decisions remain somewhat vague, and highly dependent on the circumstances of the case, an example provided by the case of *Gradinar* may help to clarifying the way the Court assesses whether sufficient reasons have been given:[185]

> 111. The Court notes that a number of findings of the Chişinău Regional Court were not contradicted by the findings of the higher courts and that, accordingly, they must be considered as established facts ... These included the fact that [*Gradinar*] and the other accused were arrested and detained on the basis of a fabricated administrative offence, during which period of detention they were questioned and made self-incriminating statements in the absence of any procedural safeguards ... There was no response to the finding that [*Gradinar*] had unlawfully been shown the video recording of D.C.'s statement at the crime scene… in order to obtain consistent statements by all the accused.
>
> 112. The Court further notes that the higher courts did not deal with the finding of the lower court that [*Gradinar*] and the other co-accused had an alibi for the presumed time of the crime ... , and that a number of serious procedural violations made unreliable most of the expert reports ...
>
> 113. The higher courts also relied on the many witness statements in [*Gradinar's*] case. However, the Court observes that no comment was made on the finding by the lower court that some of those statements were fabricated by the police ...
>
> 114. The Court concludes that while accepting as "decisive evidence" ... the self-incriminating statements made by the accused, the domestic courts chose simply to remain silent with regard to a number of serious violations of the law noted by the lower court and to certain fundamental issues, such as the fact that the accused had an alibi for the presumed

181 ECtHR 1 July 2003, *Suominen v. Finland*, No. 37801/97, para. 36.
182 ECtHR 21 May 2002, *Jokela v. Finland*, No. 28856/95, para. 73.
183 ECtHR 21 May 2002, *Jokela v. Finland*, No. 28856/95, para. 73.
184 ECtHR 11 January 2007, *Kuznetsov and Others v. Russia*, No. 184/02, para. 84.
185 ECtHR 8 April 2008, *Gradinar v. Moldova*, No. 7170/02, paras. 111–116.

> time of the murder. The Court could not find any explanation for such omission in the courts' decisions and neither did the Government provide any clarification in this respect.
>
> 115. In the light of the above observations and taking into account the proceedings as a whole, the Court considers that the domestic courts failed to give sufficient reasons for convicting [*Gradinar*] and thus did not satisfy the requirements of fairness as required by Article 6 of the Convention.

6.5 The right to appeal

It will be evident from the above that there is a clear link between the right to reasoned decisions and the right to appeal. The right to review of a conviction or sentence by a higher tribunal is not contained in the ECHR itself, but is found in the Seventh Protocol, Article 2, [186] which provides:

> (1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
> (2) This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

All Council of Europe member states, except for Belgium, Germany, the Netherlands, Turkey and the United Kingdom, have ratified this Protocol. State parties enjoy a considerable margin of appreciation in relation to the implementation of this right within their jurisdiction. Article 2 (2) of the Protocol contains several possible restrictions, and it is accepted case law that review by a higher court may be confined to questions of law.[187] Any limitations must, however, pursue a legitimate aim and must not infringe the very essence of the right to review.[188]

Where appeal procedures are provided for by state parties, the ECtHR has ruled that they must comply with ECHR Article 6 rights.[189] The Court has emphasised that a fair balance should be struck between, on the one hand, a legitimate concern

186 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 22 November 1984, entered into force on 1 November 1988.

187 ECtHR 28 May 1985, ECtHR, *Ashingdane v. UK*, No. 8225/78, para. 57.

188 ECtHR 13 February 2001, *Krombach v. France*, No. 29731/96, para. 96, and ECtHR 25 July 2002, *Papon v. France,* No. 54210/00, para. 90.

189 ECtHR 14 December 1999, *Khalfaoui v. France*, No. 34791/97, para. 37.

to ensure the enforcement of judicial decisions and, on the other, the right of access to the courts and the rights of the defence.[190] In this respect the Court has ruled in a number of similar cases that have been brought against France that it is contrary to the fundamental guarantees contained in ECHR Article 6 to declare an appeal on a point of law inadmissible solely because of a refusal by the appellant to surrender to custody. Such a ruling compels the appellant to subject him/herself in advance to the deprivation of liberty resulting from the impugned decision, although that decision cannot be considered final until the appeal has been decided or the time limit for lodging an appeal has expired. This, according to the Court, impairs the very essence of the right to appeal by imposing a disproportionate burden on the appellant, thus upsetting the fair balance that must be struck between the legitimate concern to ensure that judicial decisions are enforced, and the right of access to the Court of Cassation and exercise of the rights of the defence on the other.[191]

Another example is provided by a number of cases brought against Poland in respect of cassation appeals, which can only be lodged by a lawyer and not by a convicted person personally. In *Wersel* the ECtHR reiterated that 'the Convention does not compel the Contracting States to set up courts of appeal or of cassation. However, where such courts do exist, the guarantees of Article 6 must be complied with, including the right to free legal assistance'.[192] Therefore, for example, the court must deal with an appellant's application for legal assistance 'in a way that would have enabled him to prepare his cassation appeal properly and to put his case before the Supreme Court'.[193]

190 ECtHR 29 July 1998, *Omar and Guérin v. France*, No. 43/1997/827/1033, para. 40.

191 ECtHR 23 November 1993, *Poitrimol v. France,* No. 14032/88, para. 38; ECtHR 29 July 1998, *Omar and Guérin v. France*, No. 43/1997/827/1033, para. 40; ECtHR 25 July 2002, *Papon v. France,* No. 54210/00, para. 90; and ECtHR 14 December 1999, *Khalfaoui v. France*, No. 34791/97, para. 37.

192 ECtHR 13 September 2011, *Wersel v. Poland*, No. 30358/04, para. 42.

193 ECtHR 13 September 2011, *Wersel v. Poland*, No. 30358/04, para. 52. See also, for example, ECtHR 18 December 2001, *R.D. v. Poland*, Nos. 29692/96 and 34612/97, and ECtHR 14 September 2010, *Subicka v. Poland*, No. 29342/06.

7. Rights promoting effective defence

7.1 The right to investigate the case

It is part of our argument that in order for a suspected or accused person to have access to effective criminal defence, they should have a right, and the facilities and resources, to investigate the facts that are relevant to their guilt or innocence. If they are reliant on others, principally the police, to do so there is no guarantee that it will be done. Even if they have the power to require such investigation to be carried out, such as the pursuit of a particular line of enquiry or the interview of a particular witness, which in practice is rare, they cannot be sure that their request has been pursued with due diligence. However, the ECHR Article 6 does not contain any explicit provision giving a suspected or accused person the right to seek evidence, investigate facts, interview prospective witnesses[194] or obtain expert evidence. This may be seen as a *de facto* recognition of the tensions inherent in establishing rights that apply to both inquisitorial and adversarial judicial systems. Whilst adversarialism, at least in theory, regards the accused as a party to the proceedings who is responsible for the production of their own evidence, inquisitorialism regards the accused as a subject of a state-sponsored enquiry into their guilt or innocence. In the latter case, it is for the judicial authorities and/or the police to conduct investigations and to determine what evidence is relevant.

Existing research shows that in jurisdictions with an adversarial tradition, whilst the accused has a right to interview prospective witnesses, to instruct experts and to call witnesses to give evidence at trial, in practice the ability to investigate the facts is severely circumscribed by a lack of powers and resources. Criminal justice systems that have an inquisitorial tradition often prohibit active defence at the pre-trial phase and merely allow reactive defence subsequently. Only when the results of the official (pre-trial) investigation are made known to the accused is he/she in a position to propose further investigation, such as the questioning of (additional) witnesses or counter-investigation by an expert. If the suspected or accused person wishes to investigate, he/she has to ask the police, prosecutor or the investigating judge for permission and for help, and the accused is thus dependant on their willingness to act. In some

194 What is referred to here is a right, and the facilities and resources, to trace, contact and interview prospective witnesses. The calling and examination of witnesses itself is provided for in ECHR Art. 6 (3)(d).

jurisdictions, investigation by the accused or his/her lawyer may even be regarded as an obstruction of the course of the official investigations.[195]

The proposed EU Directive on Access to a Lawyer contains provisions giving a lawyer acting for a suspected or accused person the right to be present at certain investigative acts, but creates no positive rights of investigation. There is some indication that the ECtHR recognises the importance of investigative rights. In *Dayanan* the court stated that as from the time that a person is taken into custody, 'the fairness of proceedings requires that [they] be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention'.[196] However, the main point of this part of the judgment was to stress the right of access to a lawyer, and it remains to be seen whether the view that the defence lawyer's function includes investigation of their client's case is confirmed in subsequent judgments as a fair trial right of the suspected or accused person.

7.2 The right to adequate time and facilities to prepare the defence

The right to adequate time and facilities in order to prepare a defence is guaranteed by ECHR Article 6 (3)(b). It can be regarded as a general provision which is there to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective',[197] and also as a key aspect of the guarantee of effective participation in the criminal process by the suspected or accused person (see Section 6.3 above).[198] It is closely linked with the specific defence rights in Article 6 (3), in particular the right to information (see Section 4 above). The initial requirement is that the accused person be informed properly and promptly of the accusation, be allowed timely access to the file, and be afforded sufficient time to comprehend the information and subsequently to prepare a proper defence.[199] Access to the prosecution file has to be offered in

195 See generally, Cape et al. 2007, Spronken et al. 2009, and Cape et al. 2010.

196 ECtHR 13 October 2009, *Dayanan v. Turkey*, No. 7377/03, para. 32.

197 ECtHR 21 April 1998, *Daud v. Portugal*, No. 22600/93, paras. 36–43, and ECtHR 7 October 2008, *Bogumil v. Portugal*, No. 35228/03, paras. 46–49.

198 ECtHR 9 June 2011, *Luchaninova v. Ukraine*, No. 16347/02, para. 61.

199 ECtHR 21 December 2006, *Borisova v. Bulgaria*, No. 56891/00, paras. 41–45.

sufficient time, but this does not release the prosecution from its obligation to inform the accused promptly and in detail of the full accusation against him/her. That duty rests entirely on the prosecuting authority's shoulders and cannot be complied with passively by merely making the information available without bringing it to the attention of the accused.[200]

The time necessary for preparation will depend on the circumstances: '[t]he amount of time to be given to the defence ... cannot be defined *in abstracto*. The Court has to decide in the light of all the circumstances ... '.[201] Relevant factors include the complexity of the case, the severity of the (possible) sentence and whether the accused person is assisted by a lawyer.[202] If the nature of the accusation changes during the proceedings, the defendant must be allowed the time to react, and accordingly a court should make allowances for difficulties caused to the defence if suddenly confronted with another version of the events.[203]

The requirement of adequate time and facilities also implies that authorities should exercise diligence in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner. This means that an active attitude is required from the authorities, for example, in order to enable the suspect to receive legal assistance,[204] to enable the lawyer to come to the police station to visit the suspect before an interview,[205] and to enable the suspect to call and question witnesses.[206]

The approach of the ECtHR is illustrated by its judgment in *Luchaninova*.[207] The case that was the subject of the application to the court was neither legally nor factually complex, involving the theft of a small number of labels which belonged to the applicant's employer. The applicant became aware of the charges against her when her employer filed a report with the trial court, approximately two months before the relevant hearing, but she was not informed of the hearing until the day on which it was

200 ECtHR 25 July 2000, *Mattoccia v. Italy*, No. 23969/94, para. 6., and see the cases referred to in Section 4.3 above.

201 ECtR 28 June 2011, *Miminoshvili v. Russia*, No. 20197/03, para. 142.

202 ECtHR 7 October 2008, *Bogumil v. Portugal*, No. 35228/03, paras. 48–49.

203 ECtHR 25 July 2000, *Mattoccia v. Italy*, No. 23969/94, para. 67.

204 ECtHR 10 August 2006, *Padalov v. Bulgaria*, No. 54784/00, paras. 53–55, and ECtHR 27 March 2007, *Talat Tunc v. Turkey*, No. 32432/96, paras. 61–62.

205 ECtHR 24 September 2009, *Pishchalnikov v. Russia*, No. 7025/04, para. 79, and ECtHR 11 December 2008, *Panovits v. Cyprus*, No. 4268/04, paras. 70–71.

206 ECtHR 17 July 2001, *Sadak and Others v. Turkey,* Nos. 29900/96; 29901/96; 29902/96; 29903/96, para. 67.

207 ECtHR 9 June 2011, *Luchaninova v. Ukraine*, No. 16347/02, paras. 64–66.

held. The ECtHR found that the applicants rights under ECHR Article 6 (3)(b) and (c) were breached. She had not received notice of the hearing in time for her to prepare to participate in it. Moreover, although her request for free legal assistance was granted and a lawyer appointed to defend her, she was not informed about that decision before the hearing and therefore could not make effective use of legal assistance.

7.3 The right to equality of arms in calling and examining witnesses

Although not explicitly stated in the ECHR Article 6, the right to equality of arms as between the defence and the prosecution is, nevertheless, regarded as a fundamental feature of the right to fair trial. In general terms, it means that each party must be afforded a reasonable opportunity to present his/her case under conditions that do not place him/her at a disadvantage vis-à-vis his/her opponent.[208] Any difficulties caused to the defence by limitations on this right must be sufficiently counterbalanced by appropriate procedures in the trial process.[209]

One aspect of the equality of arms principle is found in ECHR Article 6 (3)(d) which provides that a person charged with a criminal offence has the right to 'examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. This entails, according to the ECtHR, not only equal treatment of the prosecution and the defence 'but also ... that the hearing of witnesses must in general be adversarial'.[210] Consequently, all evidence must normally be 'produced in the presence of the accused at the public hearing with a view to adversarial argument',[211] and the authorities must make 'every reasonable effort' to secure the attendance of a witness for direct examination at a trial.[212]

The accused person must have an equal opportunity as for the prosecution to summon witnesses. However, the right to call witnesses is not absolute, and can

208 ECtHR 15 May 2005, *Öcalan v. Turkey*, No. 46221/99, para. 140.

209 ECtHR 26 March 1996, *Doorson v. Netherlands*, No. 20524/92, para. 72, and ECtHR 23 April 1997, *Van Mechelen and Others v. Netherlands*, Nos. 21363/93; 21364/93; 21427/93; 22056/93, para. 54.

210 ECtHR 6 December 1988, *Barberà, Messegué and Jabardo v. Spain*, No. 10590/83, para. 78.

211 ECtHR 15 June 1992, *Lüdi v. Switzerland,* No. 12433/86, para. 47; ECtHR 28 February 2006, *Krasniki v. Czech Republic*, No. 51277/99, para. 75; and ECtHR 20 January 2009, *Al-Khawaja and Tahery v. UK*, Nos. 26766/05 and 22228/06, para. 34.

212 ECtHR 17 February 2011, *Kononenko v. Russia*, No. 33780/04, para. 64.

be limited in the interests of the proper administration of justice.[213] Thus whilst an accused person must be able to request that a witness be heard, it is acceptable for the court to determine whether it is necessary or appropriate to call the witness.[214] A defendant requesting a witness to be heard must be able to show why examination of the witness is necessary in order to establish the truth.[215] The key issue remains whether the proceedings as a whole, including the way in which the evidence was dealt with, were fair[216] and where a court refuses to hear a witness, it must adequately explain the reasons for its decision.[217]

The use at trial of statements produced during a police or judicial investigation is not, in itself, inconsistent with ECHR Article 6 (1) and 6 (3)(d), provided that defence rights are respected.[218] It is settled case law that the defendant must be given an adequate and proper opportunity to challenge and question a witness against him/her, either when the witness makes the statement or at a later stage.[219] This includes a witness who makes an identification of a suspected or accused person at an identification parade or procedure.[220] Therefore, the lack of any opportunity for the accused person to examine a witness may amount to a violation of the right to fair trial.[221] However, the ECtHR assesses such cases by reference to whether there is a good reason for the non-attendance of a witness,[222] and the impact that the accused person's inability to

213 ECtHR 29 April 2009, *Polyakov v. Russia*, No. 77018/01, para. 31.

214 ECtHR 6 May 2004, *Perna v. Italy,* No. 48898/99, para. 29.

215 ECtHR 6 May 2004, *Perna v. Italy,* No. 48898/99, para. 29, and ECtHR 29 April 2009, *Polyakov v. Russia*, No. 77018/01, para. 31.

216 ECtHR 6 May 2004, *Perna v. Italy,* No. 48898/99, para. 29; ECtHR 23 April 1997, *Van Mechelen and Others v. the Netherlands*, Nos. 21363/93; 21364/93; 21427/93; 22056/93, para. 50; ECtHR 15 June 1992, *Lüdi v. Switzerland,* No. 12433/86, para. 43; ECtHR 26 March 1996, *Doorson v. Netherlands*, No. 20524/92, para. 67; and ECtHR 14 December 1999, *A.M. v. Italy,* No. 37019/97, para. 24.

217 ECtHR 22 April 2000, *Vidal v. Belgium*, No. 12351/86, para. 34.

218 ECtHR 24 November 1986, *Unterpertinger v. Austria,* No. 9120/80, para. 31.

219 ECtHR 15 June 1992, *Lüdi v. Switzerland,* No. 12433/86, para. 49; ECtHR 20 September 1993, *Saïdi v. France,* No. 14647/89, para. 43; ECtHR 23 April 1997, *Van Mechelen and Others v. Netherlands*, Nos. 21363/93; 21364/93; 21427/93; 22056/93, para. 51; and ECtHR 14 December 1999, *A.M. v. Italy,* No. 37019/97, para. 25.

220 ECtHR 10 June 2010, *Shakunov and Mezentnev v. Russia*, No. 75330/01, para. 111.

221 ECtHR 20 September 1993, *Saïdi v. France,* No. 14647/89, para. 44.

222 ECtHR 15 June 1992, *Ludi v. Switzerland*, Series A, No. 238; ECtHR 26 July 2005, *Mild and Virtanen v. Finland*, Nos. 39481/98 and 40227/98; ECtHR 8 June 2006, *Boney v. Bulgaria*, No. 60018/00; and ECtHR 12 April 2007, *Pello v. Estonia*, No. 11423/03.

examine a witness has had on the overall fairness of the trial. In doing so, it takes into account the significance of the untested evidence in order to determining whether the rights of the accused person have been unacceptably restricted.[223] The court, in a number of cases, has developed a 'sole or decisive' rule: a conviction must not be based solely or to a decisive extent on statements of a witness who the accused has had no possibility to challenge.[224]

However, in the Grand Chamber judgment of *Al-Khawaja and Tahery*[225] it was held that the rule must not be applied in an inflexible manner. Even where a conviction is based solely or decisively on the evidence of a witness that the accused person has not had the opportunity to examine, this will not automatically result in breach of the right to fair trial: '[t]he question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only it if is sufficiently reliable given its importance in the case'.[226] Applying those principles to the facts, the court found that use at trial of a statement made by a witness to the police (the witness having died before the trial took place) which, according to the court, was decisive in the conviction of the applicant Al-Khawaja, did not breach the right to fair trial. There were a number of counterbalancing factors: the witness had made a complaint about the conduct of the applicant to two friends promptly after the events in question, there were only minor inconsistencies between the account she gave to them and the statement that she gave to the police and, most importantly in the court's view, there were strong similarities between her account of the assault and that of another complainant with whom there was no evidence of collusion.[227] By contrast, in the case of the applicant Tahery, at the trial of whom a witness had not given evidence through fear, the counterbalancing factors were found to be insufficient to render the trial fair. The witness, who was one of a number of people present at the scene of a stabbing, was the only one to identify the applicant, and did so only two days after the

223 ECtHR 21 October 2010, *Kornev and Karpenko v. Ukraine*, No. 17444/04, paras. 54–57; ECtHR 8 December 2009, *Caka v. Albania*, No. 44023/02, paras. 112–116; and ECtHR 22 June 2006, *Guilloury v. France*, No. 62236/00, paras. 57–62.

224 ECtHR 27 February 2001, *Luca v. Italy*, No. 33354/96, para. 40.

225 ECtHR, Grand Chamber, 15 December 2011, *Al-Khawaja and Tahery v. UK*, Nos. 26766/05 and 22228/06.

226 Para. 147.

227 Para. 157.

event. His evidence was uncorroborated by any other evidence, and thus was clearly decisive in the conviction of Tahery. Neither the fact that the applicant could have given evidence and/or called others who had been present, nor the fact that the trial judge had warned the jury that they should treat the evidence of the absent witness with care, were sufficient to compensate for the difficulties to the defence resulting from admission of the witness' statement.[228]

Special difficulties occur with regard to anonymous witnesses. The Court has highlighted the dangers of keeping the identity of a witness from the accused and has adopted a prudent and strict attitude towards this.[229] Reliance on anonymous informants at the pre-trial stage is not, in itself, incompatible with ECHR Article 6, but the use in evidence of the statements of such persons may be. In *Doorson* the Court established three criteria to be used in assessing whether anonymous evidence can be used at trial: first, whether there are sufficient reasons for maintaining the anonymity of the witness; second, whether the handicaps encountered by the defence are sufficiently counterbalanced by the procedures followed by the judicial authorities; and third, whether the anonymous evidence provided the sole or decisive basis for the conviction.[230] This should now be read subject to the decision in *Al-Khawaja*.

In relation to experts, where they are appointed by a court, the accused person must be able to attend any interviews held by them or be shown the documents they have taken into account. What is essential is that the parties should be able to participate properly in the proceedings before the trial court.[231] Where an expert is called by the accused person, he/she should receive equal treatment to that accorded to court-appointed experts.[232] The rights regarding examination of witnesses under ECHR Article 6 (3)(d) apply equally to experts, and the ECtHR applies the same principles to the examination of experts as it does to other witnesses. Therefore, if the accused person was not given the opportunity to question an expert either at the pre-trial stage or during trial, in respect of their credibility or their opinion, this may amount to violation of fair trial rights.[233]

228 Paras. 159–165.

229 ECtHR 20 November 1989, *Kostovski*, No. 11454/85, para. 42.

230 ECtHR 26 March 1996, *Doorson v. Netherlands*, No. 20524/92, paras. 70–76.

231 ECtHR 18 March 1997, *Mantovanelli v. France*, No. 21497/93, para. 33, and ECtHR 2 June 2005, *Cottin v. Belgium*, No. 48386/99, para. 32.

232 ECtHR 6 May 1985, *Bönisch v. Austria*, No. 8658/79, paras. 32–33.

233 ECtHR 4 November 2008, *Balsyte-Lideikiene v. Lithuania*, No. 72596/01, paras. 63–66.

7.4 The right to free interpretation and translation of documents

A suspected or accused person who does not speak or understand the language of the proceedings cannot fully and effectively participate in the proceedings, and is clearly at a significant disadvantage.[234] In recognition of this the ECHR Article 6 (3)(e) provides that a person charged with a criminal offence has the right to the 'free assistance of an interpreter if he cannot understand the language used in court'.[235] In addition, ECHR Articles 5 (2) and 6 (3)(a) provide that everyone who is arrested or charged with a criminal offence shall be informed promptly, 'in a language which he understands', of the reasons for arrest and of the nature and cause of the charge against him/her.[236] The interpretation must enable the suspected or accused person to understand the case against him/her and to defend him/herself, in particular by being able to put his version of events before the court.[237] Therefore, the scope of this right under the ECHR is not limited to interpretation of oral statements made at the trial hearing, but also covers pre-trial proceedings, and the translation of relevant documentary material.[238] The right to interpretation and translation is also the subject of the first Directive issued under the EU 'Roadmap on Procedural Rights', the Directive on the Right to Interpretation and Translation,[239] and this articulates the right in more detail than the ECHR and the ECtHR jurisprudence. It should be noted that the rights are not limited to persons who cannot speak or understand the language of the proceedings because their first (or only) language is other than that used in the proceedings, but also potentially includes persons who cannot speak or understand the language because, for example, they have a speech or hearing impediment.[240]

234 ECtHR 19 December 1989, *Kamasinski v. Austria*, No. 9783/82, para. 79, and ECtHR 18 October 2006, *Hermi v. Italy,* No. 18114/02, para. 68.

235 This is also expressed in Art. 14 (3)(a) and (f) ICCPR, and in Art. 55 (1)(c) and 67 (1)(f) of the Rome Statute.

236 See also Art. 67 (1)(a) of the Rome Statute.

237 ECtHR 18 October 2006, *Hermi v. Italy,* No. 18114/02, para. 70.

238 ECtHR 28 November 1978, *Luedicke, Belkacem and Koç v. Germany*, Nos. 6210/73; 6877/75; 7132/75, para. 48; ECtHR 19 December 1989, *Kamasinski* v. Austria, No. 9783/82, para. 74; and ECtHR 18 October 2006, *Hermi v. Italy,* No. 18114/02, para. 69.

239 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. See Chapter 1, Section 4.3.2.

240 Although there appears to be no clear ECtHR jurisprudence on this issue, it follows from the language of the ECHR articles, and is specifically provided for in respect of interpretation in the EU Directive, Art. 2 (3).

The ECtHR has held that judicial authorities are required to take an active approach to determining the need for interpretation or translation.[241] This is taken a step further by the EU Directive on Interpretation and Translation, which not only requires member states to ensure that interpretation or translation is made available where necessary (Arts. 2 (1) and 3 (1)) but, at least in relation to interpretation, requires states to ensure that a procedure or mechanism is in place to ascertain whether a suspected or accused person speaks and understands the language of the proceedings and whether they need the assistance of an interpreter (Art. 2 (4)). Furthermore, a suspected or accused person must have a right to challenge a determination that there is no need for interpretation or translation (Arts. 2 (5) and 3 (5)).

ECHR Articles 5 (2) and 6 (3)(a) clearly require that interpretation or translation of the reason for arrest, and the nature and cause of the charge or accusation, is provided at an early stage of the criminal process, including at the investigative stage. It also follows from the general approach to the meaning of charge that, in principle, the right to interpretation and/or translation under ECHR Article 6 (3)(e) applies from the time that 'official notification [is] given to an individual by the competent authority of an allegation that he has committed a criminal offence' (see Section 3 above). This approach is adopted in the EU Directive on Interpretation and Translation Article 1 (2), but is specified more particularly in respect of interpretation in Article 2 (1) stating that where a suspected or accused person does not speak or understand the language of the proceedings they must be provided with interpretation 'during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings'. Furthermore, interpretation must be made available for communications between a suspected or accused person and his/her lawyer where 'this is necessary for the purpose of safeguarding the fairness of the proceedings (Art. 2 (2)).

With regard to translation, it was held by the ECtHR in *Kamasinski*[242] that not every document has to be translated in written form. Oral interpretation provided by an interpreter or by the defence lawyer will be sufficient as long as the accused understands the relevant document and its implications. For example, the fact that the verdict is not translated is not, in itself, incompatible with ECHR Article 6 provided that the defendant sufficiently understands the verdict and the reasoning

241 ECtHR 24 September 2002, *Cuscani v. UK*, No. 32771, paras. 38 and 39. In this case, the defendant suffered from a hearing impairment.

242 ECtHR 19 December 1989, *Kamasinski v. Austria*, No. 9783/82, para. 85.

thereof. The EU Directive on Interpretation and Translation also limits the documents that must be translated to those 'which are essential to ensure that 'the suspected or accused person is] able to exercise their right of defence and to safeguard the fairness of the proceedings' (Art. 3 (1)). However, it specifically provides that such documents include 'any decision depriving a person of his liberty, any charge or indictment ... ,' and contrary to *Kamasinski*, ' ... any judgement' (Art. 3 (2)). Oral translation, or an oral summary, of essential documents is permitted provided that it does not prejudice the fairness of the proceedings (Art. 3 (7)). Whilst there is no provision for waiver of the right to interpretation in the Directive, it does provide that waiver of the right to translation is possible provided that the suspected or accused person has received prior legal advice or has otherwise obtained 'full knowledge of the consequences of waiver', and that waiver is unequivocal and given voluntarily (Art. 3 (8)).

The ECHR Article 6 (3)(e) provides that, where the right to interpretation applies, it must be provided 'free'. In the case of *Luedicke, Belkacem and Koç* the ECtHR made clear that the term 'free' implies a 'once and for all exemption or exoneration'.[243] Consequently, an accused person cannot be ordered to pay the costs of an interpreter even if they are convicted of an offence.[244] This is also explicitly stated in the EU Directive on Interpretation and Translation: 'Member States shall meet the costs of interpretation and translation resulting from the application of Articles 2 and 3, irrespective of the outcome of the proceedings' (Art. 4).

With regard to the quality of interpretation and translation, the approach of the ECtHR is that the mere appointment of an interpreter or translator does not absolve the authorities from further responsibility. States are required to exercise a degree of control over the adequacy of the interpretation or translation,[245] and judicial authorities also bear some responsibility since they are the ultimate guardian of the fairness of the proceedings.[246] The EU Directive on Interpretation and Translation places primary responsibility for quality on member states, requiring them to take concrete measure to ensure that interpretation and translation is 'of a quality sufficient

243 ECtHR 28 November 1978, *Luedicke, Belkacem and Koç v. Germany*, Nos. 6210/73; 6877/75; 7132/75, para. 40.

244 ECtHR 28 November 1978, *Luedicke, Belkacem and Koç v. Germany*, Nos. 6210/73; 6877/75; 7132/75, para. 46.

245 ECtHR 19 December 1989, *Kamasinksi v. Austria*, No. 9783/82, para. 74, and ECtHR 18 October 2006, *Hermi v. Italy,* No.18114/02, para. 70.

246 ECtHR 18 October 2006, *Hermi v. Italy,* No. 18114/02, para. 72, and ECtHR 24 September 2002, *Cuscani v. UK*, No. 32771, para. 39.

to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence' (Art. 5 (1)). This obligation is bolstered by a requirement that states endeavour to establish a register of appropriately qualified interpreters and translators (Art. 5 (2)), and ensure that there is a procedure by which a suspected or accused person can complain about the quality of interpretation or translation provided (Arts. 2 (5) and 3 (5)). States are also required to ensure that interpreters and translators be required to observe confidentiality regarding any interpretation or translation provided (Art. 5 (3)).

8. Conclusions

In this chapter we set ourselves the objective of seeking to establish standards relevant to effective criminal defence, using as a basis the ECHR and ECtHR case law, and the EU Directive and proposed Directives issued under the 'Roadmap of Procedural Rights'. This is not an easy or straightforward task. At the time of writing, only one EU Directive has been promulgated, and the two proposed Directives have been the subject of intense negotiation between member states and the various organs of the EU (but see Chapter 1, footnote 79). It is, of course, too early for a body of ECJ case law to have been developed. Using ECtHR jurisprudence as a basis for establishing standards suffers from a number of difficulties. In particular, the ECtHR approaches the question of whether procedural rights under ECHR Article 6 have been complied with in the context of the overall right to fair trial. As a result, the fact that certain, specific, procedural right have been violated does not necessarily lead to the conclusion that there has been a breach of the right to fair trial, in particular where the violation has been, or may be, compensated for by other processes or procedures in the particular case. The constituent elements making up the right to fair trial interrelate, so that even where a particular procedural right is being considered, for example, the right to legal assistance, it is considered in relation to other aspects of fair trial, such as the right to silence, the right to participate, and the presumption of innocence. In this context, the specific procedural rights are not normally treated as absolute since they may be weighed against other legitimate interests, such as the proper administration of justice or the interests of others, such as victims or witnesses.

A number of procedural considerations also have an impact on the task of using the ECtHR jurisprudence to establish standards. The case law is, by definition,

'complaint driven' and is dependent on domestic remedies having been exhausted. This has a number of implications. Some rights that we have identified as important elements of effective criminal defence, and that in principle are provided for in the ECHR, have either not been the subject of a decision, because the issue has not been brought before the court, or have only rarely been considered. Since domestic remedies must have been exhausted, the court considers the facts and issues with the benefit of hindsight, normally long after the events concerned. Thus, for example, the question of whether the requirement that a conviction must normally not be based solely or to a decisive extent on statements of witnesses the defence could not test nor challenge, can only be answered after the national court has reached its final verdict. The constituent element of the right to call and question witnesses cannot, therefore, easily be converted into a regulation at the national level that would be helpful in regulating the right of the defence to call witnesses in the course of the proceedings. At most one can deduce from the case law an evidentiary rule that courts should respect when deliberating upon a case.

Of particular significance is that many provisions allow member states a margin of appreciation as to how the fair trial requirements are implemented, a factor that is particularly relevant to the reception and treatment of evidence. It is, therefore, not always possible to define and articulate detailed standards that are operational and/or applicable to all criminal law systems or to particular stages of the criminal process.

To an extent, the ECtHR has developed the way in which it sets out its judgment in a way that is helpful to our task, by including a section in which it expresses its general views on the issue under scrutiny. Sometimes, as in *Salduz* for example, it does so in a very detailed manner.[247] Nevertheless, it is often difficult to discern standards that are, or should be, applicable in all circumstances.

As a result, there are a number of elements of effective criminal defence where neither the ECtHR jurisprudence, nor the EU roadmap instruments, enable standards to be articulated with precision and certainty. In relation to the right to legal assistance, examples include how the right applies to persons who, whilst treated as witnesses, are in fact regarded as suspects,[248] the proper parameters of the role of criminal defence lawyers,[249] and the right of the suspected or accused person or their lawyer to investigate the facts.[250] A particular lacunae concerns the right to legal aid, in respect of which

247 See Section 5.3 above.
248 See Section 5.3 above.
249 See Section 5.7 above.
250 See Section 7.1 above.

there are many uncertainties about the level of means at which a person should be treated as unable to afford legal assistance, the method by which means should be assessed and, in concrete terms, how the interests of justice test should be applied, and what minimum scope of work should be funded by the state in legal aid cases in order that it meets the requirements of effective defence.[251] Other uncertainties relate to what, and when, information should be given to a suspected person about their right to silence,[252] precisely what is required by way of free access to the case file,[253] how prompt should 'prompt production' of an arrested person before a court be,[254] and how much information must be given by way of a reasoned decision.[255]

On the other hand, there are many instances where the ECHR itself, or the ECtHR jurisprudence, is quite clear, at least in terms of the basic elements of certain rights. For example, the information to be given on arrest or detention, and about the charge or accusation, is clearly expressed in ECHR Articles 5 (2) and 6 (3)(a), and has been further clarified by the proposed EU Directive on the Right to Information.[256] The essential elements of the right of a person to defend themselves, and to legal assistance, are articulated sufficiently clearly for the purpose of establishing appropriate standards, and the jurisprudence on when the right to legal assistance arises has developed over recent years so that it can be clearly asserted that it normally applies once there has been a significant curtailment of a person's freedom of action, and during interrogation.[257] It is sufficiently clear that an accused person has a *prima facie* right to release pending trial, as are the criteria that are relevant to the determination of whether that *prima facie* right can be displaced (although not their relative weight), and that the criteria must be applied *in concreto*.[258] Similar conclusions can be drawn in respect of the obligation to provide reasoned decisions (as opposed to the extent of reasoning to be provided),[259] and the right to appeal.[260]

In the case of some rights, whilst the ECHR or the ECtHR case law may be uncertain or lacking in terms of specific detail, the EU roadmap instruments (assuming

251 See Section 5.6 above.
252 See Section 6.1.2 above.
253 See Section 4.3 above.
254 See Section 6.2 above.
255 See Section 6.4 above.
256 See Section 4.2 above.
257 See Section 5.3 above.
258 See Section 6.2 above.
259 See Section 6.4 above.
260 See Section 6.5 above.

that the proposed Directives are adopted) have provided a degree of certainty as to the relevant standards. This is the case in respect of the right to information about rights and, although there are still some uncertainties, the right of access to the relevant material or case file.[261] It is also the case in respect of the right to interpretation and translation, where the EU Directive on Interpretation and Translation has set out in some detail what must be interpreted or translated, and when and how the need for interpretation or translation must be determined.[262] If the proposed Directive on the Right to a Lawyer is adopted in terms that are similar to its draft form, it will be put beyond doubt that a suspect is entitled to have their lawyer present during interrogation, and that they have a right to an active presence. Furthermore, the conditions for waiver, and the circumstances in which the right may be denied, will be set out with a significant degree of clarity.[263]

At the outset of this chapter we asserted that an essential pre-requisite of effective criminal defence in any particular jurisdiction is a constitutional and legislative structure that, as a minimum, complies with the standards established by the ECHR and the jurisprudence of the ECtHR, and with the standards emerging from the EU's programme of legislation on procedural rights for suspects and defendants in criminal proceedings. However, it is commonly accepted that in any jurisdiction there is frequently a significant gap between the law as set out in constitutions, criminal procedure codes and other forms of legislation, and the law as it is put into practice, and as it is experienced by suspected and accused persons. We argue, therefore, that for access to criminal defence to be effective, the legal structure must be complemented by regulations and practices that facilitate and promote those rights. Therefore, the standards concerning effective criminal defence which have been articulated and assessed in this chapter will be used as a basis for examining not only the laws of the five jurisdictions in the study, but also the ways in which those laws are put into practice.

261 See Section 4.3 above.

262 See Section 7.4 above.

263 See Sections 5.2 and 5.3 above.

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PART II

NATIONAL APPROACHES TO EFFECTIVE CRIMINAL DEFENCE

Yonko Grozev

CHAPTER 3 BULGARIA[1]

1. Introduction

1.1 Basic demographic and political information

Bulgaria is a unitary state that, according to the 2011 census, has a population of 7.4 million people.[2] The population consists mainly of ethnic Bulgarians (83.9 per cent), and two sizable minorities, Turks (8.8 per cent) and Roma (4.9 per cent), although experts estimate that the second group is larger than the official figures. Bulgaria has been experiencing negative population growth since the early 1990s, as a result of low birth rates and high emigration.[3] The majority speaks Bulgarian, which is the only official language in all government business. Overall, the level of proficiency of the Turkish and Roma minorities in the Bulgarian language is adequate.[4] While the country has experienced immigration since 1990, the majority of immigrants still see the country as a transit point to the West, and the overall number of those staying for longer periods of time is rather small.[5]

1 This country report has been reviewed by Roumen Nenkov, criminal judge, presently sitting on the Bulgarian Constitutional Court.

2 See Official Census Report at http://censusresults.nsi.bg/Reports/1/2/R7.aspx.

3 In 1989, the population comprised 9,009,018 people, gradually falling to 7,950,000 in 2001 and 7,364,000 in 2011; *ibid*.

4 As the Turkish or Roma languages are used in Turkish and Roma households, proficiency in the Bulgarian language is strongly linked with schooling. As a result of high dropout rates, however, primary and secondary school attendance has been declining, and proficiency in the Bulgarian language along with it.

5 According to the 2011 census, 1.5 per cent of the population belonged to an ethnic group other than the three main ones.

The country, which has been a member of the European Union (EU) since 1 January 2007, was part of the Soviet bloc until 1990, when a process of democratic political reforms started. A special Parliament was elected in 1990 with the purpose of adopting a new, democratic Constitution, which was eventually adopted in the summer of 1991.[6] The new Constitution created a revised framework of government, which included a judicial branch that was recognised as being independent from the other branches of government.[7] According to the Constitution, the Republic of Bulgaria is a parliamentary republic. The Parliament consists of a single chamber whose members are elected for a four-year term. The Constitution expressly stipulates the principle of the rule of law as a fundamental constitutional principle, and lays down the basic constitutional rights, including the right to a fair trial and the prohibition of retroactive criminal laws.[8]

The then-existing fears of politically motivated prosecution lead to the Constitution providing exceptionally strong guarantees for independence, not only for judges and the courts but also for prosecutors and investigators. Under the Constitution, they are all governed by the Supreme Judicial Council, which consists of 25 members, of which three are members appointed by law and the rest are elected.[9] One half of the 22 elected members are elected by judges, prosecutors and investigators, and the other 11 by Parliament. The new Constitution granted judges, prosecutors and investigators identical status, with respect to their guarantees for independence. They all have tenure and all decisions regarding their appointment, promotion and discipline are made by the Supreme Judicial Council on the basis of the same regulations.

While this constitutional set up clearly has empowered the justice system *vis-à-vis* the political branches of government, it has not had the desired effect of guaranteeing equal justice. The system is criticised widely for a lack of transparency and accountability. There is a wide perception among the general public of corruption

6 Constitution of the Republic of Bulgaria, *State Gazette* No. 56 of 13 July 1991; Constitutional Court Judgment No. 7/2006, *State Gazette* No. 12 of 6 February 2007.

7 Article 8 of the Constitution proclaims the principle of separation of powers by stating that: '[T]he power of the state shall be divided between a legislative, an executive and a judicial branch'. The principle of the independence of the Judiciary is enshrined in Article 117, paragraph 2 of the Constitution, which provides: 'The judicial branch shall be independent. In the performance of their functions, all judges, prosecutors and investigators shall be subservient only to the law'.

8 See Article 4, paragraph 1 of the Constitution of the Republic of Bulgaria, *State Gazette* No. 56 of 13 July 1991.

9 The three members of the Council appointed by law are the Presidents of the Supreme Court of Cassation and the Supreme Administrative Court, and the Prosecutor General.

within the judicial system.[10] While there is sufficient, reliable information suggesting that corruption is a pressing issue, accountability mechanisms, both at the individual and institutional level, do not function effectively.[11]

1.2 General description of the criminal justice system

Historically, the modern Bulgarian criminal justice system was created as an inquisitorial one, influenced by the Napoleonic Code.[12] It developed after the creation of the modern Bulgarian state at the end of the 19th century, with the gradual adoption of new substantive and procedural laws.[13] Between 1945 and 1989, the Soviet Union was a major source of influence. However, following the collapse of the communist regime in 1989, the criminal procedure has undergone a number of substantial changes. The historically inquisitorial system, with an emphasis on the investigation stage, started to develop into a more adversarial one. These changes have been the result of a number of judgments of the European Court of Human Rights (ECtHR), and a more general willingness within the legal profession to change the system towards providing better guarantees for the rights of criminal defendants.

Changes to the system were introduced both through amendments to the Criminal Procedure Code (CPC), as well as an increased willingness of the national

10 According to the annual corruption perception reports of Transparency International, the justice system is perceived by the public as the most corrupt government agency. A full 76 per cent of the Bulgarian public perceive the judicial system as corrupt, with police and customs second. To a certain extent, these perceptions might be the result of higher media coverage of corruption in the judicial system. According to poll regarding actual bribe giving, carried out by a polling agency BBSS Gallup International for Transparency International, the number of reported incidents of actual bribery of someone in the judicial system comes third, at 10.4 per cent of those polled, with a higher percentage of individuals reportedly giving a bribe to police (15.4 per cent) and to customs officers (10.7 per cent); see Transparency International, Global Corruption Report 2010, and also 'За обществото съдебната система продължава да е най-корумпирана', http://www.mediapool.bg/за-обществото-съдебната-система-продължава-да-е-най-корумпирана-news173572.html.

11 In one telling case, a prosecutor's telephone conversation with a criminal defendant was tapped, with the prosecutor asking for a bribe. The case initially was covered up and when the story later became public, no disciplinary action was taken, as the statutory time limit for disciplining the prosecutor had elapsed.

12 This influence was not necessarily direct, but rather followed the route of adoption of legislation from other countries, including initially the Ottoman Empire, and later Russia and Hungary, among others; see Mihaylov 1996, p. 60.

13 *Ibid*.

courts to apply the European Convention on Human Rights (ECHR) directly, or interpret domestic legislation in compliance with the Convention. The most significant amendments to the CPC took place in 1999, following several judgments of the ECtHR criticising the pre-trial detention procedure. While prompted by the need to change the pre-trial detention process, the 1999 amendments took a more general approach of bringing the CPC into line with the ECHR. These amendments limited the admissibility of oral evidence collected at the pre-trial stage, introduced a *habeas corpus* procedure, transferred the power to order pre-trial detention from the prosecutor to the courts, created strict time limits for the length of pre-trial detention, and introduced some guarantees against excessively lengthy proceedings.

The law introduced also the right to legal aid for indigent criminal defendants, and transferred the power to order searches, seizures and surveillance from the prosecutor to a judge. Expedited proceedings and plea-bargaining were also introduced into the CPC in 1999. Further changes were introduced with the adoption of new legal aid legislation in 2005, transferring the management of legal aid from the courts and investigation authorities to the National Legal Aid Bureau, a newly created institution. The power to determine which individual lawyer acts under the legal aid system for a specific defendant, which until 2005 was exercised by the investigators and the judges, was now given to the bar associations. The total legal aid budget was also increased.

Since 2005, however, attention has shifted from guaranteeing a fair trial and criminal defence rights towards the effectiveness of the system. In 2005, a new CPC was adopted, detailing further some procedures created by the 1999 amendments, and creating new procedures aimed at making the system more effective. The abridged trial proceeding was newly introduced. The expedited proceedings and plea-bargain procedures were regulated in more detail.

There has also been a growing recognition of the fact that the criminal justice system is ineffective and has been particularly inept in tackling organised crime and corruption. This was the primary concern during the latter stages of the process of EU accession, and also following accession. As a result, a special monitoring mechanism was established by the EU in 2007 through which the progress on issues relating to the investigation and prosecution of organised crime has been closely monitored. The overall assessment of the system flowing from EU monitoring and independent observers, as of today, is still rather negative.[14]

[14] See European Commission *On Progress in Bulgaria under the Co-operation and Verification Mechanism*, 20 July 2011, at http://ec.europa.eu/dgs/secretariat_general/cvm/docs/com_2011_459_en.pdf.

Both domestic concerns about corruption and organised crime and increased pressure from the EU have meant that the issue of effective criminal law enforcement has become a top political priority. Fair trial and criminal defence rights have clearly lost their prominence and, to a certain extent, the ineffectiveness of the system, at least according to some politicians and observers, was seen as the result of excessive protection of criminal defence rights.

As a result, some amendments to the CPC adopted in 2010 were clearly aimed at limiting defence rights. Rules on the admissibility of oral evidence collected during the investigation were made less stringent, the appointment of an *ex-officio* lawyer, to prevent the adjournment of a hearing where the hired lawyer would not appear, was introduced, and a procedure, initially aimed at limiting excessively lengthy investigations, was repealed.[15]

As a rule, the various legal reforms were introduced without substantial research into the way the system actually functions, and the expected effect of such reforms. The general lack of both research and reliable data on the functioning of the criminal justice system is an issue that affects negatively both the quality of the legislation and the policy debate. Decision-makers tend to change legislation on the basis of their intuitive perceptions as to how the system works and what its major problems are. This readily results in rapid changes stemming from political changes in government, subsequently affecting the quality of long-term policies in the area.

The lack of data and research is easily explained by institutional self-interest. There is also no tradition of vigorous academic research in the country in general, and no research on the way the criminal justice system works in particular. The available statistical data is also not extensive. As a rule, the different institutions with a role in the criminal process – the police, prosecution and courts – provide rather limited statistical data that is often not comparable. The activities of those criminal science units that used to exist within the police and prosecution were also limited. As of late, this void has only partially been filled by a few independent organisations with an interest in the functioning of the justice system.[16]

15 This procedure allowed a criminal defendant to force the prosecution after two years of investigation to either file an indictment with the court or drop charges.

16 Among those few organisations are the Centre for the Study of Democracy, which has carried out victim studies and other research related to crime levels and the work of the different institutions in the criminal justice system, and Risk Monitor, an organisation with an interest in organised crime and corruption. Research from a criminal defence rights point of view has been carried out by the Open Society Institute–Sofia, the Bulgarian Helsinki Committee and Bulgarian Lawyers for Human Rights.

One aspect of the functioning of the criminal justice system that has attracted relatively little research and policy attention is the fact that the Roma minority is significantly overrepresented both among criminal defendants and the prison population of the country.[17] According to the available data, in 2002, about 38 per cent of prisoners were identified as Roma, which corresponded to the official 40 per cent Roma, out of all individuals convicted in 1999.[18] At the same time, according to police statistics, Roma suspects accounted for approximately 20 per cent of investigated crimes.[19] This significant over-representation of Roma in the criminal justice system mirrors a similar pattern of disenfranchisement in other spheres, like education, employment and housing.[20]

1.3 The structure and processes of the criminal justice system

1.3.1 The criminal justice process

As noted above, the Bulgarian criminal process has historically followed the inquisitorial tradition. This approach was strongly pronounced at the time of the communist regime. The investigation was the crucial stage in the development of the proceedings, with the trial acting more like a quality control check on the investigation, rather than performing a full and independent collection and analysis of the relevant evidence. As

17 The European Roma Rights Centre, 'Profession: Prisoner – Roma in Detention in Bulgaria', http://www.errc.org/cms/upload/media/00/12/m00000012.pdf.

18 See Bulgarian Helsinki Committee 2002, pp. 62 and 63. The percentage of Roma out of the prison population is calculated on the basis of data for ten out of 12 prisons and the percentage of those convicted is according to official statistic information of the National Statistics Institute. The 2002 data protection legislation prohibited the collection of data on ethnicity. This earlier data, however, represents a general picture of significant over-representation of Roma, which most likely has not changed significantly.

19 Roma are overrepresented in property crimes, burglary and theft and underrepresented in other crimes. The demographics of the group goes a long way towards explaining the higher representation of Roma among police suspects, as the Roma have a much higher percentage of men in the 15–30 age group, see http://www.capital.bg/blogove/pravo/2007/03/26/322284_romite_i_prestupnostta_policeiska_statistika_i/.

20 Roma face significantly higher unemployment, and a lack of education and professional skills, which result in overall social exclusion and poverty. The extent to which ethnicity plays a role in the overrepresentation of Roma in the criminal justice system is debatable, as a lack of financial resources, as well as low education and sometimes poor command of the Bulgarian language, inevitably affect negatively their ability to defend themselves in criminal proceedings and to receive quality legal representation.

a result of the democratic changes in the 1990s, as well as a number of judgments of the ECtHR, the system was deliberately moved towards a more adversarial process, limiting the importance of the pre-trial stage and placing a greater emphasis on the independent collection of evidence at trial. Pre-trial detention was brought into line with international standards, moving the power to order pre-trial detention from the prosecutor to the judge, and introducing an adversarial bail hearing. The power to issue warrants for searches and surveillance was also given to the courts.

Other relevant issues involved in this transformation were the degree to which defendants and victims were allowed to participate in the pre-trial stage, and the extent to which oral evidence, collected in the course of the investigation, could be admitted as evidence at trial. The type of procedural violations, for which a case could be sent back to the investigation stage, was also limited.[21]

While a consensus has largely been reached in support of this transition, the process has not been uncontroversial. There have been significant objections to the lost powers of the prosecution to order pre-trial detention, searches and electronic surveillance, and concerns about the plea bargain and other expedited proceedings, both from the perspective of the defendants and victims. The practical implications of those changes, and the degree to which the system follows its basic premises, are also unclear. One of the basic principles on which the system is built requires the investigation to collect evidence both for and against the accusation. In practice, investigations are clearly one-sided. Both the overall change towards a more adversarial approach, and the political pressure on the police to record successes in the fight against crime, have brought about a more assertive investigation.

The right of defendants to request investigation has been effectively limited. While the accused has the right to request the collection of specific evidence, it is up to the investigating authority to allow or refuse such motions, and lawyers interviewed for this report[22] have noted a clear reluctance of the investigating authority to do so.

21 Instead of sending the case back to the investigation for any procedural violation, the Supreme Court of Cassation has now limited that remedy only to situations where there has been a violation of the rights of the accused. The court has ruled that any violations committed in the process of collecting evidence should result in the exclusion of the evidence, rather than sending the case back from the court to the investigation stage; see Interpretative Decision No. 2 of 2002 of the Criminal College of the Supreme Court of Cassation.

22 For the purposes of this report, detailed interviews were made with nine judges at the trial and appeal courts, one judge at the Supreme Court of Cassation, 10 criminal defence lawyers, and one police investigator, in the period July–September 2011, in Sofia, Plovdiv and Veliko Turnovo.

This movement towards a more adversarial approach in the investigation has not been balanced, however, with an increased possibility for the defence to collect evidence on its own, or the introduction of specific disclosure rules. The use of private detectives for the collection of evidence is practically unknown and, apart from the questioning of witnesses, there is little other new evidence that could be presented by the defence at trial.

Once an indictment is filed with the court, the proceedings are based on the principle of adversarial proceedings. The two parties to the proceedings have equal rights and must be treated equally by the court. The centrality of the trial stage has also been affirmed by legislation and various interpretative rulings of the Supreme Court since the mid-1990s. These affirm that the defendant and the prosecutor participate in the case as two parties with opposing interests, both of them having the same rights in the procedure. The other fundamental principle is that only evidence collected or verified during the trial can be taken into consideration in delivering the verdict and the sentence.[23]

There are still elements of the inquisitorial tradition present during the trial stage, however, since the judge remains rather active, both as a matter of law[24] and as a matter of persisting legal culture. This active role presents itself in the judge's role in taking the initiative with respect to the collection of evidence. The judge cannot just limit him/herself to ruling on the basis of the evidence presented, but is required by law to 'establish the objective truth'.[25] Thus, judges must and in fact do undertake investigations to establish certain facts, where there are indications that circumstances important for properly deciding the case have not been clarified. Interviews held for the present research suggest that this is a significant part of judges' role in the process, particularly at the lower level courts. Judges would often call witnesses on their own initiative and request expert opinions.

The majority of judges interviewed agreed that, particularly in cases involving less serious crimes, both the prosecution and the defence could often be quite passive, requiring the judge to lead the case. Judges could be searching for evidence that could potentially help in some cases the prosecution or in other cases the defence, depending

23 For evidence collected in the pre-trial proceedings to be admitted at the trial, an express ruling of the court is required.

24 CPC, Section 13 (1).

25 *Ibid*.

on the specifics of the case.[26] This enhanced judicial role has to be considered against the background of a system that, according to the interviewed defence counsel, is biased in favour of the prosecution.[27]

Other aspects of the proactive role of judges in the process have, however, been limited. In the past, procedural violations during the pre-trial stage would more often lead to a ruling by the court to send the case back to the investigation stage, rather than a refusal to admit evidence. Courts would also influence the charges, sending the case back to the investigation stage with specific instructions. As a result of both the legislative changes and the case law of the Supreme Court,[28] judges can no longer influence the charges and, except where the rights of the criminal defendants were violated, procedural violations at the pre-trial stage would lead to exclusion of the evidence collected in violation of the procedure, rather than sending the case back to the pre-trial stage.

1.3.2 Stages of the criminal process

The criminal process is governed by the CPC, although some minor issues are regulated by legislation governing police work (the Ministry of Interior Act) and the judicial system (the Judicial System Act).[29] The formal stages of the criminal process are the pre-trial investigation, the trial and the two levels of appeal. The pre-trial investigation is conducted by a police officer with investigating powers (разследващ полицай),

[26] There is no available research on either how often judges exercise such investigative powers in the trial or the degree to which the exercise of such investigative powers is unbiased.

[27] This is an opinion commonly expressed by defence counsel, repeated also in interviews made for this report and supported by anecdotal evidence, rendering it overall credible. The extent to which the system is biased in favour of the prosecution, however, is difficult to assess. The fact that more than 95 per cent of indictments end in guilty verdicts, and for some regions like Plovdiv that percentage is even higher, is often cited in support of that view. This fact alone, however, is not sufficient for such a conclusion. A high conviction rate could also be interpreted as evidence of a policy of prosecuting only straightforward cases with strong evidence. The view that the prosecution is shunning more difficult investigations, particularly relating to economic crimes, has also been expressed by a number of interviewees.

[28] See CPC, Section 287 and Тълкувателно решение No. 2/7 October 2000 г. по н. д. No. 2/2002 г. на Върховния касационен съд - Общо събрание на Наказателните колегии (Interpretative Decision No. 2 of 2002 of the Criminal College of the Supreme Court of Cassation).

[29] Criminal Procedure Code, *State Gazette* No. 86 of 28 October 2005, Ministry of Interior Act, *State Gazette* No. 17 of 24 February 2006; Judicial System Act, *State Gazette*, No. 64, 7 August 2007.

with some limited exceptions where the investigating authority is an investigator (следовател).[30] Before the adoption of the new CPC in 2005, investigators were conducting a much larger part of the investigation, with the police having the dual function of assisting the Investigation Services in investigating serious crimes, even without having the formal power to do so, and acting as the investigating authority competent to investigate the majority of minor crimes.[31]

The changes to the CPC in 2005 were not entirely seamless, since the police had a limited number of investigators, and their workload increased dramatically. Their number has significantly increased in 2011, after Parliament adopted legislative amendments in 2010, giving investigative powers to a larger number of police officers and giving prosecutors the power to assign more investigations, particularly complicated ones, to investigators within the Investigative Service.[32]

Prosecutors effectively have a monopoly over bringing charges in court,[33] as well as having the power to supervise every investigation. The criminal justice system is governed, at least in theory, by the principle of mandatory prosecution: prosecutors may refuse to prosecute only if the alleged act is not a crime, the statute of limitations has run, the potential defendant could not be otherwise held criminally liable, or there is insufficient evidence to prove the charges.[34] Prosecutors do have limited discretion in deciding whether or not to prosecute if an act that otherwise constitutes a criminal

30 The Constitution originally entrusted investigation to the Investigation Service, which was part of the judicial system, with investigators enjoying the same status as judges and prosecutors in terms of tenure, appointment, promotion and discipline. This arrangement was criticised as duplicating the work of the police and thus being inefficient. As a result of pressure from the EU, the role of the Investigation Service was significantly limited, initially in 2001, and then still further in 2006.

31 Until 1999, the police did not have formal investigative powers, but instead conducted investigations under the direction of the Investigation Service. The 1999 criminal procedure reform transferred the majority of investigative work to the police and closed the regional investigation services, leaving the Investigation Service in charge of serious crimes. The 2006 CPC made almost all investigations the responsibility of the police, including those relating to more serious crimes; see CPC, Section 194, detailing the crimes for which the police investigators are competent and the crimes for which investigators with the Investigative Service are competent.

32 CPC, Section 194 (1) 4.

33 For a very limited number of crimes, the victim also has standing to bring charges in court. These are minor bodily injuries, certain injuries between close relatives, and criminal libel; Criminal Code, Section 161 paragraph 1, *State Gazette*, No. 26 of 1968.

34 CPC, Section 24 (1).

offense is of 'minor importance' and presents a 'low threat to public order'.[35] There are no general guidelines and no research on how these more discretionary powers are exercised by the prosecution.

By law, the pre-trial investigation is under the supervision of the prosecutor, who has the power to give mandatory instructions and even undertake investigation directly.[36] Under the 2006 CPC, police are obliged to inform the prosecutor within 24 hours of any criminal investigation that has been opened.[37] In the majority of cases, however, except for the large and complicated investigations, the police are performing the investigation with little supervision.

Once the investigation is finalised, the prosecutor would receive the case file, and could either send it back for further investigation, or draw up an indictment. In the latter case, the trial court would then hear the case. After the trial, there are two levels of appeal. At the first level, the court would review both the facts and the law, and could collect additional evidence. The cassation appeal, before the Supreme Court of Cassation, is an appeal only on points of law.

The pre-trial stage and investigation each start with a formal ruling of the investigating authority to open an investigation, or with some specific investigative action, like a search or questioning of a witness or the accused.[38] The CPC lays down specific requirements for an investigation to be opened, most importantly, that there

35 Under the law, '[a]n act is not a crime, even if it formally meets the description of a crime, if it is insignificant and a minor threat to public safety and order'; Criminal Code, Section 9 paragraph 2, *State Gazette* No. 26/1968. As a consequence of the principle of mandatory prosecution, legal theory would deny that this is discretionary power, rather taking the position that, by law, the act is not a crime. In fact, it is a discretionary power not to prosecute, but one that prosecutors do not often use. A refusal to prosecute would more likely be justified by lack of evidence that a crime was committed, without specifying legal grounds. There is no available statistical data on how often, or on what grounds, the prosecution drops cases. No publicly accessible data exists on the number of decisions that are taken not to prosecute, with official data published by the Prosecution Service only giving an overall number of pre-trial proceedings decided.

36 CPC, Section 46 (2).

37 See CPC, Section 212 paragraph 3, *State Gazette*. No. 86/2005 (effective as of 29 April 2006). This requirement was designed to overcome the lack of cooperation between prosecutors and police and to guarantee acceptable evidence from the start. The lack of sufficient involvement by the prosecution service in the investigation was seen as a significant issue, and has been criticised by the EU. This reform goes against the established institutional culture, however, and prosecutors have been heavily involved in the investigation only in more difficult case, like organised crime and corruption.

38 CPC, Section 212.

is 'sufficient information' regarding a (possible) crime.[39] The initial police arrest of someone suspected of having committed a crime, which could extend for up to 24 hours, is technically not part of the pre-trial stage. There are a variety of grounds on the basis of which the police could arrest someone for up to 24 hours, including due to 'evidence that the person has committed a crime'.[40]

While the police often interview suspects at this stage of the proceedings, and even take statements in writing from suspects in the majority of cases, the 24-hour police arrest is not considered to be part of the criminal process. Technically, the written statements collected from the suspect at that stage are inadmissible as evidence, but they are still included in the case file and remain there for the entire duration of the criminal proceedings. After the first 24 hours of police detention, a suspect could be further detained by a decision of the prosecutor, but only if charged by the investigating authority. The prosecutor would then need to file a request for pre-trial detention with the courts no later than within the following 72 hours.[41]

When the prosecutor is not satisfied that there is 'sufficient information' to justify the opening of an investigation, he/she could order the investigating authority to carry out a preliminary inquiry (предварителна проверка), without opening a formal investigation.[42] Evidence collected in the course of such an inquiry is not, however, admissible at trial.

Once an investigation is opened, it must conclude within two months. If the case is complex, that time limit could be extended by up to four months by a higher prosecutor and, in exceptional cases, extended even further by another prosecutor who is a step higher in the prosecutorial hierarchy.[43] If it is reasonable to suspect that a specific person has committed a criminal offence, the prosecutor or the investigating authority shall interrogate the suspect. The suspect could be questioned either as a witness, or as a defendant.

39 CPC, Section 207 (1).

40 Ministry of Interior Act, Section 63 (1) 1.

41 The CPC, Section 64 (2) clearly states that the accused should be brought before a judge 'immediately', and that the prosecution should order detention up to 72 hours only where there are objective difficulties to immediately bringing the suspect before the court. However, the law has been misinterpreted to introduce *de facto* a separate step in the process, namely detention ordered by the prosecutor for up to 72 hours.

42 Judicial System Act, Section 145 (1) 2 and 3.

43 CPC, Section 234 (3).

Where the suspect was questioned as a witness, his/her testimony would not be admissible evidence, if later he/she is charged and indicted. Still, the record of those statements, like the suspect's statement in writing given to the police, remains in the case file, and every person dealing with the case would have access to it. The assumption is that the courts would be able to discard such inadmissible evidence when deciding on the guilt of the defendant. The question whether such evidence does influence the decision of the court, despite being formally inadmissible, has never been studied.

From a criminal defence perspective, the bringing of charges against the suspect is a key step in the development of the investigation. While the investigation might have started before that moment, and a specific person might have even been suspected of having committed the investigated crime, that suspect has no rights guaranteed by law, unless he/she is charged.[44]

The law mandates the investigating authority to bring charges against a person, if a 'well-grounded suspicion'[45] arises that this particular person has committed a criminal offence. The law instructs the investigating authority to draw a charge sheet, informing the suspect of the nature of the suspicion and legal ramifications of the charge, and to present it to the criminal defendant prior to their interrogation. The charge sheet should contain details of *inter alia*, the crime, its legal characterisation, and some information about the available evidence.[46]

Bringing charges against someone is a pre-condition for their detention beyond the 24-hour police detention. To the extent that a suspect (заподозрян) has certain rights, these are described by law as rights of a person who is arrested by the police for 24 hours, or as the rights of a witness.[47] Once a suspect is charged, he/she is referred to by law as the accused (обвиняем) at the investigation stage, and as the 'person tried' (подсъдим) at trial. As from the moment charges are brought against a person,

44 A 'suspect' (заподозрян) is not a legally defined term, although it is used to indicate a person who the police suspects of having committed a crime, but who has not yet been charged. The investigation file might indicate that the investigation is carried out against an unknown perpetrator, or against the suspect, despite the fact that he/she has not been charged.

45 The CPC uses two different terms to set the legal standard for when a suspect should be charged, namely, when 'sufficient evidence proving [the suspect's] guilt has been collected (Section 219 (1)) and 'the presence of a well grounded suspicion that the accused has committed a crime' (Section 63 (1)).

46 See CPC, Section 219 (3) 1–5.

47 Ministry of Interior Act, Section 63 (1) and CPC 122.

the CPC guarantees his/her rights, the details of which the defendant is informed in writing in the charge sheet.[48]

While there is no express recognition of a 'letter of rights', the law obliges the investigating authority to inform the criminal defendant of his/her rights at the time of charging him/her.[49] Both as a legal requirement and as a practical matter, the information is also provided in writing, as it is written down on the charge sheet, a copy of which the accused receives.[50] Among the rights to be listed are the right of the accused to learn the nature and cause of the charges, the evidence on which it is based, the right to testify or remain silent, the right to have a lawyer or to request the appointment of a lawyer *ex officio* if he/she cannot afford one, the right to read the investigation file, and the right to make motions and appeals. There is no express warning, however, that anything the criminal defendant says or provides may be used as evidence against him/her.

The police officers entitled to carry out an investigation have the power to conduct most investigative actions without any authorisation. For certain investigative actions, however, like searches and seizures and electronic surveillance, they need a court warrant.[51] After all the relevant evidence has been collected, the investigating authority should present the investigation file to the defendant, who can make objections and file motions for further collection of evidence. The prosecutor could refuse to follow those motions.[52] Once such additional investigation is carried out or refused, the investigating authority drafts an opinion in writing, with a list of the available evidence and some additional information on the development of the proceedings up to this point.[53] The case is then forwarded to the prosecutor, who would decide whether additional investigation is needed and, eventually, whether to indict the defendant or not.

Where the prosecutor is satisfied that the charges are backed by sufficient evidence, he/she would draw up an indictment and file it with the court along with the whole case file. The second stage in the proceedings, the trial stage, is thus opened.

48 Section 94 of the CPC describes as identical the rights of the 'accused' and the 'person tried'.

49 Section 55 (1) of the CPC enumerates the rights of the criminal defendant, and Section 219 instructs the investigating authority to inform the person charged of those rights.

50 See CPC, Section 219 (3) sub-paragraph 6, which requires that the basic rights of the defendant be included in the charge sheet.

51 CPC, Section 174.

52 CPC, Section 229 (3).

53 CPC, Section 235.

The defendant receives the indictment from the court and the court will have to decide in camera all preliminary issues, in preparation for the trial. One of those issues is the appointment of an *ex officio* lawyer, if the grounds for mandatory defence have arisen at this stage of the proceedings.

The court has the power to send the case back to the investigating authority, if it finds that the rights of the defendant were infringed during the investigation.[54] If the case proceeds to trial, a trial will be scheduled, with the court summoning the defendants, the prosecution, victims, witnesses and expert witnesses. Following the trial, there are two levels of appeal, the first level of appeal is on both facts and law, and the second, the cassation appeal, is only on points of law.

There are several different courts before which the trial could take place. Which court will hear the case depends on the type of crime and, in some cases, the professional position of the defendant. In 2010, the law also introduced specialised courts for trying cases of organised crime. Trials take place either before the district courts (районни съдилища), the regional courts (окръжни съдилища) or the military courts, which are competent to hear charges against army and police personnel.[55] The district courts sit in cases of less serious crimes, with an appeal available before the regional courts and a cassation appeal before the Supreme Court of Cassation.

In more serious crimes, the regional courts, the military courts or, as from 2012, the specialised court for organised crime, would act as the trial court, with an appeal before the respective appellate court and a cassation appeal, again, before the Supreme Court of Cassation. There are detailed rules that describe the types of crimes that fall under the jurisdiction of the district or respectively regional, military or specialised courts.

The appeal courts review both issues of fact and law and can collect new evidence. The decision whether to allow new evidence depends on whether such evidence is relevant and would contribute towards 'deciding correctly the case'.[56] The Supreme Court of Cassation (SCC)[57] is the last level of appeal, reviewing appeals on points of law from appeal judgments of the regional courts and the appellate courts. The SCC

54 CPC, Section 249.

55 The trial court sits as a panel of one judge, one judge and two lay judges, or two judges and three lay judges, depending on the crimes with which the defendant is charged. In the course of administering justice, the professional judge and the lay judges have identical rights and obligations.

56 CPC, Section 327 (3).

57 Both the appeal and cassation appeal courts sit as panels of three judges; CPC, Section 28.

can change a guilty verdict, or send the case back to a certain stage of the proceedings, which it would do if it determines that some procedural violations have taken place at that stage, or where it disagrees with a not guilty verdict, giving specific instructions as to the correct interpretation of the law. The SCC also performs the function of creating binding case law through its interpretative decisions.

1.3.3 Expedited hearings and guilty pleas

Expedited proceedings and proceedings based on a guilty plea were introduced into the CPC for the first time in 1999, and further developed in 2005. While initially there were criticisms and concerns about any deviation from a fully-fledged trial, these proceedings have quickly become an important part of the system. They allow for speedier resolution, particularly of less serious offences and, at present, about 32 per cent of criminal cases ending in a criminal conviction are dealt with through expedited proceedings, with 28 per cent decided through a plea bargain.[58]

There are two types of expedited proceedings: fast track proceedings (бързи) and immediate proceedings (незабавни).[59] Expedited proceedings do not require a guilty plea by the defendant. Defendants do not benefit from these proceedings apart from the speedy resolution of the case, and have no influence on the decision as to whether the procedure will be applied. The aim is for a more timely resolution of the case, requiring all those involved in the proceedings – the investigating authority, the prosecutor, the court and the defendant – to act in the rather tight time frame established by the statutory deadlines.[60] Where the investigation cannot be finalised within these strict time limits, the prosecutor can always decide to switch to the regular track for criminal proceedings.

58 Prosecution of the Republic of Bulgaria, 2009. *This percentage excludes criminal proceedings that ended with an administrative, rather than criminal sanction.*

59 The statutory pre-conditions for the expedited proceedings are; (1) the suspect was arrested at the crime scene; or (2) immediately after the crime was committed; or (3) the existence of strong eyewitness testimony; or (4) the admission of guilt by the suspect; see CPC, Sections 356 (1) and 362 (1).

60 The investigating authority has to finalise the investigation within seven days (fast track proceedings) and three days (immediate proceedings) respectively. The prosecutor has to rule on whether to indict within three days or the same day, and the court has to schedule a hearing within seven days, providing the defendant with the opportunity to file a statement in writing within three days. The deadline for filing an appeal is also shorter, namely seven days; CPC, Sections 356 (5), 357 (1), 358 (3), 362 (5) and 363 (1).

The application of expedited proceedings is pre-conditioned on the strength of the evidence against the defendant, but may still involve a contest with regard to the evidence. These proceedings are usually applied with respect to less serious crimes. Interviews conducted for this report did not suggest any specific concerns about effective criminal defence that could be attributed to the strict time limits envisaged in the proceedings.

The plea bargain procedure was introduced in 2000, and the abridged hearing in 2005. The plea bargain is based on an admission of guilt, and the abridged hearing on the acknowledgment of certain facts, as a result of which the law expressly provides for a reduced sentence. The abridged hearing (съкратено съдебно следствие) is conditioned on an express acknowledgment by the defendant of certain facts, by not challenging evidence collected in the course of the investigation.[61] The incentive for the defendant to admit the facts on which the prosecution relies is a reduction by one-third of the sentence provided for by law.[62] The defendant must be represented by a lawyer, if he/she pleads guilty, regardless of whether a lawyer is mandatory in the proceedings.

Mandatory representation is also required for the plea bargain, which has become very widely used since its introduction. At present, close to 30 per cent of criminal proceedings[63] are dealt with through a plea bargain. It is based on a guilty plea, which is incorporated into an agreement in writing reached between the prosecutor and defendant that covers the crime, the verdict and the sentence. The prosecutor and defendant may agree on a sentence that is lower than the minimum sentence provided by law for the specific crime. As in the guilty plea proceedings, the defendant must be represented by a lawyer, regardless of whether a lawyer is mandatory on other grounds.

The written agreement will then be submitted to the court for an approval. The court will hold a hearing, a key aspect of which is an examination of whether the defendant genuinely pleaded guilty and understands the plea bargain agreement.

61 The defendant could thus waive his/her right to cross-examine certain witnesses, while still cross-examining others; see Section 271 of the CPC.

62 Initially, the law provided for a greater reduction of the sentence, but that was changed in 2010; see Section 373 of the CPC and Section 58a of the Criminal Code.

63 In 2009, 28.6 per cent of criminal cases ending in a criminal conviction were dealt with through a plea bargain.

The court could reject the agreement if it is 'contrary to the law and morals'.[64] A plea bargain approved by the court has the effect of a verdict and sentence, which becomes effective immediately. There are no official statistics available as to how often the courts refuse to approve plea bargains. The particular judge's workload is clearly a factor in the level of scrutiny to which a specific plea bargain is subjected. Those judges interviewed for this report were readily able to provide examples of cases where plea bargains were refused by the courts, due either to insufficient evidence or a lack of proper legal characterisation.

1.4 Levels of crime and the prison population

There have been no overall significant changes in registered crime levels over the last decade. Crime levels trended downwards between 2005 and 2007, and have been rising slightly again in 2009/2010. The downward trend has been explained by researchers as the result of socio-economic factors and demographics, namely a significant drop in the number of men in the age range 18–30.[65] A rise of recorded crime levels of 6.5 per cent in 2009 compared to 2008 was largely in property-related crime, with observers suggesting that the economic crisis was the principal reason. Since the 1990s, the country has experienced a high level of contract killings.

The basic measure of crime levels is crimes registered by the police. There are some concerns about the accuracy of this, as not every crime reported by the pubic is registered by the police. The police perceive the number of registered crimes to be a key indicator of their performance, both as a measure of overall crime levels, and in any calculation of the percentage of crimes solved. For that reason, there is strong institutional pressure for the police not to register every crime reported by the public. While crimes registered by the police are the most common source of information as to the level of crime, one independent organisation, the Centre for the Study of Democracy, has since the late 1990s begun to carry out victim studies. These have provided valuable information on both the level of crime and the reliability and accuracy of police statistics.

According to available statistics, there were 123,196 registered crimes in 2009 and 113,340 in 2008. This equated to 1,620 registered crimes per 100,000 people for

64 CPC, Section 382 (7).

65 Bezlov, Gounev and Gerganov 2010, p. 7.

2009, compared to 1,483 for 2008. The basic types of crimes followed by the police are theft/burglary (63,455), driving-related crimes (19,022), car theft (4,470), drug crimes (3,662) and robberies (3,596). The recorded murders for 2009 were 144 and attempted murders 66.[66]

Victim studies have revealed a rather different picture, with a 2010 study by the Centre for the Study of Democracy using the ICVS methodology, reporting that only one in five crimes are being reported/registered by the police.[67] With respect to property crimes, this ratio has been reportedly one in two.

Official data on the prison population is provided by the prison administration. The total number of prisoners has declined significantly since 1999, following major legislative reform aimed at reducing the excessively high use of pre-trial detention. As from 2008, there has again been some growth of the total number of pre-trial detainees. Overcrowding is a significant concern. While several governments have had plans to build new prisons, a lack of funding has prevented these from going forward. Instead, a broad amnesty was passed in 2008, allowing for a reduction of the total prison population.

Table 1.
Detainees per year in Bulgaria, 2008–2010

Detainees/year[68]	**2008**	**2009**	**2010**	**2010 per 100,000**
Total prisoners and detainees	10,131	10,093	10,662	144
Detainees (pre-trial, trial and appeal)	1,517	1,977	2,342	32
Detainees in pre-trial detention	947	1,435	1,635	22
Indicted detainees (trial/appeal)	570	542	707	10

66 Unpublished statistics of the Ministry of Interior.

67 Bezlov, Gounev and Gerganov 2010, p. 19. This study found that the average annual number of offences was around 550,000, with the police registering only 100,000 of them. Of the 450,000 unregistered crimes, one half was not reported and the other half, while reported, was not registered by the police.

68 Prosecution of the Republic of Bulgaria, 2010.

2. Legal aid

Traditionally, legal aid was based on the concept of mandatory defence. The law would define defence as mandatory for a certain types of crime – where the law provided for a higher prison sentence, or for some categories of vulnerable criminal defendants. If the defendant was not capable of hiring a lawyer in those cases, the investigating authority, and later the court, would appoint an *ex officio* lawyer. The system of legal aid subsequently underwent two major developments. The first major change was the introduction of free legal aid for indigent defendants in 1999, and the second was the adoption of the Legal Aid Act in 2005. That law established a legal aid managing body, the National Legal Aid Bureau (NLAB) and changed the procedure for the appointment of legal aid lawyers. Both changes came as a result of pressure from the EU, as well as the case law of the ECtHR.[69]

In 1999, the CPC was amended to provide for legal aid for indigent defendants, in compliance with the ECHR. This was added as one more ground of mandatory defence. Unlike other cases of mandatory defence, however, an express request must be made by the defendant that he/she wishes to have a legal aid lawyer. Both the investigating authority and the judge presiding in the court hearing are under a legal obligation to inform the defendant of this right before starting the proceedings.[70] If the request was made at the investigation stage, the investigating authority will decide on it, including whether the defendant is lacking the funds and is thus eligible. The decision as to whether the defendant lacks the funds to pay a lawyer is made by the investigating authority or the court on the basis of a means declaration, which the defendant has to file along with the request.

In 2005, the Legal Aid Act was adopted, creating a separate government agency managing legal aid. There were two significant changes introduced with this law. The first was to move the power to determine the individual lawyer providing legal aid in a specific case from the investigating authority and the court to the Bar. Under the new law, if the investigating authority or presiding judge make a decision that an *ex officio* lawyer should be appointed, they must draw up an official record of that decision and send it to the local Bar Association. The Bar Association would then appoint the individual lawyer and inform the investigating authority or court. This measure was taken as a reaction to the widely perceived problem of nepotism in the appointment of individual lawyers by investigators and judges. The tendency was, particularly for

69 ECtHR 10 August 2006, *Padalov v. Bulgaria*, No. 54784/00, paras. 41–55.

70 CPC, Section 15 (3).

the investigation, to appoint lawyers who were acting in line with the investigation, creating dependency and denying effective defence.

The second significant change was in the management of the legal aid budget, which was transferred from the courts and the police to the NLAB. The NLAB is now responsible for the payment of legal aid to lawyers, on the basis of a report submitted by them.

With the adoption of the Legal Aid Act in 2006, the legal aid budget was taken out of the budget of the courts and police. Although it has grown since 2006, it still remains rather small, particularly compared to the budget of the judicial system.[71] The total expenditure on legal aid, in both criminal and civil cases in 2010 was 4.1 million Euro, out of which expenditures on criminal legal aid were approximately 3.3 million Euro. Thus the spending on criminal legal aid in 2010 was 0.452 Euro per capita.[72]

When compared with the budget of the entire justice system, the legal aid budget is both small and has grown substantially less. The 2009 budget of the justice system, the courts and the prosecution, was 276 million Euro, and the budget of the police was 826 million Euro.[73] This significant difference in spending for legal aid and prosecution, courts and police, has remained despite the fact that, since 1999, the criminal justice system has moved towards a more adversarial procedure.

There are no official statistics as to the percentage of cases in which a defence counsel was retained or appointed for the defendant. There is data on the total number of criminal cases and cases of criminal legal aid, which includes, however,

71 In 2006, it was approximately 3.6 million BGN (1.8 million Euro), in 2007 5.2 million BGN (2.7 million Euro), in 2008 9 million BGN (4.6 million Euro), and in 2009 6.2 million BGN (3.2 million Euro). The overall budget of the justice system (courts and prosecution) for those same years has been 275 million BGN (141 million Euro), 345 million BGN (177 million Euro), 413 million BGN (212 million Euro), and 540 million BGN (277 million Euro), respectively; see Report of the National Legal Aid Bureau for 2008 at http://oisy.org/nbpp/Doklad2008.pdf.

72 Report of the National Legal Aid Bureau for 2010 at http://oisy.org/nbpp/Doklad2010.pdf.

73 The budget of the justice system has undergone significant changes in the last decade. Starting at 84.7 million BGN (43.4 million Euro) in 2000, it has reached 413 million BGN (212 million Euro) in 2008, growing at an average annual basis of 23 per cent; see Open Society Institute, Sofia, *The Price of Justice*, 2011, http://www.osf.bg/downloads/File/Budget_Judiciary_18%20May%20 2009.pdf. This significant growth was the result of an increasing recognition that the justice system was chronically underfunded. Another factor was the higher priority given to justice and home affairs in the process of EU integration. As a result, the budget of the justice system received the highest increase between 2000 and 2009, compared with any other government institution or program. Since 2009, as a result of the economic crises, both the budget of the courts and the budget for legal aid have been decreased.

legal aid at the different steps in the proceedings, the pre-trial detention hearing, the investigation, the trial and the appeals.[74] As a result, it is impossible on the basis of those figures to calculate the percentage of cases in which the defendant has retained a lawyer, has received legal aid or did not have the benefit of legal representation.

As a result of the lack of official statistical information, research on legal representation and legal aid was carried out by independent organisations in 2001 and 2005, and is thus not up to date. Still, as there have been no significant changes in the overall spending on legal aid, the findings of this research provide some valuable insights. The 2005 study, which took into account changes since the adoption of legal aid for indigent defendants in 1999, indicated that a high percentage of criminal defendants were not represented. The studies collected separately information for cases tried by the district courts and by the regional courts. It found that 44.2 per cent of criminal defendants had no lawyer during the investigation in cases before the district courts, and that 38.3 per cent had no lawyer during the trial. In regional court cases, with jurisdictions over more serious crimes, 19.6 per cent had no lawyer during the investigation, and 11.1 per cent during the trial.[75]

Funding for legal aid has increased slightly since 2005, but there has also been an increase in the total number of criminal cases, the most likely result being that the percentage of criminal defendants having no lawyer has most probably remained the same.[76] Data collected for this report suggests that only about two per cent of suspects arrested for 24 hours by the police were visited by a legal aid lawyer (see 3.2.2 below).

Legal aid is provided by lawyers in private practice, the vast majority of who work as sole practitioners. All lawyers providing legal aid services also have privately retained clients, although in different ratios. The Bar Associations will allocate matters to lawyers on a case by case basis, from a list of lawyers registered with the Bar specifically for legal aid work. There is no public defenders' office and suggestions to create one have been viewed negatively by the Bar.[77] Every member of the Bar Association can

74 According to the available official data, the total number of indicted criminal defendants in 2009 was 52,833, and the number of convicted was 40,872. The Legal Aid Bureau reported a total of 24,342 instances of legal aid provided for 2009, with every separate stage of the proceedings, investigation, pre-trial detention hearing, trial and appeals, counted separately.

75 Kanev 2005, p. 120.

76 In 2007, the number of convicted individuals was 31,035 in 2008 it was 36,137, and in 2009 it was 40,872.

77 One such public defenders office was created as a pilot project by the Open Society Institute in Veliko Tarnovo. As there was no support for this form of legal aid, the office was eventually closed.

register with the Bar to provide legal aid services, specifying whether they want to work in criminal, civil or administrative cases. There is no independent check of their qualifications, and no control of the quality of their legal aid work, besides general disciplinary proceedings.

In all cases of legal aid, there is a flat fee for the specific type of case and stage of the proceedings, which is paid after the work has been done and a report filed with the NLAB. If a person is granted legal aid, he/she does not have to contribute to the fees of the appointed counsel and other expenses related to the proceedings. The average fee was calculated by the Open Society Institute in a recent study at 95 Euro per case.[78] While anecdotal evidence suggests that private work is better paid, the market for general legal services is rather non-transparent, and there is no reliable data on which to make a comparison. Where the criminal defendant is found guilty, by law the court would also order the defendant to pay back to the state the legal aid fees. As a practical matter, the NLAB has a very low success rate in recovering fees.[79]

3. Legal rights and their implementation

3.1 The right to information

The right of a suspect or accused person to be informed of the nature and cause of the accusation, his/her other rights, and the evidence they could review, differ depending on the particular different stage of the proceedings. There are four important steps in the procedure from the perspective of the right to information. These are the initial police arrest, the bringing of charges, the presentation of the investigation file, which is particularly important from the perspective of access to the evidence, and the indictment, which is drawn up by the prosecutor, but communicated to the defendant by the court. Both the strength of the evidence on the basis of which any of these steps could be undertaken, and the type of information that the suspect or defendant has the right to receive at each of these steps, will also differ.

78 Open Society Institute–Sofia 2011a.

79 For the whole of 2009, the NBLA reported that it successfully recovered only 84,793 BGN (approximately 43,483 Euro).

3.1.1 Information on the nature and cause of the accusation and letter of rights

The police can arrest a person on a suspicion that he/she has committed a crime, among a number of other grounds.[80] The evidentiary threshold for this suspicion is lower than the evidence required for a person to be charged, where the law requires 'sufficient evidence' or a 'well-grounded suspicion'.[81] The law expressly states that a person who is arrested has the right to be informed of the legal grounds of his/her arrest[82] and, consequently, where the legal grounds for arrest is the existence of a suspicion that the person has committed a crime, they have to be informed of that suspicion. A person arrested must also be informed in writing of their right to a lawyer, the right to have a relative informed of the arrest and the right to medical assistance.[83]

During the 24-hour police detention, the police may interview the person arrested on a suspicion, but as long as that person is not charged with a crime, there is no legal obligation to inform him/her of any other rights. A common practice is to have the arrested person make a written statement about the specific events, which is not legally admissible as evidence at trial.[84] However, this statement is enclosed in the investigation file and, although inadmissible, it might well influence the proceedings (see further below).

There are no detailed legal standards as to what information is to be provided to an arrested suspect, at the time he/she is informed of the grounds for the arrest. A rather restrictive reading of the law, requiring that the suspect is only informed that he/she is suspected of having committed a crime, is possible. The courts would have jurisdiction to review the matter only upon an appeal on the legality of the arrest, which happens very rarely, and there is thus an absence of case law addressing the

80 See Section 63 (1) sub-paragraph 1 of the Ministry of Interior Act. While there is a long list of other grounds on which the police could arrest someone for up to 24 hours, this is by far the most common ground.

81 CPC, Section 219 (1) and CPC, Section 63 (1).

82 Section 63 of the Ministry of Interior Act.

83 Section 63 (5) and (6) of the Ministry of Interior Act. A person arrested by the police receives two documents. One is the arrest order, which should stipulate the grounds of the arrest, and the other is a document informing the arrested person of his/her right to a lawyer, right to have a relative informed of the arrest and right to medical assistance. He/she is then required to sign two copies of both documents, and keep a copy of each.

84 According to a 2005 study of the Open Society Institute, 70.5 per cent of those arrested did make such a statement in writing; see Vuchkov 2005, p. 71.

issue.[85] A monitoring of police stations carried out by the Open Society Institute has found that arrest orders often indicate only the legal ground for the arrest, providing no factual information.[86] Lawyers interviewed for this report also indicated that the right of a suspect to be informed of the grounds of his/her arrest is often breached.

Arrest orders are not legible and the only information noted under the legal grounds for arrest is typically just a number, referring to the relevant provision of the law. Defence counsel indicated that suspects usually do not receive information about the reasons for their arrest, but would rather infer those reasons from the circumstances of the arrest and the questions raised by the police.

At the moment a person is charged, the law provides for express guarantees with respect to his/her right to be informed of the charges, and all other rights in the criminal procedure.[87] This must be done in writing, and the investigating authority is under a legal obligation to provide further clarifications orally. The CPC mandates that, where the investigation authority collects 'sufficient evidence' that a person has committed a criminal offence, the investigating authority shall formally charge that person and inform the prosecutor.[88]

The law expressly instructs the investigating authority to draw up a charge sheet, which informs the suspect of the nature of the suspicion and the legal ramifications of the charge, and present it to the criminal defendant at the beginning of the interrogation. The charge sheet should contain information *inter alia* regarding the identity of the criminal defendant, the 'criminal deed' (деянието), the criminal offence with which the person is charged, and the rights of the accused. The investigator, criminal defendant and his/her lawyer must all sign the charge sheet.[89]

In addition to the information given in the charge sheet, the investigator is under an obligation to provide further clarification of the nature and cause of the charges. As a practical matter, the description of the suspicion is limited to a brief description of the alleged crime and the legal cause. Evidence supporting the allegation does not

85 As the police arrest is not part of the criminal procedure, it is not possible to challenge those breaches in the subsequent criminal procedure. There is little incentive to appeal the police arrest to the court in separate proceedings, and the question of whether a failure to properly inform a suspect of the grounds of the police arrest would render the arrest unlawful has thus not been addressed and resolved by the courts.

86 OSI, Civic Monitoring of the Police, p. 35.

87 CPC, Section 219 (3) 6.

88 CPC, Section 219 (2).

89 CPC, Section 219 (3) 6.

need to be communicated, unless pre-trial detention is requested. The investigating authority has full discretion in deciding what evidence to make available prior to the conclusion of the investigation.

The law mandates that charges should be brought against a suspect as soon as there is 'sufficient evidence' that he/she has committed a crime. This could, however, be delayed by the investigating authority as a matter of investigatory tactics. The investigating authority faces two practical limitations in deciding when to bring formal charges against a suspect. The first is the pre-trial detention, and the second is the future use of testimony given by a suspect, before the trial court. Bringing charges against a suspect is a pre-condition for the detention of a suspect beyond the 24-hour police detention, which could be ordered by the prosecutor for up to three days and then by a judge. Thus, if the investigating authority wishes to place a suspect in pre-trial detention, the suspect must be formally charged.

Where the investigating authority decides not to request the detention of a suspect, it has rather more leeway in deciding at what point to bring charges against a criminal defendant, and thus inform them of the accusations. This could be done at a later stage of the investigation or even at the very end, after the bulk of the collection of evidence has already been done. Another possibility for the investigating authority is to question the suspect as a witness, and only later to bring charges against him/her. Where a suspect is questioned as a witness, he/she is under a legal duty to testify, although he/she could refuse to give evidence that would be self-incriminatory. This testimony would later be inadmissible at trial.

However, as a practical matter, both the written statements by the suspect during the 24-hour police arrest, as well as the testimony given as a witness, while formally considered to be inadmissible evidence, are still part of the case file, with the consequence that everyone dealing with the case will have access to it.

The express provisions of the law that aim to guarantee the right to be informed of the charges and the rights of the accused are generally respected. These obligations are not particularly onerous for the investigating authority, as there is no strong obligation to inform the criminal defendant of the evidence collected, and the rights are included in the standard charge sheet forms.

The information on the rights of the accused, however, is a replication of the text of the law. It is written in a legal language, not readily understandable, particularly for individuals with a lower level of education. As a rule, the general atmosphere when bringing charges is intimidating, and this also does not facilitate a proper

understanding of these rights.[90] There has been no research done, however, as to the extent to which criminal defendants do understand their rights, and whether other factors negatively affect that exercise of those rights.[91]

If the investigating authority has failed to comply with its obligation to inform the defendant of the legal basis of the accusation, this would be grounds for the trial court to terminate the court proceedings and return the case back to the investigation stage. The investigating authority would then have to repeat the procedure of bringing charges, and allow the criminal defendant to give testimony on the charges.[92] The courts would return the case both in situations of the failure to properly bring charges in the first place, and where charges have subsequently been amended during the course of the investigation such as to substantially change the factual allegations, or introduce a charge relating to a more serious crime.[93]

3.1.2 Information regarding evidence collected by the police

Once charges are brought against a person, the accused can ask to receive information regarding the evidence. The scope of this right prior to the conclusion of the investigation is, however, limited, since the defence is generally restricted in its access to the evidence on which the accusation is based during the investigation stage. The investigating authority has the power to decide whether to allow the presence of the defence during the investigation, as well as his/her access to the case file. Information about the evidence on which the charge is based, would be revealed only 'if this would not hinder the investigation'.[94] As a practical matter, the investigating authority

90 According to research carried out among prisoners by the Bulgarian Helsinki Committee in 2010 and 2011, 16.2 per cent of the prisoners interviewed reported that physical violence was used against them in the police department; see Human Rights in Bulgarian in 2010, http://www.bghelsinki.org/media/uploads/annual_reports/2010.pdf. There are also many judgments of the ECtHR finding that torture or inhuman or degrading treatment by the police in Bulgaria has occurred.

91 The criminal defence lawyers interviewed reported that it is not uncommon for the police to use threats of pre-trial detention as leverage, in order to obtain a waiver of certain rights, like the right to a lawyer. According to those interviewed, such threats are effective particularly with respect to socially and economically disadvantaged suspects, who do not fully understand the process.

92 See Interpretative Decision No. 2 of 2002 of the Criminal College of the Supreme Court of Cassation and *mutatis mutandis* Judgement 475 of 15 November 2001, Supreme Court of Cassation.

93 Where there is no substantial change of the circumstances and no charge with a heavier crime, however, there will be no need to send the case back; *ibid*.

94 CPC, Section 219 (4).

typically reveals little evidence or information about the available evidence at this stage.[95]

The CPC expressly provides that the defendant should have access to the minutes of those investigative acts where the criminal defendant and his/her lawyer were present. This would include the interrogation of the defendant him/herself, the hearing of witnesses whose interrogation was initiated by the defence, and the hearing of a witness before a judge, something the investigating authority could decide to do. This could also include a search and seizure record, if the criminal defendant or his/her premises were searched as well as a record of any line-up that included the defendant.

The accused would have access to evidence only if a request for pre-trial detention is made and evidence is to be submitted to the court at the pre-trial detention hearing. In that case, the criminal defendant would have access to the file and the evidence in support of the charges.[96] This issue had been hotly contested in the late 1990s, with several judgments of the ECtHR finding a violation of the ECHR on account of the lack of access to the case file.[97] While the issue of access to the file at the pre-trial detention hearing is long settled, lawyers interviewed for this report have indicated that it is not uncommon for the prosecution to withhold certain evidence at this stage.

After the conclusion of the investigation, the investigating authority is to present to the criminal defendant and his/her counsel the complete investigation file.[98] Appropriate time and facilities should be given for the defendant to read the case file. This usually takes place in the office of the investigator, in his/her presence. The defendant and counsel are allowed to inspect all documents in the investigation file. This is the time when the defence receives for the first time full information as to the evidence on which the charges are based.

After the defence has read the file, the defendant and his/her counsel may put forth motions for further investigation, make comments and request copies. The

95 An observation confirmed in the interviews carried out for this report.

96 CPC, Sections 228 and 229

97 ECtHR 25 March 1999, *Nikolova v. Bulgaria*, No. 31195/96, para. 63; ECtHR 26 July 2001, *Ilijkov v. Bulgaria*, No. 33977/96, paragraph 95; ECtHR 9 January 2003, *Shishkov v. Bulgaria*, No. 38822/97, paras. 78–81; ECtHR 18 April 2005, *Kehayov v. Bulgaria*, No. 41035/98, para. 85. In each of these judgments, the ECtHR found violations of Article 5 (4) of the ECHR, due to the lack of access to the case file and deficiencies in the review of the evidence. The reason for these violations lay with the terms of the CPC, which did not give the judge the power to review the existence of 'a well-grounded suspicion' that the accused has committed a crime.

98 CPC, Sections 227 and 228.

prosecutor shall decide on those motions.[99] This step in the proceedings is particularly important, since no new evidence can be added after the investigation file is presented to the accused. While there might be some practical concerns about the time allocated for reading the case file, this part of the procedure seems to be followed in a reasonably fair manner. There are also strong legal safeguards, as any failure to present the investigation file would result in the case being sent back to the investigation by the trial court.[100]

The defence will next have an opportunity to examine the file, and the evidence on which the charges are based, after the indictment and the case file are filed with the competent court. The trial court should officially summon the criminal defendant, by delivering a copy of the indictment. Under the CPC, the bill of indictment shall contain *inter alia* a description of the act constituting the offence, the specific article of the CPC with which the defendant is charged, a list of witnesses and expert witnesses, and a list of the evidence in the case file on which the prosecution will rely.[101]

While the CPC expressly requires the prosecutor to indicate the evidence on which the prosecution will rely, all the evidence collected in the course of the investigation, including also evidence on which the prosecution would *not* rely – even including inadmissible evidence – will remain as part of the case file. There is no obligation under the CPC for the investigating authority to discover other evidence that is not part of the investigation file, and there are no separate discovery rules. The underlying assumption is that all the relevant evidence collected will be in the investigation file.

3.2 The right to defend oneself

The right to a lawyer is guaranteed under the Constitution upon arrest.[102] The right to a lawyer as at the moment of arrest or when charges are brought against that person

99 CPC, Section 229 (3).

100 See Interpretative Decision No. 2 of 2002 of the Criminal College of the Supreme Court of Cassation.

101 CPC, Section 246 (1)-(4).

102 See Article 30 (4) of the Constitution, declaring the right of every person to a lawyer as of the moment of arrest, and Section 122 (2) of the CPC, defining the rights of a witness in criminal proceedings 'to consult' a lawyer, where he/she are required to make statements that might lead to his/her criminal liability.

is also expressly stated in other legislation.[103] The law is more nuanced with respect to the right to a lawyer of a suspect – for instance, a person who is not arrested and against whom no criminal charges have yet been brought, but who is suspected by the authorities of having committed a crime. Where questioned as a witness, the suspect has the right to 'consult' a lawyer.[104] By guaranteeing the right 'to consult' and not the right to have a lawyer present during the interrogation, the law draws a distinction with important consequences for the actual enjoyment of the right to a lawyer.

According to interviews, lawyers are often not allowed to attend interviews of witnesses. The practical approach adopted is for the lawyer to wait in the hallway outside the office of the investigating authority, while the witness is being questioned. The witness may then 'consult' with the lawyer, if the investigating authority agrees, by walking outside the office and talking to the lawyer in the hallway. When a suspect is being questioned as a witness on issues that might lead to his/her criminal liability, he/she has the right to refuse to give testimony, if that testimony could be used in criminal proceedings against him/her.[105] Thus, not having the lawyer present during the interrogation could be of significant importance.

The law also expressly stipulates that a person against whom criminal charges are brought has the right to defend him/herself in person.[106] This right is guaranteed only with respect to a person against whom charges were brought. A person arrested by the police for 24 hours does not have such a right, as no criminal procedure has as yet been opened, and neither does a suspect who is questioned as a witness. The right of the accused to defend him/herself in person is reflected in many specific rights and procedures, designed to guarantee that right. The criminal defendant has the right *inter alia* to make a statement regarding the crime he/she is charged with; present facts supporting his/her defence; read the case file and to receive information on the factual and legal aspects of the charge and any changes therein; request investigative actions and be present at them; call and question witnesses; and appeal against all the decisions that interfere with his/her interests.

103 Section 63 of the Ministry of Interior Act and Section 97 of CPC.

104 See Section 63 of the Ministry of Interior Act, Sections 97, 122 (2) and 55 (1) of the CPC and the Legal Aid Act. While the right to a lawyer is expressly stated with respect to both suspects and defendants, the right to legal aid is expressly stated only with respect to criminal defendants.

105 CPC, Section 121 (1).

106 CPC, Sections 55 (2), 224 and 229.

The defendant is always summoned separately, even when there is a lawyer, and has the right both to choose whether or not to give a statement to address the court last. The accused may exercise any of defence rights on his/her own, at any stage of the proceedings, with or without a lawyer present.[107]

The law also sets out rules for the mandatory participation of defence counsel in the criminal proceedings for certain categories of defendants,[108] as well as for certain procedures at the investigation or trial stage.[109] An express waiver of the right to a lawyer is possible in some cases, but not where the defendant is a juvenile, has a physical or mental disability, is charged with a crime providing for 10 or more years of imprisonment, is detained, or if the case is heard *in absentia*.[110] The underlying logic behind this is that defence counsel should participate where the defendant is vulnerable, in many cases even against his/her will.

Where legal representation is mandatory, this applies with respect to any stage of the proceedings, investigation, trial, and at both levels of appeal. Following the same approach, no waiver of the right to legal representation is possible in certain special procedures, such as plea bargaining and an abridged court hearing. Where no express waiver is made by the defendant, or the defendant cannot make a valid waiver of the right to a lawyer, but has failed to hire a lawyer, a lawyer will be appointed under the legal aid scheme.

The law provides sufficient guarantees of the right to a lawyer for a person who is charged. Where the participation is mandatory, or a request for a lawyer is made, the investigating authority cannot perform any investigative or other procedural actions with the participation of the defendant without a lawyer present, including bringing

107 Under Section 99 (2) of the CPC, the participation of defence counsel is not an obstacle for the defendant to personally enforce his/her defence rights.

108 CPC, Section 94.

109 The participation of defence counsel is always mandatory: (i) if the criminal offence of which the defendant is accused is punishable by a sentence of imprisonment of 10 years or more; or if the defendant is (ii) detained; (iii) suffering from a mental or physical disorder (regardless of his/her mental capacity); (iv) unfamiliar with the Bulgarian language; (v) a juvenile; (vi) indigent and makes requests for a legal aid defence counsel to be appointed; (vii) if the case is heard by the Supreme Court of Cassation or *in absentia;* or (vii) if the interests of the accused are contradictory and one of them has a defence counsel. In addition to the grounds listed above, the presence of counsel is mandatory: (i) in proceedings for imposing pre-trial detention and its appeal; (ii) in proceedings on committing the defendant to a psychiatric clinic and its appeal; (iii) in expedited court hearings; (iv) in plea-bargain agreement proceedings.

110 CPC, Section 94 (1), (2), (3) and (6).

charges and questioning the defendant. The failure of the investigator to do this is a serious procedural violation that could not be remedied by appointing a defence counsel for additional interrogation of the accused on a later date,[111] and therefore if the defendant was questioned without a lawyer, the trial court would send back the case to the investigation stage.

3.2.1 Providing a lawyer to an indigent defendant

Traditionally, legal aid was based on the principle of mandatory defence. A lack of funds to cover legal costs was added as one of the grounds for legal aid as from January 2000. Thus, the system still operates within the concept of mandatory defence having a primary role. The whole approach is to first ask whether defence is mandatory and, only if it is not, the issue might arise whether the defendant is indigent. Unlike the grounds for mandatory defence, however, the investigating authority or judge is under no obligation to take action *ex officio*, as an express request must first be made by the defendant. They are under a legal obligation, however, to inform the defendant of all his/her rights at the start of the proceedings, including the right to an *ex officio* lawyer if he/she cannot afford one.[112] Where such a request was made, the investigating authority or judge/court will decide whether or not to grant it. If, upon being presented with the charges, the criminal defendant makes a request for a lawyer, that request should be recorded on the charge sheet, as should a waiver of the right to a lawyer.

The statutory standard for such a decision is for the defendant to be 'not capable of paying attorney fees'.[113] The courts have developed in their case law a requirement for the defendant to file a means declaration along with their request for legal aid, where the defendant would declare his/her employment and other income, and any property that he/she owns. On the basis of this information, the investigator and courts decide whether the defendant is indigent and meets the statutory standard. There are no more detailed standards developed by the courts, with decisions being taken on a case by case basis. As the system has not until this point considered a lack of funds, the examination of whether the defendant has sufficient funds is not

111 See judgment No. 373 of the Supreme Court of Cassation of 8 June 2004, case 101/2004.
112 CPC, Section 15 (3).
113 CPC, Section 94 (9).

particularly thorough and, according to those interviewed, judges tend to err on the side of granting legal aid.

A suspect who has not yet been charged has a limited right to free legal aid. The law expressly sets out the right to legal aid for suspects arrested by the police for 24 hours, although it is not an effective right – only about four per cent of suspects were visited by a lawyer (see 3.2.2 below). A suspect who has not been charged, but has been summoned to be questioned as witness, does not have a right to free legal aid under the criminal procedure rules. A right to receive general legal advice based on the Legal Aid Act does exist, but the procedure that must be followed is so cumbersome, and the means test so strict, that a recent evaluation of the system concluded that practically no-one could use it.[114]

The procedure for informing an accused of his/her right to legal aid contains sufficient guarantees for the effective exercise of that right. The charge sheet contains an express statement of the right to legal aid if the defendant does not have sufficient resources to hire a lawyer. The law also expressly requires the investigating authority and judges to inform the defendant of all his/her rights, including the right to legal aid. This is not the case however, in the case of suspects who have not yet been charged. Suspects are not informed of their right to legal aid during the 24-hour police arrest. The form used by the police to inform every person arrested of their rights specifies the right to a lawyer, but not the right to legal aid.[115] Moreover, under the CPC, suspects, when questioned as a witness, do not have the right to free legal aid.

As noted earlier (see section 2), the official statistics does not allow for a conclusion to be made regarding the overall number and/or the percentage of cases, in which defence counsel was retained, appointed as mandatory requirement or appointed upon the request of a indigent defendant. This does not enable a proper evaluation to be undertaken of the effectiveness of the system, and this needs to be addressed. The little available research, as well as the interviews carried out for this report, suggest that, as a rule, criminal defendants facing heavier charges have legal representation from the moment when the charges are brought against them. Criminal defendants facing lighter charges, and who have not been detained, were more likely to have no lawyer during the investigation stage.

114 Open Society Institute–Sofia 2011a.

115 The fact that the form used by the police does not mention the right to free legal aid reflects the fact that this right is also not expressly stated in the Ministry of Interior Act.

3.2.2 Arrangements for access to a lawyer

Both the police upon arrest, and the investigating authority when bringing charges against a person, are under a duty to inform the accused of his/her right to a lawyer and to provide him/her with the opportunity to contact a lawyer immediately. As noted earlier, the police must present every person arrested with a statement of *inter alia* their right to a lawyer, which the arrested person should sign. Where someone is charged, the investigating authority should not only inform, but also 'clarify to the accused' his/her right to a lawyer. The charge sheet form, which must be signed by the defendant, contains a statement of the right to a lawyer and to legal aid.[116]

Where the suspect is not detained, the duty to inform the defendant of his/her defence rights is also laid down in the law. The investigator cannot bring charges if the defendant was not properly summonsed,[117] and a proper summons must include information of the person's right to authorise an attorney, or to apply for legal aid. He/she should also have three days available to organise his/her defence. A request for a lawyer, whether for one hired on private basis, or for a legal aid lawyer, should be recorded. The investigating authority cannot perform any investigative or other procedural actions with the participation of the accused, before it has clarified the right to a lawyer, and a lawyer is present, either if a lawyer is mandatory, or the defendant has expressed a wish to have one.[118]

Where a suspect has been detained for up to 24 hours and has expressed a wish to consult with a lawyer, he/she should be given the opportunity to contact a lawyer or, as appears to be the common practice, the police officer should contact the lawyer. The lawyer would then appear at the police station. At this stage, the lawyer can only consult with the suspect, and there therefore exists no issue of formal authorisation, nor the necessity to conclude a contract. However, if the lawyer and detainee wish to sign a contract and a letter of authority, they can do so.

Where the suspect makes a request for a legal aid lawyer, the police officer should call the local Bar Association and request an on duty lawyer to appear. A common practice that has apparently developed, albeit one contrary to the procedure set by law, is for the Bar to provide police stations with a list of lawyers willing to take urgent requests. The police officer would then either let the suspect choose from the list, or suggest a lawyer from the list.

116 CPC, Section 219 (3) 6.

117 CPC, Section 219.

118 As already indicated, this rule is backed with strong guarantees, since the court will send the case back if no lawyer was provided; Interpretative Decision No. 2 of 2002 of the Criminal College of the Supreme Court of Cassation.

Detention beyond 24 hours is conditional on the suspect being charged, and if the investigating authority decides to bring charges, the same procedure must be followed with respect to contacting a lawyer. At the trial stage, should the court take the decision to appoint an *ex officio* lawyer, this decision will then be communicated to the local Bar, and the Bar Association would then indicate a specific lawyer.

The defendant has the right to choose a lawyer when hiring one. If the defendant does not have the financial resources, and has to rely on legal aid, his/her right to choose a specific lawyer is very limited. If the investigating authority, or later the judge, makes the decision that an *ex officio* defence counsel should be appointed, this decision is forwarded to the relevant Bar Association, which has the power to determine the specific attorney. The preferred attorney indicated by the defendant would be appointed only 'if possible',[119] with Bar Associations having a policy of distributing cases on an equal basis among lawyers registered under the legal aid scheme.

The right to choose a lawyer is not absolute, even when a lawyer was privately retained, the limits being set mostly to protect the interests of the defendant. The appointed defence counsel should withdraw, or should be replaced by the investigative authority, prosecutor or judge, when the lawyer had acted in the case in another capacity, creating a suspicion that he/she would be biased against the interests of the defendant.[120] The lawyer could also decide to withdraw from a case, even after initially having agreed to represent the defendant.[121]

Another limitation on the right to choose one's lawyer was introduced in 2010. The law was amended to allow for the appointment of an *ex officio* lawyer, even where the defendant has retained a lawyer, if the retained lawyer fails to attend a court hearing without good cause. This *ex officio* lawyer would be appointed at an earlier stage by the court, and would attend all court hearings, but would step in, even against the wishes of the criminal defendant, only if the retained lawyer fails to appear without good cause.[122]

119 LLA, Section 25 (5)

120 CPC, Section 91 (3).

121 Section 95 of CPC and Section 35 of the Attorney's Act prescribe that the defence counsel can withdraw from a case if it becomes impossible for the lawyer to fulfil his/her obligations for 'objective reasons', after notifying the defendant so as to allow him/her to organise his/her defence.

122 See Section 94, paragraphs 4–6 of the CPC. The provision was challenged before the Constitutional Court, but the court refused to strike it down in the abstract, holding that the trial court has the ultimate duty to guarantee a fair trial, and would be better placed to make a decision, based on the circumstances of the particular case; Judgement No. 10 of 28 September 2010 of the Constitutional Court.

The adoption of this procedure was rather controversial, with objections raised by the Bar asserting that it infringes on the right to defence. It was adopted only recently, and it is not clear how it will work in practice. There have been no reports of cases where the retained lawyer failed to appear and the *ex officio* lawyer stepped in. The NBLA has reported 90 cases since the adoption of that procedure, where *ex officio* lawyers have been appointed under this scheme, prompting the suggestion that this seems to be an unreasonable waste of public resources.[123]

In cases of both privately retained and *ex officio* lawyers, the defendant has the right to request that his/her lawyer be replaced. The law expressly states the right of the defendant to have counsel replaced upon his/her request,[124] without the need to first show good cause. The law only specifies that the defendant should make a request. There is no available research or evidence as to the extent to which this right is exercised and enforced. There is also no case law, suggesting that most likely this right is rarely exercised in practice.

As mentioned earlier, there is little research and data on the availability of lawyers at the different stages of the criminal proceedings. Research by the Open Society Institute–Sofia suggests that there is very limited access to a lawyer during the 24 hours of police detention. This research, based on monitoring police stations, suggests that, in some police stations, there were only a few visits by a lawyer recorded over a period of one year, that there were problems with availability of on duty legal aid lawyers, and that an overall attitude among police officers prevailed that a lawyer is really needed only when a formal investigation was opened and charges were brought against the suspect.[125] Lawyers interviewed for this report confirmed those findings. The overall impression is of a general attitude of discouraging access, and raising practical barriers to access to a lawyer, during the first 24 hours of detention.

Data collected for this report by the police regarding access to a lawyer during the 24-hour police arrest, also confirms this general finding – that only a few suspects are visited by a lawyer during that period. According to information provided by the Ministry of Interior for 2010, in only four per cent of all cases of police arrests

123 As the *ex officio* lawyer has to be able to step in at any point, he/she has to attend all hearings and is paid for that; *Оценка на приложението на Закона за правната помощ 2007–2011*, Институт отворено бществo.

124 CPC, Section 96 (2).

125 Report on Civic Monitoring of Police Stations by the Open Society Institute; http://www.osf.bg/downloads/File/PoliceWarch_2008_Final_BG.pdf.

of a suspect for 24 hours was the suspect visited by a lawyer. In half of those cases, the lawyer visiting the suspect was a legal aid lawyer, provided under the legal aid scheme.[126]

Difficulties reportedly also go beyond the initial 24 hours of police detention, with access hindered in cases where legal representation is not mandatory. Reportedly, psychological pressure is exercised by police officers on detainees, who are actively discouraged from making a request for a lawyer. It is presented as something that is at best useless, or even likely to have negative consequences.[127] Detainees are also not informed of the opportunity to receive legal aid and are left with the impression that their only option is to hire a lawyer privately.

Apart from the general attitude of police, access is also hindered because lawyers are unavailable and/or turn down requests to appear at police stations at short notice. Thus, a lack of financial resources could still change the outcome of whether a person has a lawyer or not. Practical difficulties were also reported, apparently including delaying tactics and other efforts to prevent visits by lawyers.[128] In cases where a lawyer is informed and does appear at the police station, however, access to the detainee is eventually provided.

126 Information provided by the Ministry of Interior for this report indicates the total number of individuals arrested, those arrested on suspicion of having committed a crime, and those visited by a lawyer, for the years 2008, 2009 and 2010. While the number of police arrests increased significantly in 2010, this did not affect the percentage of arrests where a lawyer visited the suspect. There are some gaps in the primary information collected by the police departments, some of which collected no data on visits by a lawyer. Still, for two-thirds of all the police arrests, there was relevant information, with no significant discrepancies, thus allowing for some general conclusions. The total number of people arrested by the police on suspicion of having committed a crime in 2010 was 45,060. Police departments, which recorded visits by a lawyer, effected 28,504 of these arrests. Of those, 1,166 were visited by a lawyer, with the number of visits by legal aid lawyers being 408.

127 The interviewed defence lawyers gave the following example of such an investigation tactic: the suspect is promised immediate release, in exchange for cooperating, including waiving their right to a lawyer, where legally possible. This tactic is reportedly successfully employed against defendants with a limited education and understanding of the process.

128 Examples given of such practical difficulties were the delaying of phone calls to lawyers, or where a lawyer was informed independently, making the lawyer wait, sometimes by misinforming him/her that the detainee is in another police station, moving a detainee to another police station, or asking for a letter of authority from the detainee authorising the particular lawyer to act on his/her behalf.

As already noted, it is common for the police to make a suspect arrested for 24 hours give a statement in writing. The limited access to a lawyer at this stage means that, in the majority of cases, those statements were made and included in the investigation file, without the benefit of a lawyer. As these statements are clearly inadmissible evidence, the national courts have never addressed the issue. The ECtHR decided a case recently where the issue could have been addressed, but it failed to do so.[129] In this judgment, the ECtHR restated its general holding that access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. However, the Court did not address the issue that, under domestic law, the police do not inform suspects at this stage of their right to legal aid, nor whether the applicant was informed of his/her right to legal aid.[130] The ECtHR held that, while the first confession to a murder by the applicant was made without a lawyer, there was no violation of Article 6 since, as a matter of domestic law, there was a right to a lawyer at that stage and the applicant confirmed later his confession, the second time in the presence of an appointed *ex officio* lawyer.

Practical arrangements for confidential communication between a suspect and an attorney at the police station are also somewhat problematic. While police stations should have a separate room for lawyers to meet detainees, most do not have such accommodation. Instead, various other places are used for that purpose, like hallways and the offices of police officers. While the interviewed lawyers generally agreed that they are allowed the opportunity to communicate in private with their clients, such arrangements clearly limit the available time for such communication.

With respect to later stages of the proceedings, when the accused is placed under pre-trial detention, lawyers are allowed to visit detainees at any time during working hours, with meetings taking place in a specifically designed room for a larger number of lawyers and detainees. Interviews suggest that legal aid lawyers often do not visit their clients in pre-trial detention, which relates more to the quality of legal aid than to access (see below).

129 ECtHR 21 December 2010, *Hovanesian v. Bulgaria,* No. 31814/03.

130 It is not clear from the judgment itself, whether and to what extent this particular issue was raised by the applicant, which could be a reason for the Court's failure to address it.

3.2.3 The right to an independent and competent lawyer, acting in the best interests of the client

The independence of lawyers is guaranteed through the structure of the Bar, which is a self-governing institution.[131] No lawyer can practice law and represent a criminal defendant without being a member of the Bar. The Bar sets its own standards for admitting lawyers to legal practice, as well as the ethical rules to which every lawyer must adhere. The Bar also has the power to discipline lawyers for breaching these ethical rules. The law confirms the legal requirement for lawyers to act in the best interests of their clients.[132] A Bar entrance exam was introduced in 2004[133] and the Bar has been very active in organising training, particularly in relation to international human rights standards.

While the legal standards are in place and the Bar is aspiring to guarantee competent legal defence, there are still some deficiencies with respect to the quality of legal aid. The process of registering for legal aid is entirely based on self-selection, with lawyers deciding what type of legal aid they are competent to provide. There is also no system of quality control of legal aid services provided by lawyers. No research on the quality of legal defence has ever been carried out, although a limited assessment of the quality of legal aid was recently undertaken by the Open Society Institute (OSI).

In its report, OSI recommended the introduction of quality review of legal aid by the NLAB. In light of the interviews carried out for this report, that recommendation seems justified. Interviewees indicated that a lack of quality legal representation in legal aid cases is not uncommon. Both judges and lawyers cited various problems, including passive, formal defence by legal aid lawyers, an insufficient knowledge of the facts in the case and sometimes even the law, and inadequate defence strategies, due to the lack of experience of those lawyers in practicing criminal law.

A common explanation for those problems was that lawyers with a practice in other branches of law, like family or property law, would also register for criminal legal aid. A common opinion expressed by judges was that lawyers with high professional standards provided equally good quality of legal representation both in cases where

131 Attorneys Act, Section 2 (1). The law establishes a structure of regional Bar Associations, 27 in total, including the national council with standard setting powers, and a national disciplinary review panel. Individual lawyers are members of the regional Bars, but can practice throughout the country.

132 Attorneys Act, Section 2 (2).

133 Attorneys Act, Section 4 (4).

they are privately retained, and in legal aid cases. This indicates that the system has the potential to provide professional representation, and that the current problems are of an organisational nature, rather than due to a lack of capacity.

Another issue noted by practically all judges interviewed, was that it is quite common for *ex officio* lawyers to only meet their clients for the first time in the court room.[134] The observation that *ex officio* lawyers do not meet clients earlier, and do not visit detainees in the detention facilities, is confirmed by other anecdotal evidence and is commonly explained by the limited fees for legal aid, which do not cover travel costs and are not considered sufficient to cover any work over and above reading the case file and attending hearings. In light of those findings, both the introduction by the NBLA of a more stringent procedure for lawyers registering to provide legal aid, and a proper system of quality control, are clearly necessary.[135]

3.2.4 Remuneration for lawyers

The market for legal services in Bulgaria is not very transparent. Except for law firms working with corporate clients, hourly fees are not used. Instead, lump-sum remuneration is agreed between a lawyer and a client, depending on the type of case. The Bar has adopted mandatory guidelines, setting minimum fees. It is not clear as to what extent these minimum fees reflect actual fees agreed between lawyers and clients, and there is no reliable information on standard fees charged. Anecdotal evidence suggests significant differences in the fees charged by different lawyers to different clients. Another important factor in defining the market of legal services is the significant increase in the number of lawyers over the last 15 years, shifting the balance in the supply of legal services.[136]

134 The judges interviewed indicated that some judges, when learning that the *ex officio* lawyer and the defendant apparently do not know each other, would allow them time for a short private discussion prior to the hearing. It was suggested, however, that this is not always possible, and not all judges are willing to make that effort.

135 The existing system of control through disciplinary proceedings is clearly not sufficient. Disciplinary proceedings could be initiated only upon a complaint, which is not likely in legal aid cases. A review for this report of the type of disciplinary cases heard by the Bar showed that the large majority of disciplinary cases do not raise issues of the quality of service, but are initiated by the courts for failure by the lawyer to appear at court hearings, thus causing an adjournment of the hearing.

136 In the early 1990s, there were about 1,000 lawyers in the country; their number today exceeds 10,000.

Where an *ex officio* defence counsel is appointed, lawyers are paid under the legal aid rules per case, with the fee being higher for heavier crimes, with a small additional fee added for extra hearings. Overall, however, legal aid fees are small, which does not stimulate high quality legal representation. The average fee in a legal aid case, according to a study carried by the Open Society Institute, was 93 Euro. The system of payment, however, is diversified, allowing for different levels of payment depending on the complexity of the case.[137] Presently, the fees for crimes punishable with a fine are between 25 and 50 Euro for the investigation phase, and between 30 and 60 Euro for each court level. An additional fee of approximately 40 Euro is paid for every extra court hearing.

The fees are higher where the charges are for graver crimes, with the fee for the investigation stage being between 60 and 100 Euro, and fees for court hearings between 60 and 150 Euro. For legal aid provided on weekends and holidays, as well as between 10 p.m. and 6 a.m., the remuneration provided in the guidelines could be increased by 50 per cent of the maximum fee provided.

Lawyers are highly critical of legal aid fees, complaining both about the amount and the delays in payment. While it is difficult to make an informed judgment as to the extent to which such complaints are justified, the available evidence suggests that legal aid fees are significantly smaller than for privately paid criminal defence work. Still, as there is no shortage of legal aid lawyers, legal aid apparently does provide an income that, on balance, remains attractive.

A number of factors could be put forward as an explanation. A clearly negative reason is that, since legal aid fees are low, the amount of work put into a legal aid case might also be minimal. Further, although it is difficult to state the extent to which this happens, legal aid might also be attractive as a way of recruiting clients. Although by law a criminal defendant who has had an *ex officio* lawyer appointed to represent him/her has no obligation to contribute to that lawyer's fee, anecdotal evidence suggests that defendants granted legal aid might in some cases still be paying additional fees.

On the more positive side, criminal legal aid work is apparently still attractive for younger lawyers, as a way of gathering professional experience. Overall, over the last

[137] The 2006 Regulation for the Payment of Legal Aid contains detailed rules on the fees, and sets minimum and maximum fee levels, depending on the severity of the crime and the type of punishment provided in the case. Detailed guidelines regarding the determination of the fees are provided by the Chair of the National Legal Aid Bureau in the 2010 *Guidelines for Determining the Remuneration of Attorneys Who Provided Legal Aid*.

decade, there has been an oversupply of lawyers, making the market for legal services supply driven, thus pushing prices down.[138]

Interviews also suggested that the flat fees paid for different types of cases might not reflect the actual amount of work required. An example was given with respect to plea bargains, which require relatively little work from a lawyer, while bringing in a reasonable fee. A trial, on the other hand, could take many hearings, and the fee received could be wholly inadequate. Regional differences in the remuneration and costs of living are also not reflected in the current flat fee arrangement. This clearly requires a more thorough review of the issue, as well as a broader reconsideration of legal aid fees and the way they are determined.[139]

3.3 Procedural rights

3.3.1 The right to be released from custody pending trial

Efforts to bring national law and practice into line with international standards on pre-trial detention have been a rather controversial process, which started in the late 1990s with a number of judgments of the ECtHR. Since then, national legislation, as well as the case law of the courts, has largely come to reflect international norms, although the issue is still politically very controversial. The current government has, in particular, publicly attacked the courts in a strikingly vehement manner, for decisions to release accused persons on bail, in reaction to specific verdicts. Both national and international observers considered these attacks to be unjustified, and the language used as undermining judicial independence.

At the end of the 1990s, the ECtHR delivered several judgments, finding systemic violations of the rights under Article 5 of the ECHR.[140] These related both to the procedure under which pre-trial detention was ordered, as well as the standard applied to order detention. Up until the end of 1999, pre-trial detention was ordered by the prosecutor – this was determined to be a systemic violation of the Convention. Another issue was the lack of access to the evidence, on the basis of which a conclusion could be reached as to the suspicion for a crime.

138 As noted, there is no hard data and research available on the legal services market, and thus these observations are based on anecdotal and circumstantial evidence.

139 This was also the recommendation of the Open Society Institute–Sofia in its recent assessment of legal aid: see Open Society Institute–Sofia 2011a.

These violations were addressed, along with other issues touching upon basic rights in the criminal process, with some legislative amendments that became effective in 2000. The courts were given the power to order pre-trial detention in an adversarial procedure. The prosecution bears the burden of proving that there is a well-grounded suspicion that the accused committed a crime, and that there is a risk of him/her absconding, or hindering the investigation.[141] The defence was given access to the evidence in support of the request for pre-trial detention and, in 2005, mandatory legal representation was introduced. A one year pre-trial detention was introduced, with a maximum of two years in cases of particularly serious crimes.[142]

Over the next years, the ECtHR delivered a large number of judgments, finding violations of Article 5 of the Convention on account of the length of detention, and the often automatic ruling of pre-trial detention simply due to the gravity of the charges.[143] This has prompted national courts to bring their case law into line with international standards. One remaining systemic issue is the time between arrest and the bail hearing. As national law sets a maximum of 24 hours of detention by the police, and 72 hours by the prosecutor, the legislative requirement to bring the accused before a judge 'immediately' has largely been ignored, with the pre-trial detention hearing often taking place only after 96 hours. In 2008, the ECtHR found this to be a violation of Article 5, but no changes in the law, or in the way it is applied, have as yet taken place.[144]

Both the changes in the approach of the national courts, and the statutory time limits for the length of pre-trial detention, have largely brought domestic practice into line with international standards. Since 2009, however, a new government with a strong political agenda of fighting organised crime has repeatedly attacked the courts over pre-trial detention decisions. Some officials, and particularly the Minister of Interior, have attacked judges on many occasions with extremely strong language, for their refusal to order pre-trial detention in specific cases. Judges have been accused of helping organised crime, being corrupt and have been threatened, with their

140 See among others, ECtHR 28 October 1998, *Assenov* v. *Bulgaria,* No. 24760/94; ECtHR 25 March 1999, *Nikolova v. Bulgaria*, No. 31195/96, paragraph 63; and ECtHR 26 July 2001, *Ilijkov v. Bulgaria*, No. 33977/96.

141 CPC, Sections 63 and 65.

142 CPC, Section 63 (4).

143 The total number of judgments where a violation of Article 5 was found is close to 100.

144 ECtHR 6 November 2008, *Kandzhov v. Bulgaria*, No. 68294/01.

names being widely publicised for making such decisions, quite often on the basis of a deliberate misrepresentation of the facts.[145] These attacks have prompted visits and criticism by the European Association of Judges and the United Nations Special Rapporteur on the independence of judges and lawyers.[146]

3.3.2 The right of a defendant to be tried in his//her presence

The law guarantees the right of defendants to be tried in their presence. No waiver of that right is possible if the charges are for a crime carrying more than five years of imprisonment, or where the judge decides for some other reason that the presence of the defendant is mandatory.[147] The law allows for trials *in absentia* under certain limited circumstances, if it would not hamper ascertaining of the truth, and the accused was outside the territory of the country, if: (i) his/her residence was unknown; or (ii) he/she could not be summoned because of other reasons; or (iii) he/she had been duly summoned and had not indicated a good cause for his/her failure to appear. [148]

When an accused is tried *in absentia*, his/her legal representation is mandatory. Until 1 January 2000, Bulgarian law did not provide for the re-opening of criminal cases heard *in absentia*. Thereafter, this became possible in cases where the convicted person was unaware of the criminal proceedings against him/her and he/she submitted a request for the re-opening of proceedings within one year after having learned of the conviction. The request is examined by the Supreme Court of Cassation, which may quash the conviction and either order a rehearing of the case or, discontinue or suspend the criminal proceedings.[149]

In some cases, the Supreme Court of Cassation has refused to re-open cases, despite the fact that the defendant has not been properly informed of the criminal proceedings against him/her, reasoning that the defendant has apparently deliberately

145 See, among many other similar publications, http://dnes.dir.bg/news/sadii-tzvetan-tzvetanov-narkobos-itzo-bykov-9351858; http://mediapool.etaligent.net/show/?storyid=181539.

146 See http://www.thebulgariannews.com/view_news.php?id=128291; *dariknews.bg/search.php?tag_id=327104,* http://www.capital.bg/politika_i_ikonomika/bulgaria/2011/05/16/1090184_evropeiskata_asociaciia_na_sudiite_cvetan_cvetanov/, International Experts: Bulgarian Interior Minister Erodes Justice System Credibility, http://www.novinite.com/view_news.php?id=128291.

147 CPC, Section 269 (1).

148 CPC, Section 269 (3).

149 CCP, Sections 423 and 425.

gone into hiding.[150] The ECtHR has found a violation of the right to a fair trial in such cases, holding that, as the accused has not waived his/her right to be present during the trial, the refusal to re-open the proceedings may fairly be described as 'manifestly contrary to the provisions of Article 6 or the principles embodied therein'.[151]

3.3.3 The right to be presumed innocent

National law expressly stipulates the presumption of innocence, stating that the accused shall be considered innocent until found guilty with an effective judgment.[152] The law also states that the prosecution bears the burden of proving the charges, to a standard of 'beyond doubt', while the defendant is not obliged to prove that he/she is innocent. According to the case law of the SCC, the placing of the burden of proof on the prosecution, the banning of assumptions as to the guilt of the accused, and the duty of the court to acquit when in doubt, are all guarantees of the presumption of innocence.

The SCC has also held that the prosecution cannot base its case on the argument that the alibi of the defendant is not convincing, as that would represent a shift in the burden of proof.[153] When the prosecution has presented its case and the court is not convinced that the criminal act was committed by the defendant, or committed with the requisite intent, or that the act was a crime, the court must declare the defendant innocent and acquit him/her, not because the doubt is interpreted in his/her favour, but because the charges were not proven beyond doubt.[154] The presumption of innocence, however, does not prevent taking into account the fact that the defendant was also accused of other crimes in other proceedings, even where no final verdict was delivered, for the purpose of character assessment, in cases where the law expressly requires a character assessment in determining the sentence.[155]

While the law provides clear and strong guarantees for the presumption of innocence, lawyers and some judges interviewed expressed concerns with an apparent accusatorial bias in the courts. They gave examples of individual cases where, in their view, a guilty verdict was delivered and eventually became effective even though insufficient evidence was presented to justify this. Institutional pressure, as well as

150 Judgement by the Supreme Court of Cassation No. 172, Case No. 913/2006 of 1 March 2007.

151 ECtHR 24 March 2005, *Stoichkov v. Bulgaria*, No. 9808/02, para. 56.

152 CPC, Section 16.

153 Judgement by the Supreme Court of Cassation No. 138, Case No. 57/2010 of 9 April 2010.

154 Постановление No. 6 от 4 May 1978 г., Пленум на ВС, изм. с Постановление No. 7/87 г.

155 Решение No. 463 от 13 December 1999 г. на ВКС по н. д. No. 442/99 г., I н.

pressure exercised by the current government through strongly worded public criticism of bail decisions and verdicts, was cited as a general cause for such biased judicial decisions.[156] Indeed, public attacks against the courts by government officials using strong language have increased dramatically since the election of a new government in 2009, giving real reasons for concern.

The current government has, on several occasions, also selectively publicised evidence from pending investigations for the purpose of boosting its political standing.[157] The practice of the police, to seek public recognition for its investigation work by selectively announcing evidence without the necessary clarifications and conditions, has also been criticised by human rights groups.[158] The ECtHR has found a violation of the right to be presumed innocent in a case where a prosecutor had publicly stated in unequivocal terms his opinion as to the guilt of the accused.[159]

3.3.4 The right to silence

The defendant has the right to remain silent, or make a statement concerning the charges, when charges are brought and subsequently at any moment during the trial. The court shall not draw conclusions against the defendant if he/she refused to give a statement or did not prove his/her objections.[160] The SCC has held that the defendant's statements are not only evidence, but also a remedy that must not be limited by the threat that it will be used against the defendant. The refusal of the defendant to make a statement also cannot be taken into account in deciding whether to impose a suspended sentence, although the defendant's admission of guilt, and critical attitude towards his/her conduct, could be regarded as a mitigating factor.[161]

156 Acquittals are a rare occurrence, arising from only three per cent of the total indictments filed with the courts. Regional differences have been also given as examples in the interviews, with the region of Plovdiv indicated as a place where the courts are particularly likely to side with the prosecution in evaluating the evidence.

157 In a particularly telling example, in December 2010, the Minister of Interior read out in Parliament transcripts from a wire-tap in a pending investigation, during a parliamentary vote of confidence on the government's law enforcement record. The transcripts, which specified the names of the accused, were meant to, and achieved the effect of, convincing the public that the named doctors had conspired to kill a baby. As it turned out later, the transcripts were taken out of context, and completely misrepresented the facts in the case.

158 Bulgarian Lawyers for Human Rights 2006, page 3, http://www.blhr.org/bg/baza-danni/118/.

159 ECtHR 7 January 2010, *Petyo Petkov v. Bulgaria*, No. 32130/03.

160 CPC, Section 103.

161 *Ibid*.

The accused does not testify under oath and cannot be held liable for perjury for his/her statements. The SCC has held that the credibility of the defendant's statements as evidence are not affected by this fact, however, and that the law does not *a priori* define the statements of the accused as less credible. Rather, they should be interpreted in light of their veracity and that of all the other evidence.[162] Judges interviewed for this report have confirmed that they do not consider statements by defendants as different from other statements of witnesses, despite the fact that they are not given under oath. They do, indeed, interpret them in light of all the other evidence.

One outstanding issue with respect to the right to silence, however, is the inclusion in the case file of the statements in writing given by the accused during his/her 24-hour detention by the police, as well as testimony given by the accused as a witness prior to being charged. While the right to a lawyer at this stage is required by law, in practice no lawyer is guaranteed at this point, and only about four per cent of arrested suspects are visited by a lawyer (see 3.2.2), while 70 per cent of suspects give written testimony.[163]

On the basis of the interviews, however, it appears that such testimony is read by the judges and could well influence the verdict. While appellate judges tend not to read such evidence, trial judges, and particularly judges at the district court level, do read it on a regular basis, just as they read all the other evidence in the investigation file. Such evidence could contain further inadmissible evidence, like memos by police officers. Several judges indicated that, from their perspective, such statements do contain important information that allows them to make a better assessment of the circumstances, including how the police came to suspect the accused and how the arrest was affected.

There was no unanimous position among interviewees as to whether such evidence should be excluded from the case file. Even some defence lawyers have objected to such exclusion, principally for two reasons. The first was that this would result in a wider use of testimony by police officers, and they had misgivings about the objectiveness of such testimony. In addition, they argued that, once a procedure for excluding evidence is introduced, it would open the possibility for the procedure to be abused by the police withholding other evidence favourable to the defence.

162 Решение No. 825 от 10 January 2005 г. на ВКС по н. д. No. 435/2004 г., II н. о.

163 See Vuchkov 2005, p. 71.

While such concerns about abuse of power by the police, particularly in the current political climate, are not an exaggeration, there is no principled objection to police officers testifying. Moreover, the risk of non-disclosure of relevant information is present in any case, and the more appropriate remedy should be the creation of sufficient safeguards.

3.3.5 The right to reasoned decisions

The law states that the court should provide reasons in the judgment as to why it came to a particular finding of fact, as well as discussing what evidence and legal analysis its decision was based upon.[164] Where contradictory evidence exists, the court should analyse it and indicate reasons why certain evidence is credited and other evidence is rejected. The appeal court does not have to state detailed reasons when it confirms the trial court judgment. It is under a duty to do so only when it delivers a new verdict, different from the one delivered by the trial court.[165] Since the courts have to announce their verdict immediately at the end of the court hearing, most often they announce the reasons at a later point. The failure of the court to announce the reasons for the verdict immediately is not considered a procedural violation, with the law allowing for reasons to be announced within 15 days, or within 30 days in complex cases. It is not uncommon for that time requirement to be breached but, as the parties will be given the opportunity to react after the reasons were announced, this is not considered to prevent effective defence.

3.3.6 The right to appeal

The defendant has the right to appeal the verdict and the sentence either as a whole or in part.[166] The defendant can exercise that right by submitting an appeal against the trial court judgment within 15 days after it was announced, or by joining the appeal filed by a co-defendant no later than at the first court hearing on appeal.[167] Where the trial court

164 CPC, Section 305 (3).

165 Решение No. 411 от 15 July 2005 г. на ВКС по н. д. No. 821/2004 г., НК, II н. о.

166 CPC, Section 318 (3).

167 CPC, Section 320 (5). The withdrawal of the appeal by one defendant does automatically end the proceedings with respect to the other defendant who joined that appeal, because it is not derivative, but submitted of its own ground, with independent and different objections; see Решение No. 594 от 7 January 2004 г. на ВКС по н. д. No. 383/2003 г., III н. О.

has announced the verdict, but has not published its reasons, the defendant should file a skeleton appeal, and would then have to provide detailed grounds and arguments in an additional submission. A cassation appeal is available in the majority of cases. Where there is no right to a cassation appeal, or the defendant has failed to file a cassation appeal, the case could still be reviewed on appeal following a special procedure.

The defendant can request the re-opening of the case within six months of the final judgment, for serious procedural violations.[168] Where the defendant did not appeal the trial court judgment, he/she does not have the right to a cassation appeal, unless the prosecution appealed and the situation of the defendant has worsened.[169] There is no requirement for either the appeal, or the cassation appeals, to be filed by a lawyer, and the lawyer representing the defendant before the trial court, can file an appeal independently. The filing of an appeal is not expressly covered by the legal aid fee for the trial, but the official position of the Bar is that legal aid lawyers should appeal guilty verdicts.

3.4 Rights relating to effective defence

3.4.1 The right to investigate the case

There are no special provisions regulating the right of the defendant and defence counsel to independently collect any evidence. Instead, any collection of evidence must be done by the investigating authority or, subsequently, by the court. However, there are also no limitations imposed by law on the ability of lawyers to interview potential witnesses, or to examine evidence to be presented later in court. As a practical matter, lawyers would only interview witnesses indicated by the defendant and never really undertake any investigation on their own.

The use of private detectives to investigate cases is also rare, if it happens at all. This restricts the investigative efforts of the defence largely to those of the defendant him/herself. Once the defendant indicates certain witnesses or documents, defence counsel will call those witnesses to testify, either before the investigation or the court. Recruiting private expert opinions and requesting the court to appoint an expert is also possible. As noted earlier, there is no absolute right of the accused, or his/her

168 CPC, Section 422 (1) 5. The prosecution has an identical right to request the re-opening of a case, for serious procedural violations.

169 Решение No. 75 от 20 March 2003 г. на ВКС по н. д. No. 713/2002 г., I н. о.

lawyer, to participate in investigative actions during the investigation. Such a right exists only where the defendant has requested a certain investigative action and the request was granted,[170] or he/she is questioned, a witness is questioned before a judge, the accused or his premises are subject to a search, or he/she takes part in a line up. As a practical matter, interviewed defence counsel stated that the defence is rarely allowed to participate in investigative actions.

3.4.2 The right to adequate time and facilities to prepare the defence

There is no expressly stated right to adequate time to prepare one's defence. However, the principle is well established both in legislation and court practice. The CPC sets strict deadlines for summonsing a suspect and accused. Thus, where the suspect has to be summonsed in order to be charged, and later to be presented the investigation file, he/she should have received the summons no less than three days in advance, while the accused should receive the indictment for the court hearing no less than seven days earlier.[171] After receiving the indictment, the accused also has seven-day time period to present requests and new submissions in writing.

Similarly, where an expert report is presented for the first time at trial, it must be presented no less than seven days prior to the hearing. Apart from the express legislative guarantees, the investigating authorities and courts reportedly demonstrate sufficient understanding of the need for the defence to prepare effectively for trial. With respect to the two crucial steps in the development of the criminal procedure, the presentation of the investigation file and the start of the trial, defence counsel interviewed generally agreed that the defence would normally be given sufficient time to read the investigation file.

As to the adequate facilities to prepare the defence, this is not a concept that is expressly recognised under domestic law. The notion is implicit in the right of an arrested suspect to meet with his/her lawyer without the presence of another person. However, as discussed earlier, there are practical issues with respect to available space for private meetings between a lawyer and a suspect in the police department and, as a result, these meetings must also be relatively short. There are also practical issues with respect to the lack of remuneration for legal aid lawyers to travel and meet detained criminal defendants.

170 CPC, Section 230 (1).

171 CPC, Sections 219 (5), 227 (3) and 254 (3).

3.4.3 The right to equality of arms in examining witnesses

The principle of equality of arms is expressly laid down in law,[172] as is the right of the defence to cross-examine witnesses. Both the prosecution and the defence can request a witness to be called, with the court deciding whether to do so. However, witnesses requested by the prosecutor will already have been questioned during the investigation, so it is easier for the judge to decide on the relevance of their testimony. Where the defence requests a witness to be called to give evidence for the first time in court, it will have to inform the court of the relevance of their testimony. Interviewees for this report agreed that, when considering requests for a witness to be called, judges are not too strict and prefer to err on the side of allowing them.

Although the right of the defence to cross-examine a witness is specified in law,[173] under certain circumstances, a criminal defendant might be denied this right. This would happen where the witness was questioned during the investigation before a judge, but without the presence of the accused, as no charges were brought against him/her at that point.[174] If that witness cannot or is unable to appear to be questioned at trial, either because his/her whereabouts was unknown, he/she has died, or for some other reason, this witness's testimony will be read out at trial and accepted as evidence, without the opportunity for the defence to cross-examine that witness.[175]

As noted earlier, judges assist the parties and might also take the initiative and call certain witnesses, where there are grounds to believe that they know relevant information. There are no statutory rules designed for the protection of vulnerable witnesses that would limit the right to cross-examine them.[176] Issues related to the right to cross-examine a witness might also arise in cases of questioning of anonymous and protected witnesses. As special equipment is not always available, questioning might take place in the form of the parties writing down their questions and the court then using them to question the witness in an adjacent room.

172 CPC, Section 12.

173 CPC, Section 280.

174 CPC, Section 223. Where charges have already been brought against a suspect, and the investigating authority has decided to question a witness before a judge, the accused and his/her lawyer must also be present; CPC, Section 223 (2).

175 CPC, Section 281 (1) 3 and 4.

176 As the procedure is clearly deficient in this respect, providing no protection against secondary victimisation of vulnerable defendants – particularly minors, rape and traffic victims – some courts have pioneered the use of a video connection to question such victims in an adjacent room.

Since the prosecutor has already questioned the witness earlier, this gives the prosecutor some advantage when questioning the same witness by this method at the trial. This procedure also does not allow for the standard dynamic of questioning that would normally involve following with a question stemming from the specific answer just provided. With a recent amendment to the CPC, the law also extended the applicability of the procedure for questioning anonymous witnesses to witnesses who have been provided with some sort of physical protection, even if they are not anonymous.[177]

3.4.4 The right to free interpretation and translation of documents

The law expressly provides that criminal proceedings should be held in Bulgarian, while also stating that a person who does not speak Bulgarian may use another language and has the right to an interpreter.[178] If the defendant does not understand and/or speak Bulgarian, an interpreter shall be appointed by the investigating authority or presiding judge.[179] The right to be informed of the charges in a language that the defendant understands is a key right, the violation of which would lead to a return of the case to the investigation stage, or the quashing of the verdict and a retrial, if no interpretation was available during the trial. The costs of interpretation are borne by the state.

The courts have rendered contradictory decisions as to whether the defendant should repay the interpretation cost in the event that he/she is found guilty.[180] The ECtHR has on two occasions found a violation of the right to a fair trial, where defendants, who were found guilty, were ordered to pay interpretation costs.[181] The law also specifies that, where the defendant does not speak/understand Bulgarian, his/her representation by a lawyer is mandatory,[182] but does not provide for interpretation of communications between the lawyer and his/her client.

177 CPC, Section 141 (4). This amendment was introduced in May 2010. It is not clear what prompted it and the extent to which the courts will allow a limitation of the right to cross-examine a witness under those circumstances.

178 CPC, Section 21.

179 CPC, Section 142 (1).

180 Those differences come from conflicting statutory provisions. On the one hand, the CPC states that where someone is convicted, they should recover all costs; see CPC Section 189 (2). However, the Law on the Judiciary specifies that interpretation costs should be carried by the courts; see Decision of 2003 (Решение No. 117 от 4 March 2003 г. На ВКС по н.д. No. 539/2002 г., II н.о.).

181 ECtHR 20 November 2008 *Isyar v. Bulgaria,* No. 39103, and ECtHR 21 December 2010, *Hovanesian v. Bulgaria,* No. 31814/03.

182 CPC, Section 94 (1) 4.

Until recently, the defendant had no right to have any documents translated into a language that he/she understands. This right was created for the first time with amendments to the law introduced in 2010, which were effective as from 28 April 2011. According to those amendments, the following documents shall be translated into a language that the defendant understands; the charge sheet, which includes an enumeration of all the basic rights, the pre-trial detention ruling, the indictment, the verdict and any decisions on appeal.[183] As this is a fairly recent provision, it is not yet clear how it will work in practice.

As to the right to interpretation, anecdotal evidence suggests that the obligation to appoint an interpreter is generally followed with respect to foreigners, with the interpreter available to read the case file. There are no formal mechanisms to monitor the quality of the interpretation, which could become more of an issue with the new requirement for translating documents.

4. Political commitment to effective criminal defence

Political action has, over the last few years, shifted away from criminal defence rights towards the fight against crime and particularly against organised crime and corruption. These have been top political priorities since 2009, when the current parliamentary majority won Parliamentary elections. The functioning of the judicial system has been a focus of major political and public discussions, with the government accusing the courts of being too lenient towards high-profile criminals, attacking judges for being corrupt and using very strong language. As noted, such attacks have usually been unjustified, and occasionally have been based on manifest misrepresentation of facts. The government has in turn been strongly criticised by professional organisations, human rights groups and international organisations.

While actual crime levels are not particularly high, in the public's perception at least, crime has been a significant issue and, particularly through the 1990s, has been perceived as reaching dramatic proportions. Crime levels have indeed increased after the fall of the communist regime, with its tight police control over society. Another factor explaining the public's perception of increased criminality has been the change in the media that, during the communist regime, was not reporting on crime. The

183 CPC, Section 55 (3).

media has since begun to report on crime in a very immediate and graphic way, hugely affecting the public's perception of crime. As there have been few reliable statistics and little analysis, public debate has largely been driven by populist messages, rather than well-informed policies.

The criminal justice system has suffered significant lapses in its effectiveness, but there have been relatively few measures to improve institutional performance. At the same time, legislative amendments, increasing the penalties for all categories of crimes, have been a constant throughout the years. There has been no significant political debate over the funding of the justice system, which has increased substantially over the last decade.

In the public's perception, there are two groups that are strongly associated with crime. One is the Roma, associated with property crimes, mostly theft, burglaries and theft of agricultural produce. The other group is not so clearly defined, but could be described as organised crime and high-level government corruption. Both of these are perceived as being able to evade justice due to a corrupt and inefficient criminal justice system.

While there was more attention towards Roma crime in the late 1990s and the following years, as of late, organised crime and corruption have taken centre stage. This has been the result of increased public awareness of the links between organised crime and corrupt government officials, as well as the pressure put on the Bulgarian government by the EU. Those organised criminal activities that generate significant profits include smuggling, particularly alcohol, tobacco and fuel, drug trafficking, human trafficking and prostitution.

Privatisation and government contracts are seen also as highly corrupt, and evidence has been mounting throughout the years of political involvement and cover-ups of organised crime and high-level government corruption. In addition, fraud relating to EU funds and a lack of effective prosecutions have become particularly sour points in relations between Bulgaria and the EU. This has resulted in the fight against organised crime and corruption becoming the top priority of the government that was elected in 2009.

5. Conclusions and recommendations

5.1 Major issues

The legal framework in Bulgaria has developed significantly over the last decade to establish a procedure that guarantees the basic rights of criminal defendants. Both the legislation and the case law of the courts have evolved considerably in this respect, creating strong legal guarantees, in line with international law. While legal regulations are generally in place, there are, however, some real concerns with respect to the rights of criminal defendants. These could be addressed by a combination of measures, legislative as well as organisational, together with a heightened sensitivity of the courts to the rights of the accused. Data on key aspects of the functioning of the system from a criminal defence rights perspective, as well as relevant research and critical analysis, are also often missing or insufficient, thus hindering improvements to the system.

The issues that stand out could be grouped into four main areas. The first is timely access to quality legal advice and representation. There are insufficient guarantees with respect to access to a lawyer, both privately retained and legal aid lawyers, during the 24-hour police arrest. Suspects arrested by the police for 24 hours are not informed of their right to free legal aid and only about four per cent are visited by a lawyer during this time period. The statutorily defined right to a lawyer for a suspect questioned as a witness is also too limited. Further, there are outstanding issues with respect to the funding, recruitment and quality control of legal aid work. While legal aid is generally under-funded, the system does not use the existing resources in the most efficient manner, with fees for legal aid work not reflecting sufficiently the actual work performed. Moreover, the system of selection of legal aid lawyers does not function well and needs to be reconsidered.

The second group of issues relates to some rules of evidence and other procedural guarantees for a fair trial. The one issue that stands out is the common practice of including in the case file manifestly inadmissible evidence, such as police reports, statements in writing by the accused, and testimony given by the accused as a witness. The standard legal answer is that this is inadmissible evidence and cannot therefore be taken into account by the courts. This answer, however, does not in practice withstand scrutiny. Such manifestly inadmissible evidence does influence the courts and therefore should not be presented at all. This issue is closely linked to the obligation of the police and prosecution to disclose to the defence all material that might be relevant to

the case. While such obligation exists, it is of a more general nature, and there are no sanctions for lack of disclosure.

A few other issues, noted in this report should also be addressed by the courts through case law. These include the introduction of practical guarantees for an 'immediate' bail hearing after arrest; compliance with international standards on the re-opening of proceedings after a trial *in absentia*; refraining from claiming from the accused the costs for interpretation, where the accused is found guilty; and providing full enjoyment by the defendant of the right to cross-examine a witness in line with international standards, in cases of protected witnesses, anonymous witnesses and where the witness was questioned before a judge at the pre-trial stage. The use of expedited proceedings and guilty pleas has increased significantly since their inception in 2000, without an assessment of their overall fairness.

The final group of issues relates to public criticism of court decisions by government officials and the public announcement of incriminating evidence in pending proceedings. While the courts should certainly not be immune from criticism, public criticism is all too often not based on a careful and detailed analysis of the facts and involves strong and emotional language and personal attacks that might undermine the institutional integrity and independence of the courts. Some public announcements by officials about pending investigations could also easily be seen as compromising the right of defendants to be presumed innocent.

5.2 Recommendations

1. Ensure timely access to quality legal advice and representation, including during the 24-hour police arrest, through strengthened statutory guarantees of the right to a lawyer for the suspect.

2. Improve the quality of legal aid by matching more closely legal fees with legal aid work actually performed, introducing basic quality control for legal aid work, and strengthening the right of criminal defendants to choose an individual lawyer under the legal aid scheme.

3. Terminate the practice of including in the case file manifestly inadmissible evidence, and strengthen the legal obligation of the police and prosecution to disclose to the defence all material that might be relevant to the case.

4. Guarantee through the court's case law full compliance with international standards on the right to an 'immediate' bail hearing after arrest, re-opening of proceedings after a trial *in absentia,* the right of the accused to free interpretation of the criminal proceedings, and full enjoyment by the defendant of the right to cross-examine a witness.

5. Ensure that public criticism of the courts and court decisions by government officials is well balanced and does not undermine the integrity of the judiciary. Public announcements of incriminating evidence in pending proceedings should not compromise the right of the accused to be presumed innocent.

6. Collect data on a regular basis on key aspects of the functioning of the system from a criminal defence rights perspective, and develop capacity for critical research and analysis of the outstanding issues.

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Besarion
Bokhashvili

CHAPTER 4 GEORGIA[1]

1. Introduction

1.1 Basic demographic and political information

The Republic of Georgia has a continental law system and has undergone significant legal reforms[2] since 2004. It has an area of 69,700 square kilometres and is located to the east of the Black Sea and south of the Great Caucasus Mountain Range. This region is known as the 'South Caucasus' or 'Transcaucasia'. It shares its border with the Russian Federation in the north, Turkey and Armenia in the south and Azerbaijan in the east.

According to the latest data, the population of Georgia is approximately 4,436,400, comprising approximately 2,108,900 males and 2,327,500 females.[3] Its ethnic makeup is as follows: Georgians – 70 per cent, Armenians – 8 per cent, Azeris – 6 per cent, Russians 5 per cent and Greeks – 2 per cent. The capital is Tbilisi (population 1,151,500) and the other principal towns are Kutaisi (700,400), Rustavi (119,500), Batumi (123,500), Gori (144,000) and Poti (47,700).[4] The Christian majority is mainly Orthodox, and other religious/confessional groups include Shiite and Sunni Muslims, Armenian Gregorians, Catholics, Baptists, Jews and Jehovah's Witnesses.

1 This country report has been reviewed by Giorgi Chkheidze, lawyer, currently the Deputy Chief of Party of the 'Judicial Independence and Legal Empowerment Project', a USAID-funded four-year initiative implemented by the East-West Management Institute.

2 http://siteresources.worldbank.org/GEORGIAEXTN/Resources/annual-eng.pdf.

3 http://geostat.ge/?action=page&p_id=472&lang=geo.

4 *Ibid*.

Georgia gained its independence from the Soviet Union in 1991. During the 'Rose Revolution' in 2003, former President Eduard Shevardnadze left his position following massive protest demonstrations, and new elections in early 2004 swept Mikheil Saakashvili into power, along with his National Movement party. There followed legal changes and in almost every area, with reform of criminal justice sector being one of the most noteworthy.

1.2 General situation in the criminal justice sector

Legal reforms in the criminal justice sector were primarily intended to address the high rate of corruption in all sectors, as well to combat organised crime. Prior to these significant reforms, the high rate of corruption, as well as nihilism and a general distrust by society towards reporting crimes, meant that law enforcement representatives did not register many crimes, so that the generally available data was vague and incomplete. Moreover, a deep-rooted tolerance towards crime, a certain 'respect' by significant parts of population towards mafia bosses, an 'obligation' of silence (similar to Italian principle of 'Omerta') and the legacy of the Soviet era each had a significant influence on public perceptions of crime.

However, since 2004, authorities have officially followed a 'zero tolerance' policy towards crime and 'thieves by law' (mafia bosses). Many mafia leaders have either been detained, convicted or have fled the country. The Parliament of Georgia has even introduced relevant amendments to the Criminal Code of Georgia declaring that being a thief by law, as well as having an association with a criminal environment, are crimes, carrying maximum sentences of 10 and eight years, respectively.

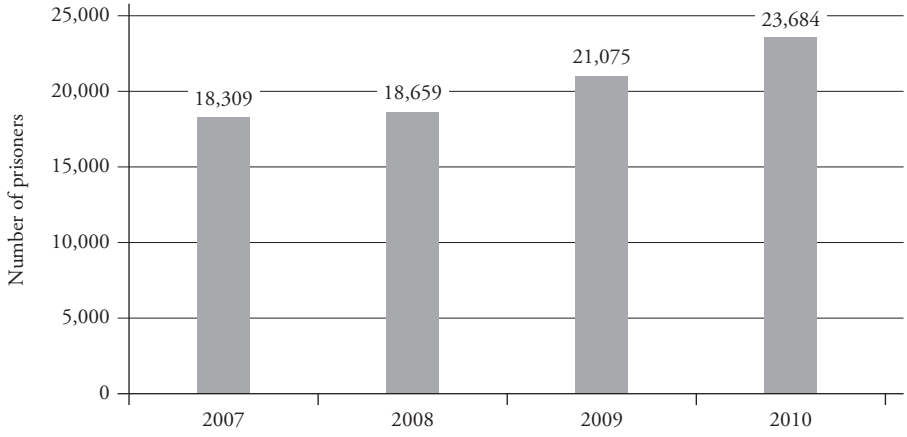
Various significant reforms within law enforcement agencies (mainly the Police and Prosecutor's Office), effectively combating corruption and increasing public trust towards law enforcement institutions,[5] have resulted in substantial changes in public perceptions of crime. Society has welcomed the fight against corruption and mafia organisations, calling for even more stringent measures. The most recent criminological survey[6] shows that 58 per cent of respondents expressed their readiness to assist law enforcement authorities in combating and investigating crimes.

2 http://www.police.ge/uploads/sakanonmdeblobaza/bcg_kvleva.pdf.

6 Conducted by the Ministry of Justice of Georgia and company GORBI 2011.

The official announcement of the zero tolerance policy towards crime has resulted in more stringent measures, and the country's criminal justice policy has therefore become much more punitive in nature. According to official statistics provided by the Supreme Court of Georgia, criminal courts convicted 19,940 and acquitted eight persons in 2010, 18,354 convicted persons and 18 acquitted in 2009, and 20,804 convicted and 30 acquitted in 2008. This has resulted in a drastic increase of prisoners in Georgian jails. While there were 9,688 prisoners in 2005, the number rose to 21,075 in 2009 and 23,684 in 2010. The latest report published by World Prison Population places Georgia in sixth place, with 505 prisoners for every 100,000 persons.[7]

Figure 1.
Prisoners in Georgia, 2007–2010

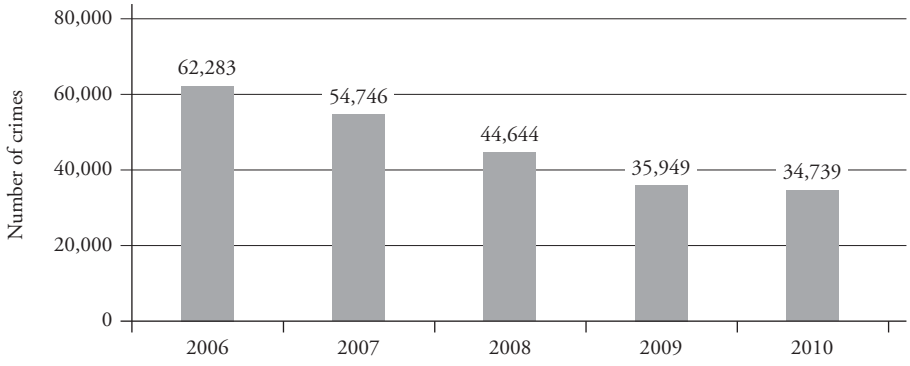


In addition, these stringent measures and policies have resulted in a significant reduction of crime. According to the most recent statistical data, the level of crime in Georgia is declining. This could be attributed to more effective work by law enforcement institutions, as well as the increased trust of the public towards the police and the timely reporting of crimes. In 2006, the Ministry of Interior registered 62,283

7 http://chartsbin.com/view/eqq, published on 2 February 2011.

crimes, whereas in 2010 the number was 34,739, having gradually declined in the intervening years (2007 – 54,746, 2008 – 44,644, 2009 – 35,949).[8]

Figure 2.
Crimes in Georgia, 2006–2010



The most recent survey conducted by the Ministry of Justice and the European Union (EU)[9] revealed that 98 per cent of respondents felt safe from crime during daytime and 96 per cent during the night. Some 87 per cent of respondents assessed the work of the police as effective and emphasised their increased trust towards them. The most trusted law enforcement agency in Georgia was the Patrol Police. On the other hand, 49 per cent of respondents assessed the work of the Prosecutor's Office as positive, while 26 per cent were neutral. Respondents expressed the least trust towards the judicial authorities.

1.3 Legal reform of the criminal justice sector

Adoption of the new 2010 Code of Criminal Procedures (CCP)[10] was preceded by lengthy discussions and controversy among all stakeholders, as well as hundreds of amendments being introduced to the previous CCP. This sometimes gave rise to a sense of vagueness and a lack of relevance to the previous CCP provisions.

8 http://www.police.ge/uploads/statistika/shss_statistika/BIULETENI.saqartvelo.ianvari.14.02.10.pdf.

9 http://www.justice.gov.ge/index.php?lang_id=GEO&sec_id=130.

10 Enacted on 1 October 2010.

The new CCP has transformed the whole criminal process from an inquisitorial to an adversarial one. It introduced core innovations such as: a jury system;[11] a significant increase in the extent of the equality of arms of the parties in obtaining and submitting relevant evidence before the court; the role of the judges as an arbiter with no power to call evidence or to order the conduct of investigative measures on his/her own account; the burden of proof placed on the prosecution; a ban on the questioning of witnesses without their consent; the presence of the judge during the pre-trial stage; a reduction of detention during the preliminary investigation of a case; and a 12-month deadline for conviction from the moment a person has been charged.

In addition to these innovations, the guilty plea (by procedural agreement) was a major initiative introduced to the Georgian criminal justice system in 2004. This aims to lead to a court judgment without substantive consideration of a case. A plea agreement may relate either to a guilty plea, or an agreement as to sentence. The most recent statistics reveal that in almost 80 per cent of criminal cases, a plea agreement is used – in 2010, criminal courts delivered 19,956 judgments, which included 15,867 plea agreements.[12]

1.4 Criminal courts

Generally-speaking, judicial authority in the criminal sphere is exercised by common courts comprising of District (city) courts,[13] Courts of Appeal,[14] and the Supreme Court of Georgia.[15] The Constitutional Court of Georgia has no competence to deal

11 As a pilot case, the jury system will be applied to cases of aggravated murder only in the Tbilisi until 1 October 2012, after which it will also cover Kutaisi District, and from 2014 the whole of Georgia.

12 http://www.supremecourt.ge/files/upload-file/pdf/sisxli2010.pdf.

13 If a criminal case is not tried by a Court of Jury as a first instance court, the case shall be tried by the District (city) court (Article 20 of the CCP).

14 ' ... the Investigative Panel of the Appellate Court shall examine the complaints filed against the decisions of the magistrate judge ... The Appellate Chamber of the Appellate Court shall examine the appeals filed against a judgment and other final decision rendered by the District (City) Court or a magistrate judge ... The Criminal Chamber of the Appellate Court shall consider an appeal requesting to re-examine a judgment and other final decision of the common courts of Georgia that have entered into legal force due to newly discovered circumstances, in cases identified by this Code and in accordance with the established rules' (Article 20 of the CCP).

15 The Criminal Chamber of the Supreme Court of Georgia examines cassation appeals filed against a judgment and any other final decision rendered by the Appellate Court.

with criminal cases or to revise the rulings of any of the common courts.[16] Criminal trials are heard by professional judge(s) or jurors as provided for by legislation.[17]

The fairness of trial proceedings before domestic judicial authorities has been questioned by various human rights supervisory institutions, as well as by the US Department of State in its 2010 human rights report on Georgia[18] which stated that: 'reports persisted that the executive branch continued to exert pressure on judicial authorities'. Similar statements can be found in the most recent report of the Public Defender of Georgia (Ombudsman), which noted that: 'in criminal cases the courts did not adequately implement the right to a fair trial provided by the European Convention of Human Rights'.

Citing the general attitude of the courts, alleged influence by the Prosecutor's Office on the judiciary, the lack of relevant substantiation of judgments delivered by criminal courts, as required under Article 6 of the ECHR, and the statistical data noted above relating to the extremely low rate of acquittal, NGOs have complained that judicial authorities continue to act as a rubber-stamp for the prosecutor's decisions and that the executive branch exerts undue influence.

1.5 Bar

The Georgian Bar Association (GBA) covers all lawyers, including criminal defence lawyers.[19] The requirements to undertake legal practice are very liberal. The law provides that a lawyer (advocate) can practise alone, or with other lawyers, or with other professionals, by establishing legal bureaux or other private legal entities in accordance with the relevant legislation on commercial activities.[20]

16 The Constitutional Court of Georgia is competent to deal with individual applications only where the provision(s) of normative act(s) is thought to contradict with basic right(s) or freedom(s) secured under the Second Chapter of the Georgian Constitution. The Constitutional Court of Georgia is one of the active institutions using and basing its decisions on standards established by the ECHR.

17 Nowadays only for manslaughter in aggravated circumstances.

18 United States Department of State, Bureau of Democracy, Human Rights and Labor 2009 (2010) Country Reports on Human Rights Practices, Georgia http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136032.htm.

19 It should be mentioned that, during the past several years, lawyers have questioned the idea of having only one Bar and not allowing several GBAs to operate.

20 Article 18 of the Law on Lawyers (Advocates), adopted 20 June 2001.

According to the official list of GBA members, there are 3,691 registered lawyers. However, not all of them are allowed to participate in criminal proceedings, since only those who have passed general bar exams (covering all fields of law – criminal, civil, administrative), or exams in criminal justice, are granted a licence to participate in criminal proceedings (2,971 lawyers).[21]

As to the perception of criminal defence work in general, the situation in Georgia is not flattering. While the state authorities have concentrated their efforts on raising the capacity of law enforcement agencies (courts, prosecutor's service, police), hardly anything has been done by the state to strengthen the GBA. On the basis of the statistical data on acquittals by national judicial authorities, as well as the reported pressure by the prosecution on the judiciary,[22] many criminal defence lawyers are pessimistic about achieving success in criminal cases. In unofficial conversations, many lawyers have stated that, as a result, they prefer to concentrate on civil cases.

The recent report published by the International Observatory for Lawyers[23] highlighted:

(a) that the prosecutor regularly intervenes in the lawyer/client relationship, urging the client to change lawyers if the current one does not suit him/her (it has been claimed that prosecutors prefer to deal with a certain group of lawyers with whom they are keen to achieve a plea agreement, and propose and even exercise pressure on defendants to choose one of those lawyers);[24]
(b) the practical obstacles to enjoying the rights of legal counsel in criminal cases;
(c) reports of pressure imposed on defence lawyers on behalf of the prosecution authorities (threats, arrests, searches);
(d) that judges refuse to accept the majority of motions put forward by defence counsel and simultaneously meet all the intercessions lodged by prosecution authorities;
(e) that defence lawyers have difficulties with respect to meeting with a detainee, waiting for hours, and with strict limits on any such meeting;

21 http://www.4barristers.weebly.com.

22 See US Department of State report on Georgia 2009 http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136032.htm.

23 http://www.observatoire-avocats.org/wp-content/uploads/Mission-report-Legal-profession-in-Georgia1.pdf.

24 According to the statement made by lawyer J.B.

(f) the non-observance of confidentiality between the lawyer and his/her client in detention;
(g) the non-observance of the confidentiality of lawyer's notes and of the case documents.

1.6 Police[25]

Georgia has a system of law enforcement involving special and militarised units exercising executive authority, which protect public security and order, and human rights and freedoms from illegal violations, within a legislative. The police operate within the Ministry of Internal Affairs, in which persons of special police or military rank, as well as other public servants, are employed.[26]

The Ministry of Internal Affairs and its units (criminal police, Special Operative Department, Department of Constitutional Security) conduct investigations of all crimes, except those defined by Order of the Minister of Justice.[27] The Prosecutor's Office is in charge of investigating crimes committed by high-ranking officials such as the president, MPs, judges, ambassadors and consuls to foreign states, ombudsmen, prosecutors, high-ranking military officers and the head of the Chamber of Control. The Ministry of Finance has competence to investigate financial crimes, and the Ministry of Defence investigates crimes committed by military personnel.

1.7 Prosecution service[28]

In order to carry out criminal prosecutions, the prosecution service provides procedural guidance over investigations. Before 2004, the Constitution of Georgia referred to the Prosecutor's Office as a judicial authority. However, the 2004 amendments to the Constitution placed the service under the chapter dealing with the executive branch. As a result, the Prosecutor's Office has become an integral part of the Ministry of Justice. In cases defined under the Order of the Minister of Justice, the Prosecutor's Office carries out the full investigation of the crime(s).

25 See Law on Police (27 July 1993).
26 Amendment of 18 December 2009, N2390 entered into force from 1 February 2010.
27 Adopted 29 September 2010.
28 Law on Prosecution Service, Article 32 of the CCP.

The prosecutor carries out his/her responsibilities and acts in the capacity of a state accuser at the court. The prosecutor is authorised *inter alia* to: issue a binding instruction to an employee of a law enforcement institution and/or a subordinate prosecutor during the investigation; file motions with the court requesting a court order on the application, alteration or revocation of preventive measures for a defendant, or on the adoption of court decision in carrying out investigative and/or operative activities restricting human rights; revoke a ruling issued by an investigator or subordinate prosecutor; terminate or suspend a criminal prosecution and/or investigation; substitute charges; enter into a plea agreement with the defendant, and submit a motion to the court to render a judgment without a substantive hearing of the criminal case.

In practice, the Prosecutor's Office has become powerful, particularly since the 'Rose Revolution'. As mentioned above, it has been alleged by NGOs, defence lawyers and international organisations that the Prosecution Service has a high level of influence on judicial authorities, and that the latter serve simply as a rubber stamp for all requests and motions submitted by prosecutors. In almost all the cases when the Prosecutor's Office requests the imposition of preliminary detention on individuals, judicial authorities grant their requests. In 2009, the prosecution requested imposition of preliminary detention in 8,713 cases, 94.1 per cent of which were met; in 2010 this ratio was 92.6 per cent out of 8,761 requests. The situation is even worse with regard to the rate of criminal convictions.

The Prosecution Service takes the leading role in the plea bargain process. It has been alleged that this legislative power is sometimes abused by prosecutors/investigators in order to pressure a defendant to choose certain lawyers offering him/her a plea agreement.

2. Legal Aid Service

The special law on free legal aid was drafted from 2004 to 2007 under the leadership of the Ministry of Justice and with the active participation of national and international experts and non-state actors.[29] Adoption of the separate law was based on the need

[29] For example, a local foundation (Open Society) and other Georgian foundations and local NGOs, including the Georgian Young Lawyers' Association and Association 'Article 42 of the Constitution', were actively engaged in the process.

to ensure independence and stability of the service, thus requiring a special law establishing the Public Legal Entity[30] within the Ministry of Justice.[31] The new law on legal aid was adopted on 19 June 2007. Since then, the law has been amended twice – once in 2008, postponing introduction of legal aid in civil and administrative proceedings, and among other issues later that year, making important changes to the system, which involved moving the Public Legal Entity from the Ministry of Justice to the newly created Ministry of Corrections and Legal Aid.

In general, the Law is based on the following principles:

- Recognition of the right of *everyone to* legal consultation and court representation at state expense;[32]
- Legal consultation to be provided for any legal issue and for everyone; court representation for specific cases to be provided in criminal, civil and administrative proceedings (as for the actual trials, this is only in criminal and some administrative proceedings);[33]
- A right of access to the service only for physical persons (and not legal persons);[34]
- Legal aid in criminal proceedings to be provided where the law directly provides, or where the accused/defendant cannot pay for the service of the lawyer – that is, to persons whose social status has been assessed by the Ministry of Labour, Health and Social Issues as falling under 70,000 (conditional points), to persons whose social status has been assessed as under 100,000 (conditional points) and who have three or more children, to persons with disabilities, to veterans of war and the armed forces, and to juvenile orphans;[35]

30 The 'Public Legal Entity' is a semi-independent state body, which is *controlled* by the Ministry, or other body of the Executive Branch; this agency exercises considerable independence in its daily work (including having more flexibility with regard to the non-state budget sources of funding), but formally and institutionally is subordinated to the supervising body. Specific regulations for such bodies are provided in the Law on Public Legal Entity adopted 28 May 1999 (discussed further below).

31 The status of the service within the executive branch will be discussed further below.

32 Article 1 of the Law on Legal Aid.

33 Article 1 of the Law on Legal Aid.

34 Article 4 of the Law on Legal Aid.

35 Article 5 of the Law on Legal Aid.

– The Legal Aid Service (LAS) is a Public Legal Entity under the Ministry of Corrections and Legal Aid (MCLA), headed by the LAS director appointed by the minister of the MCLA;[36]
– To ensure effective and transparent functioning of the LAS, as well as the independence of individual LAS lawyers, a Monitoring Council has been established by the minister with a membership drawn from various state bodies and non-state organisations.[37]

The legal status of the LAS as a public legal entity allows it to be much more flexible towards funding, *vis-à-vis* ordinary state institutions (for example, the ministry and its departments). According to the Law on Public Legal Entities, in addition to budget funding (where such bodies should have separate budget line) such entities are entitled to funding from the following sources: membership fees (if the entity is established as a membership based organisation); targeted budgetary donations from the state; income received as a result of state procurement; income received as a result of services provided under contract; other legal sources of funding (including grants).[38] A similar list of possible funding is provided in the Law on Legal Aid.[39]

The specific budgetary allocations provided to the service over the six years to 2010 are as follows:[40]

– 2005 – approximately 13,000 Euro;
– 2006 – approximately 52,000 Euro;
– 2007 – approximately 652,000 Euro;
– 2008 – approximately 1,248,260 Euro;
– 2009 – approximately 1,256,950 Euro;
– 2010 – approximately 1,113,500 Euro.

36 Article 8 of the Law on Legal Aid;

37 In accordance with Article 10 of the Law on Legal Aid, the Monitoring Council of the LAS was established.

38 According to the Article 4 of the Law on Grants (adopted 28 June 1996), Public Legal Entities are entitled to receive direct grants.

39 Article 22 of the Law on Legal Aid.

40 See 2009 Annual report of the LAS, as well as 2010 Law on State Budget at: http://www.mof.gov.ge/4069.

According to the Law on Legal Aid, the LAS Monitoring Council has a major role in ensuring the financial sustainability of the service. According to Article 22[1] (which was introduced with the 2008 changes), a decrease of the budget of the LAS, in comparison with the previous year's budget, is only allowed with the consent of the LAS Monitoring Council.

In 2008, the LAS provided legal representation in 9,008 cases, in 2009 this figure amounted to 8,906, and in 2010 it was 9,596 cases.

As to the salary policy for LAS lawyers, according to the established internal system, the salary for LAS lawyers is a fixed monthly amount. (According to the information provided by Mr. Irakli Kobidze, the Director of State Free Legal Aid Service, the current monthly salary for LAS lawyers in Tbilisi is approximately 420 Euro; for regional lawyers 350 Euro; and for legal consultants 310 Euro.) As for lawyers invited from the public registry, they receive reimbursement of their services based on the specific list of actions/documentation they submit (for example, based on the number of motions prepared and submitted to the judiciary/law enforcement agencies, and the number of visits to prison).

3. Legal rights and their implementation

3.1 The right to information

Georgian legislation provides that, at the moment of detention or, if a detention does not take place, immediately upon being recognised as an indicted person, as well as before any questioning, the defendant shall be informed that he/she has a right to a defence counsel, the right to remain silent and to refuse to answer any questions, the right against self-incrimination, that everything that he/she says may be used against him/her, and the right to undergo a medical examination free of charge in the case of detention or arrest, immediately upon being brought to a relevant institution.[41]

The obligation to provide information to a defendant regarding his/her rights rests:

- in the case of arrest, upon the arresting official;[42]
- in the case of indictment, upon the prosecutor, or the investigator.[43]

41 Article 38 of the CCP.
42 Article 174 of the CCP.
43 Article 169 of the CCP.

If grounds for arrest exist, the arresting official shall explain these rights to the defendant. Any statement(s) made by the arrested individual prior to being informed of his/her rights is inadmissible as evidence.[44] The list of a defendant's rights is set out in the protocol of arrest,[45] and legislation provides that authorities are under an obligation to provide the arrested person with a copy of his/her arrest record. In cases where an arrest does not take place and the prosecutor, or upon the prosecutor's order, the investigator, presents the indictment to a defendant without making an arrest, a copy of the indictment listing the defendant's rights and duties shall be handed to the defendant or his/her defence counsel.[46]

In the case of arrest, the arresting official is the person responsible for informing the defendant of his/her rights at the time of arrest.[47] Immediately after taking the person into custody, the arresting official shall draw up the record of arrest. If, due to an objective reason(s), it is impossible to draw up the record of arrest, it shall be drawn up immediately after the person taken into custody is brought to the police station or other law enforcement agency. The record should indicate the list of the defendant's rights under the CCP; where relevant, the record shall also state the objective reasons for failure to draw up the record immediately after the person was taken into custody. The arrested person shall immediately be given a copy of his/her arrest record.[48]

In the case of indictment where no arrest takes place, if sufficient grounds for an indictment exist, the prosecutor may give a ruling subjecting a person to criminal liability as a defendant. The charges shall be presented no later than 24 hours from the giving of the ruling. The prosecutor, or upon the prosecutor's order, the investigator, must present the indictment to the defendant and to his/her defence counsel. A copy of the indictment listing the defendant's rights and duties shall be handed to the defendant or his/her defence counsel.[49]

Although it is not expressly mentioned in the CCP that the list of rights must be given to the defendant in a language that he/she understands, the spirit of the relevant provisions provides sufficient grounds for this to be the case. The CCP clearly stipulates that a participant in a proceeding with no command, or insufficient knowledge, of the language of the criminal proceedings shall be assisted by an interpreter.[50]

44 Article 174 of the CCP.
45 Article 175 of the CCP.
46 Article 169 of the CCP.
47 Article 174 of the CCP.
48 Article 175 of the CCP.
49 Article 169 of the CCP.
50 Article 11 of the CCP.

Georgian legislation also clearly provides for an obligation of the law enforcement authorities to inform the defendant about accusations and charges brought against him/her. It requires that, at the moment of detention or, if a detention does not take place, immediately upon being recognised as a defendant, as well as before any questioning, the defendant shall be informed in a language he/she understands of the crime(s) under the Criminal Code of Georgia where a probable cause of action exists. The defendant shall be given the record of his/her detention or, where he/she is not detained, a copy of a ruling recognising him as a defendant.[51]

A defendant has the right to the services of a translator/interpreter at the expense of the state during questioning and other investigative actions, if he/she has no knowledge, or insufficient knowledge, of the language of the criminal procedure.[52]

Formally, the CCP foresees that the defendant must be released immediately if he/she was not informed of the rights provided for by Article 174 of the CCP upon arrest and was not given a copy of the arrest record, or the arrest record is drawn up with substantial violations that prejudice the legal position of the defendant.

In practice, the obligation to provide information verbally on the spot, during arrest, if the latter takes place, is not complied with by the relevant authorities. Some defence lawyers[53] claim that only in high profile cases, when TV is involved and the arrest procedure is being filmed, will the verbal information regarding his/her rights be provided to the defendant. Generally speaking, authorities try to take advantage of an unexpected arrest and obtain as much evidence/testimony from the arrested person as possible without informing him/her about his/her rights. Furthermore, even when the protocol of arrest (containing the list of rights) is provided to defendant, the authorities believe that there is no apparent obligation to verify whether the arrested person has clearly understood his/her rights. However, defence lawyers do not express any complaints regarding the vagueness of the text defining the rights of the defendant which is provided either in the arrest protocol (in the case of arrest) or the indictment protocol.

Georgian legislation also clearly provides for an obligation of law-enforcement authorities to inform the defendant about accusations and charges brought against him/her.

51 Article 38 of the CCP.

52 *Ibid*.

53 According to lawyers J.B., G.M. and G.M.

3.2 The right to defend oneself

3.2.1 The right to defend oneself personally

Georgian legislation provides guarantees for a defendant to defend him/herself either personally, or through defence counsel. This right arises at the moment of arrest or, if an arrest does not take place, immediately upon being recognised as a defendant. The CCP[54] provides that a defendant has the right to refuse the services of defence counsel and to independently carry out his/her defence, for which he/she shall be given sufficient time and means. However, the right to defend oneself personally is not absolute, and Georgian legislation envisages certain circumstances where obligatory defence must be provided, notwithstanding the defendant's wishes during the investigative and trial stages. This is the case, for example, where: the defendant is a juvenile; the defendant does not speak the language of the criminal proceedings; the defendant has a physical or mental disability that prevents him/her from exercising his/her self defence; a court order (ruling) requiring a psychological examination has been rendered; the CCP establishes life imprisonment as a punishment for the alleged crime; the defendant is in the process of negotiating a plea agreement; the defendant is charged with a crime for which the CCP requires a jury trial; the defendant fails to appear before the investigative bodies; the defendant is removed from the courtroom; or the defendant is an unidentified person.[55]

Georgian legislation allows a defendant to carry out a private investigation independently, or with assistance of defence counsel, to lawfully obtain and present evidence in accordance with the rules set forth in the CCP, to request obligatory conduct of an investigative action and to request submission of evidence necessary to counter charges or alleviate criminal responsibility, and to participate in the investigative action carried out on his/her motion and/or a motion of his/her defence counsel.[56]

The CCP provides a right for a defendant to participate in the investigation of the charges and the trial; to file a motion and a recusal; to request the examination of evidence of the defence under the same conditions and through the same procedure as the evidence of the prosecution; to be familiar with the complaint filed by the

54 Article 38 of the CCP, Paragraph 6.
55 Article 45 of the CCP.
56 Article 38 of the CCP, Paragraph 7.

opposing party and to present his/her opinion thereon; and to examine the record of the court session and to make remarks thereon.[57]

In accordance with the rules established under the CCP, a defendant has the right to file an appeal against an action of an investigator before a prosecutor, or file an appeal against an action and a decision of a prosecutor before a superior prosecutor or, in specified cases, before the court. A defendant/convict shall be entitled to appeal a court decision, as well as to obtain a copy of the appealed decision.[58]

In practice, suspects and accused persons very rarely waive their right to be assisted by defence counsel or expresses their desire to defend themselves personally. In the majority of criminal cases, a plea agreement is achieved between the parties (in approximately 80 per cent of cases).[59] In plea agreement proceedings, the participation of defence counsel is obligatory and the defendant cannot achieve a plea agreement without hiring defence counsel (or enjoying free legal assistant if he/she is indigent).

3.2.2 Right to defend through legal counsel

As mentioned above, along with the right to defend oneself personally, Georgian legislation also provides that a defendant has the right to counsel of their choice,[60] as well as the right to substitute counsel of their choice at any time. The CCP provides that from the moment a person is recognised as defendant, he/she enjoys the right to legal defence counsel, since they are regarded as a defendant from the moment of arrest or indictment.[61] A defendant has the right to legal counsel at any time and there are no circumstances prohibiting counsel's participation at any stage of the proceedings.[62]

The CCP provides that a defendant or a close relative or other person acting in accordance with the defendant's will shall select and appoint defence counsel.[63] Investigators, prosecutors or judges have no right to recommend such counsel. The right to choose a lawyer is, however, not absolute. For example, the previous version of the CCP provided for possibility of the participation of a foreign lawyer when the permission of the Minister of Justice was granted. The present CCP does not foresee

57 *Ibid.*
58 *Ibid.*
59 http://www.supremecourt.ge/default.aspx?sec_id=1171&lang=1.
60 Article 38 of the CCP.
61 Articles 170 and 169 of the CCP.
62 Article 38 of the CCP.
63 Article 41 of the CCP.

such a possibility. Where a person is in a position to cover the relevant costs for legal assistance, he/she is free to choose from the list of lawyers who are members of the Georgian Bar. Where a person is provided with free legal assistance, the choice of lawyer is made by the LAS.

If a defendant is indigent, legislation provides for a right to have counsel appointed at the state's expense. The CCP guarantees to a defendant reasonable time and means for the preparation of his/her defence, as well as confidentiality of communication between a defendant and his/her defence counsel. It also prohibits any restrictions upon such communications that would obstruct the proper execution of the defence.[64]

The CCP authorises the defendant to carry out private investigations with the assistance of defence counsel, in order to lawfully obtain and present evidence; to request obligatory conduct of an investigative action and request submission of evidence necessary to negate charges or alleviate criminal responsibility; to participate in the investigative action carried out on his/her motion and/or a motion of his/her defence counsel. A defendant also has the right to request that his/her defence counsel attend investigative action in which the defendant is required to participate.[65]

In practice it has been claimed[66] that defendants face difficulties in relation to having adequate and timely access to their lawyer. In November 2010, the International Observatory for Lawyers (IOL) conducted a fact-finding mission to assess the situation with respect to the legal profession in the country. The IOL reported that lawyers encounter impediments in freely exercising their profession, such as difficulties in accessing penitentiary establishments and meeting their detained clients, violation of the lawyer-client confidentiality principle, difficulties in obtaining access to detainees' medical files, and being themselves subjected to degrading and humiliating searches when entering penitentiary facilities.

It has been alleged that, in the very recent past, law enforcement agencies have transported arrested individuals to temporary detention facilities located far from their place of ordinary residence, and the lawyer chosen by the person in question therefore finds it more difficult to visit that person and frequently refuses to do so.[67] In some cases this fact is then used by investigation authorities as an excuse to provide the person with a lawyer from the legal aid service (whom initially he/she did not request).[68]

64 *Ibid*.

65 Article 38 of the CCP, Paragraph 7.

66 According to the statement made by lawyers J.B. and G.S.

67 According to the statement made by lawyers J.B. and G.S.

68 Interview with lawyer G.S.

In his most recent report, the Public Defender of Georgia has indicated that lawyers encounter difficulties in accessing their clients due to inadequate infrastructure or organisation in the establishments concerned.[69] Furthermore, on 10 June 2010, the Ministry of Corrections and Legal Assistance adopted a controversial decree requiring that lawyers may meet with only one defendant on a single visit to a penitentiary establishment, although this measure does not apply to lawyers wishing to meet their clients in pre-trial detention. Lawyers, NGOs that provide legal aid, and the Public Defender have all criticised the decree, which – according to them – both restricts defendants' rights and prevents lawyers from an effective exercise of their profession.

Further problems relating to effective enjoyment of the right to defence include the fact that there is no effective system for ensuring that lawyers are involved at the earliest stages of police detention, particularly in legal aid cases. It might take more than 24 hours until a defendant is given access to his/her lawyer. During this period, the defendant is in the most vulnerable situation, and this is often used by authorities to carry out interviews, declare that defendant did not request assistance of lawyer, or obtain his agreement on a plea agreement on certain conditions.

It has also been claimed that investigators or prosecutors regularly intervene in the lawyer/client relationship, urging the client to change lawyers if the current one does not suit them (it has been alleged that prosecutors prefer to do business with a certain group of lawyers with whom they are keen to achieve a plea agreement and propose, and even exercise pressure on defendants, to choose one of those lawyers).[70] Defendants confront practical obstacles in enjoying the right to counsel in criminal cases; there have been reports of pressure on lawyers exerted on behalf of prosecution authorities (threats, arrests, searches). Moreover, lawyers experience difficulties in meeting with a detainee, often having to wait for hours, with strict limits on the meeting and non-observance of confidentiality between the lawyer and his/her client in detention.[71] However, since 2011, it has been reported that problems related to meeting with a detainee and the confidentiality of meetings have been addressed by the authorities.[72]

69 http://ombudsman.ge/index.php?page=1001&lang=1&id=1330.

70 According to the statement made by lawyers J.B. and G.S.

71 http://www.observatoire-avocats.org/wp-content/uploads/Mission-report-Legal-profession-in-Georgia1.pdf.

72 According to the statement made by lawyer J.B.

3.2.3 Right to defence through free legal aid

As mentioned above, Georgian legislation guarantees free legal aid. The relevant provisions of the CCP provide criteria for accessing legal aid, requiring that the state shall bear the costs of the defence if:

(a) due to his/her indigence, a defendant requests the assignment of a defence counsel;
(b) it is a case where mandatory defence is provided for by the CCP and the defendant is not represented by a defence counsel.

In such cases, a prosecutor or judge makes a request to the relevant service providing legal aid for the appointment of defence counsel at the expense of the state. The relevant authority addresses the local office of the LAS, which assigns the case to a relevant lawyer. Unfortunately, as mentioned above, no comprehensive scheme has been developed thus far to ensure that the LAS lawyer has access to the defendant immediately after the arrest of the person – this might take up to 24 hours. Furthermore in such cases, a defendant is entitled to make a direct request to the relevant service providing legal aid for the appointment of defence counsel.

The procedures for the selection and appointment of defence counsel at the expense of the state are defined in the Law on Legal Aid, and relate to:

(a) Preparation of legal documents;
(b) Protection of the interests of the suspect, accused, defendant and convict in criminal proceedings;
(c) Protection of the interests of the victim in criminal proceedings, at the expense of the state, in cases determined by CCP;
(d) Representation before the court in administrative and civil cases;
(e) Representation before the administrative bodies.[73]

A natural person is entitled to benefit from legal aid at the expense of the state in criminal cases, and legal aid shall be provided if the person is indigent. Rules for ascertaining the indigence of a person are determined by the order of the Minister of Justice.[74]

[73] Article 3 of the Law on Legal Aid.
[74] Article 4 of the Law on Legal Aid.

The LAS Bureau ensures the involvement of a public attorney in a criminal case, based on an application by:

(a) a suspect, accused, defendant or his/her representative/next of kin;
(b) an appropriate procedural body, in accordance with the requirements of the legislation.

A defendant has the right to contact and invite a public attorney. The appropriate procedural body must ensure that the public attorney is involved in the case without any obstacles and is able to carry out his/her rights and duties as laid down in the legislation. Any refusal to provide legal aid must be well-founded. An appeal against the refusal may be submitted to the higher-ranking officer or body. If this appeal is not successful, refusal may be appealed to the courts in accordance with the procedure laid down by the legislation.

However, there remains scepticism as to the organisational arrangements of the free legal aid service, as well as to the independence of legal aid scheme lawyers. The main problem in this regard has been associated with placing of the Legal Aid Service, as a legal entity of public law, within the Ministry of Corrections and Legal Assistance. This raises justified fears with respect to maintaining the absolute independence and impartiality of legal aid lawyers, particularly as the head of the service is appointed by the Minister of Corrections, Probation and Legal Aid and, in the majority of cases, legal aid lawyers are used to conduct the plea bargaining process.

3.3 Procedural rights

3.3.1 The right to release from custody pending trial

Georgian legislation provides for a right of defendants to be released from custody pending trial. The CCP[75] provides that preventive measures can only be applied to ensure that the defendant does not avoid appearing in court, to prevent him/her from committing further criminal activities, or to ensure enforcement of judgments. The code emphasises that detention or other preventive measures shall not be applied against the defendant if a less restrictive measure meets the objectives. Furthermore, the code shifts the burden to the prosecution and the judicial authorities to apply

[75] Article 198 of the CCP, Purpose and Grounds for Applying Preventive Measures.

detention as a preventive measure for the defendant only where the relevant goals cannot be accomplished by applying less restrictive measures (for example, bail, personal guarantees). The legislation provides an exhaustive list of grounds as to when preventive measures can be applied: if it is established that the person (1) will probably flee or fail to appear in court; (2) will destroy information relevant to the case; or (3) will commit a further offence.

The code provides that, when filing a motion to apply a preventive measure, the prosecutor must justify the reason for his/her choice of preventive measure and the inappropriateness of a less restrictive preventive measure. When deciding on the application of a preventive measure and its specific type, domestic courts are under an obligation to take into consideration the defendant's character, scope of activities, age, health condition, family and financial status, restitution made by the defendant for damaged property, whether the defendant has violated a previous preventive measure, and any other relevant circumstance.

Georgian legislation clearly provides for the right of a defendant to bail. Bail is comprised of a pecuniary amount or real estate. A pecuniary amount is deposited by a defendant, or another person on behalf of the defendant or in his/her favour, to the account of either the court trying the criminal case or a legal person of public law covered by the jurisdiction of the Ministry of Justice and located in the territorial jurisdiction of an investigative agency – the relevant local office of Georgia's Writ Enforcement Bureau – in order to ensure the defendant's written obligation of proper conduct and timely appearance in court, or before the investigator and prosecutor. When filing a court motion on an application for bail against a defendant, a prosecutor shall indicate the bail amount sought and the deadline for depositing it. After the bail amount is set, the defendant, or other person on his/her behalf or in his/her favour, may post immovable property of equivalent value instead of posting the bail amount. The bail amount is set by considering the crime of which the defendant is charged, together with his/her financial circumstances. The minimum amount of bail is 1,000 GEL (approximately 550 USD). If the defendant fails to post the bail or its equivalent in immovable assets to the account of the court or preliminary investigation body, the prosecutor shall request the court to apply a heavier preventive measure against the defendant. According to Article 219 of the CCP, the judge of the pre-trial hearing shall:

(a) ... examine [a] motion to apply, change, or revoke a preventive measure

The 'presumption in favour of liberty' has not been effectively implemented in Georgia. Although legislation in force clearly requires the imposition of preliminary detention as a last resort, domestic courts use it in most instances. As noted above, when the prosecution requests imposition of preliminary detention, domestic courts tend to grant their request in almost every case. As a proportion of all types of preventive measures utilised (including bail, bail guaranteed by detention, personal guarantees), preliminary detention was imposed in 49 per cent of cases in 2010, and in 51 per cent in 2009.

According to the most recent statistical data, in 2010 and 2009, 21,626 and 20,619 persons respectively were arrested by law enforcement agencies and placed in temporary detention facilities (at police stations) of the Ministry of Interior. Of these, in 8,109 cases (2010) and 8,198 cases (2009), persons have been placed in preliminary detention by domestic judicial authorities.

This indicates that the presumption in favour of liberty does not generally operate in Georgia and that authorities fall short of international human rights standards. The European Court of Human Rights has criticised the government of Georgia for failing to meet the required standards on right to liberty and security under Article 5 (3) of the ECHR. In its well-known decisions in the cases of *Giorgi Nikolaishvili v. Georgia* and *Patsuria v. Georgia*, the ECtHR identified several inadequate practices followed by domestic authorities, and:

- deplored the use of standard templates by domestic courts imposing preliminary detention. In such templates, only the name of defendant, date of hearing and charges vary, while the most important part of the court decision dealing with reasons, substantiation and purpose of preliminary detention remains the same and no individual assessment is conducted;[76]
- stated that, rather than fulfilling its duty to establish convincing reasons for the detention, the domestic courts relied on the abstract terms of the pre-printed form. Such a practice suggests a lack of 'special diligence' on the part of the national authorities, contrary to the spirit of Article 5 (3) of the Convention;
- condemned the mention *in abstractio* of grounds for detention, which were simply copied from the CCP (then Article 151), and the failure to refer to the relevant factual circumstances justifying any of the risks relied upon.[77]

[76] ECtHR 13 April 2009 *Giorgi Nikolaishvili v. Georgia*, No. 37048/04, para. 73.

[77] *Ibid*; see also ECtHR 6 November 2007 *Patsuria v. Georgia*, No. 30779/04, paras. 74–75.

Both of these ECtHR decisions have identified systemic problems in Georgia. Notwithstanding the clear and direct provisions in the new CCP on the imposition of preliminary detention, the practice in this field unfortunately remains the same, and judges meet almost all requests of the Prosecution Services to impose preliminary detention on individuals, often failing to substantiate their decisions and corroborate them with the relevant factual circumstances.

3.3.2 The right of a defendant to be tried in his/her presence

Georgian legislation guarantees the right of a defendant to be tried in his/her presence. The CCP provides that a defendant shall have the right to participate in the investigation of the charges and the trial; to file a motion and a recusal; to request the examination of the evidence of the defence under the same conditions and through the same procedure as the evidence of the prosecution; to be familiar with the complaint filed by the opposing party and present his/her opinion thereon; and to examine the record of the court session and to make remarks thereon.[78]

However, the defendant's right to be present on the trial is not absolute and may be restricted in certain circumstances. Potentially, this may happen during the trial when:

(a) the examination of a witness takes place, if one of the special measures for witness protection is applied;[79]
(b) where there has been a violation of a court order, non-compliance with the resolution of a presiding judge, or expression of disrespect towards the court when a presiding judge of the court session renders a resolution through deliberation in the court room removing the defendant from the court room. If a defendant is removed from the courtroom, the court judgment should still be announced in his/her presence. However, if he/she continues to disrupt the court, the final decision shall be announced in his/her absence, upon which the defendant shall receive a copy of the judgment and confirm receipt thereof by his/her signature;[80]
(c) if the person is tried *in absentia*.[81]

78 Article 38 of the CCP.
79 Article 40 of the CCP.
80 Article 85 of the CCP.
81 Article 189 of the CCP.

As to the latter, substantial consideration of a case without the defendant's participation is permissible only if the defendant is avoiding appearing before the court. In this case, defence counsel's participation is mandatory.

As to the legal guarantees of those tried *in absentia*, Article 292 of the CCP stipulates that a party may appeal a judgment issued by a first instance court if he/she deems it to be illegal and/or unsubstantiated. An appeal may be filed only by a prosecutor, a superior prosecutor or a convicted person. The defence counsel may file an appeal only when the convicted person is a juvenile, or has a physical or psychological defect that excludes the possibility of obtaining his/her consent.

When a judgment of conviction is rendered *in absentia*, the convicted person has a right to file an appeal within one month from the moment of imprisonment, from the moment of appearance before the relevant bodies, or from the moment of pronouncement of sentence by the court of first instance, if the convicted person requests the review of the appeal at the Appellate Court without his/her participation. When a conviction is determined by the Appellate Court *in absentia*, the convicted person has a right to file an appeal within one month from the moment of imprisonment, from the moment of appearance before relevant bodies, or from the moment of pronouncement of sentence by the Appellate Court, if the convicted person requests the review of his/her appeal by the Court of Cassation without his/her participation.

If a defendant in custody is absent due to the failure of the prison escort service to bring him/her to the court, the court shall postpone the session for a reasonable time, but for no more than 10 days, and shall inform the Chairman of the Penitentiary Department, who must ensure that the defendant is subsequently brought to the court session and that the court is informed of the reasons for the initial failure to appear.

Georgian legislation also provides certain guarantees for those who fail to appear before the investigative body. In such circumstances, he/she or a close relative shall be given a reasonable time to appoint a defence counsel. If this is not done within the given term, the defendant shall be assigned a defence counsel. A prosecutor, or upon a prosecutor's order, an investigator, shall summon the defence counsel to present the charges and shall familiarise the counsel with the indictment. The defendant's counsel shall confirm, with his/her signature, that he/she has familiarised him/herself with the indictment.[82]

[82] Article 169 of the CCP.

In practice, it happens very rarely (if at all) that the person wishing to be present at his/her trial is not given the possibility to attend. However, the legislation allows for trial *in absentia* for every person and for every crime, notwithstanding its character or gravity. While, in certain cases (involving high-ranking officials or significant issues), trial *in absentia* could be justified and falls within the margin of appreciation of the state, there would be no legitimate aim for the state to conduct a trial *in absentia* in every case where the person goes in hiding, particularly where it does not involve a significant crime.

3.3.3 The right to be presumed innocent

The principle of the presumption of innocence is guaranteed in the Constitution, as well as under the CCP. The Constitution provides that: an individual shall be presumed innocent until the commission of an offence by him/her is proved in accordance with the procedure prescribed by law and under a final judgment of conviction; no-one shall be obliged to prove his innocence; the burden of proof shall rest with the prosecutor; and an accused shall be given the benefit of doubt in any event.[83] Similarly, the CCP provides that a person shall be presumed innocent until his/her guilt is proven by a final court judgment and enters into legal force.[84] The legislation provides that no-one shall be obliged to prove his/her innocence, and that the burden of proof with respect to the charges rests with the prosecutor. Furthermore, the law provides that any doubt arising when evaluating evidence that cannot be resolved under the procedure established by law shall be settled in favour of the defendant (convicted person).

Although the presumption of innocence is guaranteed at the constitutional and legislative levels, violations of the principle occur on a daily basis. Virtually every day, TV news reports are broadcast (including the relevant logos stating that the material is provided by the Ministry of Internal Affairs, Prosecutor's Office, tax authorities) that relate to (alleged) crimes, showing the faces of the detained suspects and identifying their names. Moreover, the 'confessions' of detained persons, as well as excerpts of telephone tapping or secret surveillance, are also frequently broadcast. Police spokespersons frequently refer to the suspects as persons who have been 'arrested' in relation to the crime.

83 Article 40 of the Constitution.

84 Article 5 of the CCP.

Another aspect potentially infringing the presumption of innocence is the very high rate of preliminary detention in Georgia. In 2010, more than 92.6 per cent of motions submitted by Prosecution Services before domestic courts requesting the imposition of preventive measures (preliminary detention) were accepted by domestic courts (2009 – over 94 per cent; 2008 – over 95 per cent). Furthermore, there is nothing that prohibits the participation of the judge who imposed preliminary detention in the panel on the merits of the case.

3.3.4 The right to silence

The right to silence, as well as the privilege against self-incrimination, are protected under the CCP, which provides that no-one shall be obliged to testify against him/herself or against a certain category of persons.[85] A defendant may exercise his/her right to remain silent at any time, and if he/she does so, this cannot be regarded as evidence proving his/her guilt.[86]

Furthermore, the required arrest procedure clearly imposes an obligation on law enforcement agencies to inform arrested persons of their rights, including the right to remain silent. If grounds for arrest exist, the arresting official is required to notify the arrested person about those grounds in a clear manner. He/she must explain to the defendant the crime he/she is suspected of committing, inform him/her about the right to have a defence counsel, to the right to remain silent and refrain from answering the questions asked, the right not to incriminate himself, and that everything that s/he says can be used against him/her in the court. Any statement(s) made by an arrested individual prior to being informed of the rights referred to are inadmissible evidence.

However, lawyers frequently report that strategies are used by the Prosecutor's Office to 'extract' information from the relevant person that could potentially be used against them. As an example, the prosecution may summon persons as witnesses, telling them both of the obligation of a witness to provide all the information he/she knows, and also the relevant criminal responsibility if he/she refuses to do so. This often has the desired effect from the prosecutor's perspective. After providing statements as witnesses, investigators frequently declare them to be indicted persons, and all material that the person provided as a witness is then used against them.[87]

85 Article 15 of the CCP, Privilege against Self-incrimination.

86 Article 38 of the CCP.

87 This has been confirmed by various lawyers, including lawyers J.B., G.M. and G.M.

3.3.5 The right to reasoned decisions

Various provisions under the new CCP provide for the obligation of domestic judicial authorities to deliver reasoned judgments. The CCP requires that corroborative evidence proven beyond reasonable doubt is necessary for a finding of guilt.[88] The legality and fairness of a judgment is further required under the CCP, which provides that 'A court judgment shall be legitimate, substantiated, and fair'. A court judgment is legitimate when it is rendered in accordance with the requirements of the Constitution of Georgia, the CCP, and other laws of Georgia. It is substantiated if it is based on the body of doubtless evidence examined at the trial. All findings and decisions in the judgment should also be fair, and the sentence imposed must proportionate to the convicted person's character and to the gravity of the crime.[89]

Furthermore, the CCP provides that the reasoning in the judgment leading to a conviction must include the evidence on which the court opinion is based, and the reason why the court admitted this evidence and rejected other evidence, as well as mitigating or aggravating circumstances. If the charges are found to be groundless, or the crime was improperly classified, the judgment must include the grounds and motive for changing the charges to the benefit of the defendant. Domestic legislation also obliges national courts to substantiate the nature and length of the sentence, the use of a conditional sentence (for example, probation), the imposition of less than a minimum sentence specified by the CCP for the particular crime, a decision to revoke or continue to apply a coercive measure, and the decision to apply, replace or revoke a special measures of protection for participants of the proceedings.[90]

Unfortunately, these legislative requirements are not effectively translated into practice. Analysis of intermediary and final decisions of national courts clearly shows that they often fail to provide adequate reasoning.[91] As mentioned above, the government of Georgia has been criticised by the Strasbourg authorities for failing to substantiate decisions regarding the imposition of preliminary detention. In cases of the imposition of preliminary detention as a preventive measure, the practice shows that judicial authorities confine themselves to only mentioning legislative provisions as grounds for their decisions, but fail to corroborate the decision with relevant facts

88 Refer to Article 82 of the CCP.

89 Requested under Article 259 of the CCP.

90 Article 273 of the CCP.

91 See Annual Report (2010) of Public Defender of Georgia presented to the Parliament of Georgia.

that would justify the existence of a threat of absconding, interference of justice or commission of a further offence.

Defence lawyers also criticise the adequacy of substantiation of final convictions. The Georgian Ombudsman has even devoted a special chapter to this topic in his annual report to the Parliament, in which he has identified substantial problems in the final decisions of criminal courts.[92] The practice shows that domestic courts mainly rely on the evidence and testimony of victims, use general statements to conclude that there exists a sufficient body of evidence to convict the person, and fail to provide more comprehensive detail of such 'evidence'. This results in an alarmingly high proportion of convictions *vis-à-vis* acquittals (less than 0.01 per cent of acquittals in both 2010 and 2009).

3.3.6 The right to appeal

Georgian legislation clearly provides for the right to appeal. The CCP states that 'A party may appeal a judgment issued by a first instance court, if he/she deems it to be illegal and/or unsubstantiated'.[93] An appeal may be filed only by a prosecutor, a superior prosecutor or a convicted person. A defence counsel may file an appeal only when the convicted person is a juvenile, or has a physical or psychological disability that excludes the possibility to obtain his/her consent. When a conviction is rendered *in absentia*, the convicted person has a right to file an appeal against the judgment within one month from the moment of imprisonment, from the moment of appearance before the relevant bodies, or from the moment of pronouncement of the sentence by the court of first instance, if the convicted person requests the review of the appeal at the Appellate Court without his/her participation.

However, Georgian legislation, in common with other countries, does not foresee the possibility of an appeal (on the facts) in relation to the verdict of a jury.

3.4 Rights relating to effective defence

According to the CCP, 'evidence' is comprised of: the information submitted to the court under the rules established by law; and the subject, document, substance or other object containing the information and in relation to which the parties prove

92 http://ombudsman.ge/index.php?page=21&lang=0.

93 Article 292 of the CCP.

or refute facts, legally assess them, carry out their duties, and protect their rights and lawful interests. On the other hand, the court determines if the fact or conduct giving rise to the criminal proceedings exists, whether a certain person committed an action and whether he/she is guilty or not; as well as circumstances that affect the character and degree of responsibility of the defendant, and his/her personal character.

A document is considered to be evidence if it contains information necessary for establishing the factual and legal circumstances of a criminal case. A document is considered to be any source on which information is depicted through a word-sign shape, and may include a photo, film, video, sound or other type of recording, or through the use of other technical means. The testimony of a witness relates to information provided by the witness to the court pertaining to the circumstances of the criminal case. Material evidence constitutes items, documents, substances or other objects, which through their origin, place and time of discovery, and characteristics are related to the factual circumstance of the criminal case and could serve as the means for revealing the crime, determining the perpetrator, and denying or proving charges.

3.4.1 The right to investigate the case

Pursuant to the CCP, a defendant has the right to collect evidence personally or through his/her defence counsel at his/her own expense. Such evidence has equal legal force to that collected by the prosecution. As regards the relevant rules governing submission of evidence, no evidence has a pre-determined legal value until presented before the pre-trial hearing by one of the parties to the criminal proceedings and declared admissible by the court. The CCP provides that:

> The judge of the pre-trial hearing shall:
> examine motion(s) of the parties on the admissibility of evidence ... .[94]

If the collection of evidence requires an investigative or other procedural action, which cannot be performed by the defendant or his/her defence counsel, the defence has the right to file a motion with a judge having jurisdiction over the investigation requesting the issuance of a relevant order. The judge must make every effort not to disclose to the prosecution the fact of collection of evidence by the defence.

[94] Article 219 of the CCP.

Defence counsel also has the right of discovery of prosecution evidence within the limits and procedure envisaged by the CCP, the right to obtain copies of evidence and criminal case files, and also to enjoy all the other rights of a defendant provided for by the CCP. Defence counsel may not, however, exercise the rights that are by their nature exercisable exclusively by the defendant.

However, the CCP does not guarantee absolute equality between the prosecution and the defence, since it does not authorise the defence to submit a motion to a court requesting that a search and seizure be ordered. Only the relevant law enforcement authorities are empowered under the CCP to obtain and conduct operative search activities.

Another major issue affecting the equality of arms between the prosecution and the defence is the temporary rule in the revised CCP[95] authorising the prosecution, until 1 October 2012, to summon witnesses and impose obligations to provide testimony in accordance with regulations being enshrined in former version of the CCP. According to the former version of the CCP, witnesses were criminally liable for refusing to provide witness statements, or for providing false witness statements, to the prosecution. Conversely, the defence has no such tools at its disposal, and is not in position to somehow impose obligations on a witness to provide a statement/evidence and corroborate the defence position.

In practice, lawyers are confronted with further difficulties:

– In carrying out effective investigations. Although the new code provides that lawyers may investigate facts, obtain evidence and testimony, and convince potential witnesses to provide testimony, hardly any capacity-building efforts have been instituted by state authorities for training lawyers on the relevant issues. Formally, lawyers have equal powers. However, in practice, the prosecution, in respect of whom numerous reforms and capacity-building activities have been initiated, is in a much better position to collect evidence and convince witnesses to provide testimony.[96] A relative lack of the necessary skills among (defence) lawyers, the absence of previous experience in doing similar things, and the non-existence of adequate continuous education regarding the relevant investigative skills all serve to further perpetuate these inequalities.

95 Article 332 of the CCP.

96 According to interviews with lawyers I.K., S.B., G.S. and G.M.

– In obtaining evidence that is not used by the law enforcement authorities and prosecution against the defendant, but is in their possession and could corroborate the position of the defence. Since the entry into force of the new CCP, lawyers have been able to seek to obtain any prosecution evidence that is to be used against the defendant. However, even where it is clear that the prosecution is in possession of evidence that could corroborate the position of the defence, and which may even have been broadcast on television, the prosecution frequently claim that such evidence will not be used against the defence, and that no obligation rests on it to share that evidence with the defence, notwithstanding the latter's request to make it available to them.

3.4.2 The right to adequate time and facilities to prepare the defence

The CCP provides that a defendant shall have reasonable time and means for the preparation of his/her defence.[97] Article 93 stipulates that, during a trial, the court shall determine a reasonable time for the party to raise a motion, and present its position with regard to the motion that has been raised. According to Article 239 of the CCP, after finding additional evidence admissible, the court, on the motion of the parties, has the power to adjourn the case for a reasonable time, if the parties are in need of additional time for the preparation of the position(s) of the defence or the prosecution. According to Article 84 of the CCP, five days prior to the pre-trial hearing, the parties shall provide each other and the court with all the information available in their possession at that moment regarding the evidence to be submitted to the court.

3.4.3 The right to equality of arms in examining witnesses

The CCP provides for the cross-examination of witnesses by the party who did not call them. Leading questions are permissible during cross-examination. The judge shall impose a reasonable time limit for the posing of questions, as well as for the answering of questions.[98] A party has a right to conduct re-directed and additional cross-examination, subject to limitations as to their scope.

97 Article 38 of the CCP.
98 Article 245 of the CCP.

According to the rules, evidence presented by the prosecution shall be examined first, followed by an examination of the evidence presented by the defence. The defence shall participate in the examination of evidence presented by the prosecution, and the prosecution shall participate in the examination of evidence presented by the defence.[99] Georgian legislation does not permit the use of evidence that is not subjected to verification or challenge by the other party.

3.4.4 The right to free interpretation and translation of documents

According to Article 11 of the CCP, criminal proceedings shall be carried out in the Georgian language. In the Autonomous Republic of Abkhazia, they are also conducted in the Abkhazian language. A participant in criminal proceedings who has no, or an insufficient, knowledge of the language of the proceedings shall be assisted by a interpreter.

Article 38 of the CCP provides that, at the moment of detention or, if a detention does not take place, immediately upon being recognised as a defendant, as well as before any questioning, the defendant shall be informed in a language he/she understands of the crime(s) under the CCP for which probable cause of action may exist. The defendant shall be given the record of his/her detention or, where he/she is not detained, a copy of a ruling recognising him as a defendant.

A defendant has the right to the services of the translator/interpreter, at the expense of the state, during questioning and other investigative actions if he/she has no, or an insufficient, knowledge of the language of the procedure, or if he/she has a physical disability that rules out any communication with him/her without the assistance of an interpreter.[100] Furthermore, Article 53 of the CCP provides that an interpreter/translator shall be summoned if:

(a) a participant in a criminal procedure has no, or an insufficient, knowledge of the language of the procedure; or
(b) a document must be translated into the language of criminal procedure.

There is no definite sanction or consequence for failure to provide an interpreter; however, where the state authorities fail to do so, one would logically expect the same

99 Article 242 of the CCP.
100 Article 38 of the CCP.

consequences as if person had not been provided with clear information about the indictment or evidence against him/her.

4. The professional culture of defence lawyers

All practising lawyers in Georgia, including legal aid service lawyers, are members of Georgian Bar Association (GBA). The GBA was created in 2006 and currently has 3,691 members. It acts as an official licensing body for the legal profession and has promulgated a Code of Ethics, which includes a disciplinary mechanism. The formal requirements to practice are very liberal. A lawyer (advocate) can practise alone, with other lawyers, with other professionals by establishing legal bureaus or with other private legal entities in accordance with the relevant legislation concerning commercial activities.[101] However, not all GBA members are allowed to participate in criminal proceedings. Only those lawyers who have passed the general bar exams (covering all fields of law – criminal, civil, administrative), or exams exclusively in criminal justice, are granted the appropriate licence to participate in criminal proceedings (according to official list, currently 2,971 lawyers are eligible to act as defence counsel, having obtained the necessary licence to participate in criminal proceedings).[102]

The relationship between criminal defence lawyers and their clients is regulated by a Code of Ethics of the GBA. According to the code, all lawyers must conduct their activities based on the following six main principles:

(a) Independence – in carrying out his/her professional functions as a lawyer, he/she should be free from any outside influence and pressure and must abide only by Georgian legislation and rules established under international law and the Code of Ethics;
(b) Trust – lawyers must use their best efforts to serve the interests of the client and not place the trust of the client towards him/her under any doubt. The Code of Ethics provides that this is a professional obligation of a lawyer;
(c) Confidentiality – any information obtained by the lawyer during the carrying out of his/her functions must remain confidential indefinitely. The lawyer is authorised to divulge such information only upon receiving the

101 Article 18 of the Law on Lawyers (advocates), adopted 20 June 2001.
102 http://www.4barristers.weebly.com.

express consent of his/her client or to defend him/herself against charges brought against him/her;

(d) Serving the best interests of the client – the lawyer must always serve the best interests of the client and place them above his/her own personal and other interests;

(e) Avoiding conflict of interests – the lawyer is not authorised to represent two or more clients if this gives rise to a conflict of interest;

(f) Collegiality – all lawyers are obliged to respect one another.

The Code of Ethics clearly imposes an obligation on the lawyer to serve the best interests of the client. However, the reality of the past several years indicates that criminal defence lawyers face difficulties in effectively implementing their basic functions, particularly in view of the policies and practices of the prosecution and judicial authorities. Almost all of the criminal defence lawyers interviewed for the purpose of the research[103] claimed that their role in criminal proceedings is simply nominal and that the situation, particularly with relation to criminal justice, is disturbing. While in civil cases lawyers claim to be in a position to properly carry out their role, the situation is radically different when it comes to most criminal and administrative cases. The statistical data relating to the number of acquittals granted by the national judicial authorities, as well as the reported pressure by the prosecution on the judiciary, indicate why criminal defence lawyers are usually quite pessimistic about achieving success in criminal cases. In unofficial conversations, many lawyers have stated that, because of this, they prefer to concentrate on civil cases.[104] Criminal defence lawyers also claim not to be on an equal footing with the prosecutor in the criminal justice system. In particular, lawyers' motions are typically dismissed by judges who do not always provide adequate reasons for doing so. They claim not to be in position to use every legal means during the criminal proceedings. While judges appear to meet all of the requests of the prosecution, the majority of intercessions and motions by defence counsel are rejected without due substantiation.[105]

Furthermore, judges frequently do not analyse, or even mention in their judgments, the evidence submitted during the proceedings by the defence, leading to

103 According to lawyers G.S., J.B., G.M. and G.M.

104 According to lawyers G.S., J.B., G.M. and G.M.

105 *Ibid*; see also the latest report of the Human Rights Commissioner, Thomas Hammerberg, https://wcd.coe.int/wcd/ViewDoc.jsp?id=1809789.

a sense of frustration among lawyers. Lawyers claim that, notwithstanding all of their efforts, actions and evidence obtained in support of the defendant, these are in most cases neither analysed in the final judgment, nor relied upon by domestic courts, and that therefore their role in criminal proceedings remains simply nominal.

Another significant aspect negatively influencing the role of lawyers in criminal proceedings is the relatively new instrument of the plea bargain, which was introduced in Georgia in 2004. A plea agreement permits a court judgment without substantive consideration of a case, and is used in respect of either a guilty plea, or an agreement on sentence. The most recent statistics reveal that in almost 80 per cent of criminal cases, a plea agreement is used (in 2010, Georgian criminal courts delivered 19,956 judgments, among which 15,867 were decided through a plea agreement). The involvement of a defence lawyer is mandatory in the context of a plea bargain; however, the role of the lawyers in this process is significantly limited, while the prosecutor has broad competences. In his most recent report, the national Human Rights Commissioner reaffirmed allegations provided by criminal defence lawyers that:

> ... most defendants are virtually certain that they will be sentenced, and lawyers, instead of working towards their clients' acquittal, advise them to plea-bargain with the prosecutor to reduce the sentence to a minimum. This attitude is particularly common for violations that foresee imprisonment as a punishment.[106]

Even when certain lawyers strive for, and advise their clients to fight until the very end in most cases defendants, having no hope for success in the courts, prefer to agree with the prosecution for a plea agreement and payment of the relevant penalty agreed, thereby reducing or avoiding a prison sentence. Defence lawyers only formally represent clients in these circumstances, having no effective remedies in their hands to somehow influence the outcome of the plea agreement, or fight until the end of the case since they are, of course, constrained by the decision of the defendant.

Another factor that negatively influences the role of lawyers in criminal proceedings is the lack of any efforts by the state authorities to raise their capacity and education. The adoption of the new CCP, the transformation of the whole system from an inquisitorial into an adversarial one, and the various innovations brought about by the code, including new rights and responsibilities, all call for the effective continuous education for lawyers to ensure adequate and qualified assistance. However, the

106 https://wcd.coe.int/wcd/ViewDoc.jsp?id=1809789#P361_77428.

training efforts implemented thus far by the state authorities and international actors directed towards the judicial system have focused mainly on prosecutors and judges, and this negatively affects the role of lawyers in criminal proceedings.

Having said this, lawyers also acknowledge their failure to actively maintain a strong and effective Bar during the period 2006–2009. During this a period, lawyers did not manage even to convene the General Assembly and choose the president of the Bar, because the initial text of the law required election of all governing bodies by the majority of the members of the GBA. Consequently, in 2007–08, the GBA was struggling to assemble the required quorum and allow for its positive development. Furthermore, the state authorities were tacitly expressing their satisfaction with this situation, since it was much easier to implement the criminal justice policy (with its positive and negative aspects) without a unified and committed response from the GBA. Since 2009, the GBA has begun to gradually absorb and implement its real functions. After a number of unsuccessful attempts finally, in November 2009, the law was amended and the quorum requirements were changed. The supreme governing body – the General Assembly – has since been convened and has elected its Executive (governing) Council and Chair, Internal Control Commission and Ethics Commission. The latter has been active over the past two years and has received 108 complaints against lawyers, following which the Ethics Commission instituted disciplinary proceedings against 10 lawyers, imposing sanctions against six of them. The GBA has also begun to initiate the provision of continuous legal education for lawyers, raising their capacity in all fields of law. There is no law that requires lawyers to undertake pro-bono work and provide free legal aid. As mentioned above, the main state institution providing legal aid is the Legal Aid Service. This legal entity within the system of the Ministry of Correction and Legal Assistance ensures accessibility to consultation and legal aid and carries out its mandate based on legislation. Service is provided through the staff of the Legal Aid Service, Legal Aid Bureaus and consultation centres. According to the data provided by its Director, the Legal Aid Service of Georgia presently employs 97 lawyers.

In addition to the state free legal aid service, legal aid is also provided by the NGO sector. The most prominent NGO in this area is the Georgian Young Lawyers' Association (GYLA). In contrast to the state legal aid service, which only provides legal aid in criminal cases, the GYLA provides legal aid in criminal, civil and administrative cases for the most vulnerable of society. In 2010, it conducted more than 130,000 consultations.

5. The political commitment to effective criminal defence

During the past several years there has been active debate and controversy regarding the proposed adoption of new CCP. It came into force on 1 October 2010 and introduced significant changes to the criminal justice system that were closely linked to the provision of effective criminal defence. The major objective of the new CCP is to ensure equality of arms and full implementation of the principle of adversarial proceedings within a legal system, which was previously largely inquisitorial in nature. The new system foresees a restriction of the role of the prosecutor, who is now obliged unequivocally to disclose evidence (to be used against the defendant) five days before the trial, as well as immediately upon receiving a request from the defence. It envisages better rights for the defence, in particular concerning access to case evidence during the pre-trial investigation. The judge is to assume the more neutral role of 'supervisor', ensuring the fairness of judicial proceedings. In addition, the new CCP introduces jury trials for first-degree murder, although the implementation of this measure will initially be limited to Tbilisi.

As mentioned above, a person can also access and benefit from free legal aid if he/she is not in a position to cover the expenses related to representation of his/her legal interests in criminal proceedings. The relevant provisions of the CCP provide criteria for accessing legal aid, requiring that the state shall bear the costs of the defence if: (a) due to his/her indigence, a defendant requests the assignment of a defence counsel; (b) there is a case of mandatory defence provided for by the legislation and the defendant is not represented by a defence counsel. The legislation provides that a defendant is entitled to refer to the relevant service providing legal aid and request the appointment of a defence counsel.

However, there continues to be scepticism concerning the organisational arrangements of the state free legal aid service and the independence of the legal aid scheme lawyers. The main problem in this regard has been associated with the placing of the Legal Aid Service, as a legal entity of public law, within the system of the Ministry of Correction and Legal Assistance. This raises justified fears about ensuring absolute independence and impartiality of legal aid lawyers, particularly given that the head of the service is appointed by the Minister of Corrections, Probation and Legal Aid and, in certain cases, the penal code authorises a prison inmate to enjoy the assistance of a LAS lawyer. In such a case, the LAS lawyer will have to act in the court against his own Ministry, thus raising questions of independence and impartiality.

Although, at first glance, it appears that the authorities have done everything to guarantee effective criminal defence under the new CCP, numerous steps must still be taken to guarantee the effectiveness of criminal defence in practice. The policies implemented at a practical level by the domestic law enforcement and judicial authorities negatively affect the very essence of the right in the following ways:

- The state is hardly implementing any policy to strengthen the GBA and raise the capacity and education of lawyers, while all efforts are being made to strengthen and raise the capacity of the law enforcement agencies and judiciary;
- Notwithstanding the numerous allegations of ineffectiveness, as well as the various strong indications from international stakeholders that the overall situation must be addressed, the state is doing hardly anything and the judicial authorities cannot be said to be changing their practice towards rendering unsubstantiated intermediary and final decisions.[107] The same remains true with regard to analysis and reliance on evidence submitted by the defence;
- The drastic rise and popularity of the plea agreement process (being used in 80 per cent of all cases), where the major key player is a prosecutor and the defence counsel is given only a minimal role, with no effective power for the court to 'balance' the terms of such an agreement (the court's role is significantly limited in a plea bargaining process), all operate to make the role of criminal defence lawyer largely illusory.

6. Conclusions and recommendations

6.1 Major issues

Since the Rose Revolution in 2003, Georgia has made some serious efforts to reform its justice system. The process of criminal justice reform implemented by the state authorities has had numerous positive impacts, including a drastic reduction in crime and corruption and an increase in public trust towards law enforcement bodies.

[107] *Ibid*; see also the latest report of Human Rights Commissioner, Thomas Hammerberg https://wcd.coe.int/wcd/ViewDoc.jsp?id=1809789.

However, this process has also had negative effects in relation to the provision of effective criminal defence.

A stringent criminal justice policy, dubbed as a 'zero tolerance' policy against petty crime, was launched in 2006 and is still in force in Georgia. One of the results of the policy has been a more than three-fold increase in the overall prison population, and Georgia currently has one of the highest per capita rates of prison population in the world. The official announcement of the 'zero tolerance' policy was welcomed by a broad sector of society and has resulted in more stringent measures, with the consequence that criminal justice policy has become much more punitive in nature. This is apparent from the official statistics provided by the Supreme Court of Georgia in relation to the very small rate of acquittals.

As noted, the stringent measures and policies being implemented by the state have resulted in a significant reduction in the level of crime in Georgia. This is also due to the more effective work of law enforcement institutions, as well as the increasing level of trust of the public in the police and the timely reporting of crimes. While in 2006 the Ministry of Interior registered 62,283 crimes, by 2010 this had declined to 34,739 (2007 – 54,746; 2008 – 44,644; 2009 – 35,949).[108] According to the most recent survey conducted by the GORBI, the Ministry of Justice of Georgia and the EU,[109] 98 per cent of people felt safe at all times of the day, and 96 per cent during the night. Some 87 per cent of the respondents assess the work of the police as effective and emphasise their increased trust towards the police.

However, along with these positive aspects, factors such as the increased influence of the law enforcement agencies, and the alleged control of the judiciary by the executive, have significantly undermined the role of criminal defence counsel in criminal proceedings. The role of the lawyers has often become nominal, and they frequently claim not to be in a position to effectively defend the interests of their clients.

One of the major problems related to the effective enjoyment of the right to defence is the lack of an adequate system for involving lawyers at the earliest stages of police detention, particularly in legal aid cases. During this period, the defendant is in the most vulnerable situation, and this is often used by authorities to carry out interviews, declare that the defendant did not request the assistance of a lawyer, obtain his agreement on a plea agreement on certain conditions, and so on.

108 http://www.police.ge/uploads/statistika/shss_statistika/BIULETENI.saqartvelo.ianvari.14.02.10.pdf.

109 http://www.justice.gov.ge/index.php?lang_id=GEO&sec_id=130.

The obligation to provide information to the defendant regarding his/her rights at the time of arrest is usually not complied with by the relevant authorities. Generally speaking, authorities try to take advantage of an unexpected arrest and obtain as much evidence/testimony from the arrested person as possible, without informing him/her about his/her rights.

The 'presumption in favour of liberty' has not been effectively implemented in Georgia. Although legislation in force clearly requires the imposition of preliminary detention as a last resort, when the prosecution requests imposition of preliminary detention, domestic courts tend to meet their request in almost every case without adequate substantiation of their intermediary and final decisions.

Equality of arms is not fully guaranteed in the process of obtaining evidence. Since the entry in the force of the new CCP, lawyers can seek to obtain any prosecution evidence to be used against the defendant any time. However, the defence is unable to request evidence (within the possession of a third party) that may be obtained by the conduct of a search, even if it can potentially corroborate or acquit the defendant. While the prosecution is obliged to reveal to the defence any evidence to be used against it, there is no obligation on the prosecution to reveal or provide to the defence evidence, within its possession, which they do not intend to use against the defence, but which may potentially corroborate the position of the defence. Frequently, where evidence that could corroborate the position of the defence is held by the prosecution, it claims that it will not use it against the defence, and is therefore not under an obligation to disclose it.

Another major issue affecting the equality of arms between the prosecution and the defence is the temporary rule in the revised CCP authorising the prosecution, until 1 October 2012, to summon witnesses and to impose obligations to provide testimony. Witnesses remain criminally liable until 1 October 2012 for refusing to provide, or for providing false witness statements to the prosecution. Conversely, the defence has no such tools at its disposal, and is not in position to somehow impose obligations on a witness to provide a statement/evidence and corroborate the defence position.

The unequal position of the defence compared to the prosecutor is frequently based upon the fact that defence lawyers' motions or defence evidence are dismissed by judges, who do not always provide adequate reasoning for doing so. Furthermore, the failure of judges to mention and analyse in their judgments evidence submitted by the defence, and the lack of adequate substantiation of convictions and judgments, negatively affect effective implementation of defence rights.

The plea bargain process is used in Georgia in a majority of criminal cases. Here, the judge has only a formal role, the prosecutor the leading role and the defence lawyer only a nominal one. This also negatively affects the essence of effective criminal defence.

6.2 Recommendations

1. Establish an effective system for ensuring that lawyers are involved at the earliest stages of police detention, particularly in legal aid cases, and that lawyers are given access to their clients in detention.

2. Establish an effective mechanism to ensure and verify that defendants are informed about their rights immediately from the outset of police custody.

3. Require judicial authorities to substantiate in their decisions why it is not possible to use alternative preventive measures, and why it is necessary to use preliminary detention to ensure that the defendant does not abscond, interfere with the proper administration of justice, commit a further offence or remain a threat to public security.

4. Law enforcement authorities should be required to stop providing investigative materials, video footage, records of interrogation, telephone tapping materials or recordings of admission of guilt to TV companies. TV companies must do their best to respect the principle of the presumption of innocence.

5. In order to guarantee the full equality of arms between prosecution and defence, the CCP must clearly guarantee the right of the defence to request, through a court order, evidence that is in the possession of the law enforcement agencies or third parties; and adequate funding should be provided for the investigation of cases by legal aid lawyers.

6. The role of the national judicial authorities must be increased in the plea bargaining process, in order to balance the interests of parties. Judges should be empowered to examine the details of a plea agreement, assess its reasonableness and, where necessary, modify it.

7. Ensure that judicial authorities take into consideration evidence submitted by the defence and make a relevant and appropriate assessment of such evidence, and that decisions are substantiated and provide adequate justification for the decisions taken.

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CHAPTER 5 LITHUANIA[1]

1. Introduction

1.1 General data

The Republic of Lithuania (Lietuvos Respublika) is a unitary Eastern European state with a territory of 65,300 square kilometres and a population of approximately 3,244,600 people.[2] The population is decreasing for several reasons, of which the most relevant is economic emigration. Lithuania is situated in the south-eastern part of the Baltic Sea and has borders with Latvia, Belorussia, Poland and Russia (Kaliningrad area). There are five major cities in Lithuania – Vilnius, the capital, situated in the south-eastern part of the country, Kaunas, Klaipėda, Šiauliai and Panėvėžys. Vilnius has over 540,000 inhabitants;[3] however, the official statistics are inaccurate, since many people living in the capital do not register themselves. According to 2011 statistics, most residents of Lithuania are Lithuanians (84 per cent), but there are also some small minorities. These include are 6.6 per cent Polish, Russians (5.4 per cent), Belorussians (1.3 per cent), Ukrainians (0.6 per cent), Germans (0.1 per cent), Jews (0.1 per cent), Tartars (0.1 per cent), Latvians (0.1 per cent), Roma (0.1 per cent)[4]

1 This country report has been reviewed by Raimundas Jurka, professor, head of the Department of Criminal Procedure at Mykolas Romeris University, Lithuania.

2 Department of Statistics of Lithuania at: http://db1.stat.gov.lt/statbank/selectvarval/saveselections.asp?MainTable=M3010201&PLanguage=0&TableStyle=&Buttons=&PXSId=3234&IQY=&TC=&ST=ST&rvar0=&rvar1=&rvar2=&rvar3=&rvar4=&rvar5=&rvar6=&rvar7=&rvar8=&rvar9=&rvar10=&rvar11=&rvar12=&rvar13=&rvar14=.

3 *Ibid.*

4 *Ibid.*

and people of other nationalities (0.2 per cent). The population comprises 79 per cent Roman Catholics and 4.1 per cent Orthodox, with the remainder consisting of other religions. Most of the Orthodox believers live in the cities of Vilnius and Klaipėda.[5] At the beginning of 2011 the population comprised 1,737,300 (53.5 per cent) women and 1,507,300 (46.5 per cent) men.[6]

1.2 Outline of the legal system

The Republic of Lithuania is an independent democratic state. The foundation of the social system is enforced by the Constitution of the Republic of Lithuania, adopted in 1992 by referendum, which also establishes the rights, freedoms and duties of citizens. Under this law, the power of the sovereign state is vested in the people of Lithuania and is exercised by the Seimas (Parliament), the President of the Republic, the government and the courts.

The Lithuanian legal system is principally based on the legal traditions of continental Europe. The main sources of law are legal acts. The Constitution is the main and highest legal act in the hierarchy of all laws, followed by Constitutional Legal acts, which are provided in the Constitution itself. International treaties, ratified by the Parliament, stand at the third level. At the next rank stand legal acts enacted by the Parliament, which must comply with the Constitution and are divided into two categories: codified legal acts, such as the Criminal Procedure Code and the Criminal Code, and ordinary legal acts. The last step in the hierarchy of sources of law is comprised of bylaw acts.

Historically, court precedent was not strictly regarded as a source of law in Lithuania. This reasoning was changed by the Constitutional Court of Lithuania, which declared that, in particular case categories, precedents existing and created by upper courts bind not only lower courts giving decisions in analogous cases, but also the upper courts that had created the precedents.[7] Deviation from the existing court precedents is possible and new court precedents can be created only in exceptional instances, where it is unavoidably and objectively necessary, constitutionally grounded and only with proper argumentation.[8]

5 Department of Statistics of Lithuania at: http://www.stat.gov.lt/lt/news/view/?id=292.

6 Department of Statistics of Lithuania at: http://www.stat.gov.lt/lt/pages/view/?id=1299.

7 Decision of 28 March 2006, the Constitutional Court of the Republic of Lithuania.

8 *Ibid.*

Lithuania ratified the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) on 27 April 1995.[9] The ECHR is a source of law in Lithuania and has direct effect in the legal system. The Constitutional Court has ruled that the ECHR is a constituent part of Lithuania's legal system and has the same effect as Lithuanian laws, but that legal norms of the ECHR have to be applied by courts effectively; the state has no right to breach any legal norms of the ECHR through national legal regulation.[10]

The past decade has been important due to the reforming of the Lithuanian legal system. During this period important codes – the Criminal Code, Criminal Procedure Code, Code of the Execution of Penalties and Labour Code – were newly enacted by Parliament. Moreover, Lithuanian laws were harmonised with the *acquis communautaire*, in order for the country to become a member state of the EU as of 1 May 2004.

1.3 Outline of the criminal justice system

Criminal procedure is governed specifically by the Criminal Procedure Code of the Republic of Lithuania[11] (CPC) of 2002. However, certain important aspects may also be found in the Constitution of the Republic of Lithuania,[12] as well as international treaties or other legal acts. Criminal law is governed by the Criminal Code of the Republic of Lithuania of 2000[13] and the Penal Code of the Republic of Lithuania of 2002.[14]

Lithuanian criminal procedure has more characteristics of an inquisitorial system, although there are some features of an adversarial system, particularly at the court hearings stages (first instance court, appeal and cassation instance courts). Despite the fact that the CPC states that cases have to be heard in a court on the basis of adversarial principles,[15] the court must not restrict itself to the evidence provided

9 The Convention entered into force on the 20 April 1995.

10 Decision of 24 January 1995, the Constitutional Court of the Republic of Lithuania.

11 Law on the Approval, Effect and Implementation of the Criminal Procedure Code. *Valstybės Žinios* (Official Gazette), 2002, No. 37–1341, No. 46.

12 Constitution of the Republic of Lithuania. *Valstybės Žinios* (Official Gazette), 1992, No. 33–1014.

13 Law on the Approval and Effect of the Criminal Code, *Valstybės Žinios* (Official Gazette), 2000, No. 89–2741.

14 Law on the Approval and Effect of the Penal Code. *Valstybės Žinios* (Official Gazette), 2002, No. 73–3084.

15 Article 7 of the CPC.

by the parties, but must seek to establish the truth. During the pre-trial investigation stage, no features of an adversarial criminal justice system are found, so that this stage of criminal procedure is essentially inquisitorial. Since Lithuanian criminal procedure has more inquisitorial than adversarial characteristics, it is regarded as a mixed or integrated system, as has been affirmed by the jurisprudence of the Constitutional Court of Lithuania.

Under Lithuanian criminal procedural law, criminal procedure is defined as the investigation of criminal offences and the examination of criminal cases before the court as prescribed by law.[16] Therefore, the main task during criminal procedure is to determine whether a criminal offence has been committed and by whom. Under the CPC, criminal procedure appears to be a continuous process. However, in practice, the procedures of investigation and prosecution, in the sense of putting an accused person on trial, are divided by the decision to put that person or persons on trial, which is made by the public prosecutor.

According to the CPC, there are several stages of criminal procedure in a criminal case: (i) pre-trial investigation; (ii) examination of a case before the first instance court; (iii) examination of a criminal case before the appellate instance court; (iv) execution of a judgment; and (v) cassation complaint procedure.

The pre-trial investigation must be commenced as soon as any evidence of an alleged criminal offence appears to be found. During the pre-trial investigation stage, all procedural actions are carried out in order to collect evidence and to prove later before a court that a particular criminal offence was committed by a particular person. All procedural actions during the pre-trial investigation stage are prescribed by the CPC. This stage usually, but not always, ends with an indictment, which is adopted by a public prosecutor. The CPC prescribes legal grounds for termination of a pre-trial investigation without an indictment. In such cases, this decision is made by the prosecutor.[17]

All procedural actions during the pre-trial investigation stage are organised and 'controlled' by a public prosecutor. The relevant officers of the pre-trial investigation carry out the procedural actions under the control of a public prosecutor. Although

16 Goda 2005, p. 11.

17 There are legal grounds for termination of criminal proceedings, specified in Article 212 of the CPC, some of which refer to instances when the proceedings can be terminated even in the case where there is sufficient evidence of guilt (for example, through the application of the statute of limitations).

pre-trial investigation officers have some powers, a public prosecutor can direct them not to carry out any pre-trial procedural actions. Certain provisional measures during the pre-trial investigation can be carried out only upon the decision of a public prosecutor or the pre-trial investigation judge.[18]

According to the CPC,[19] the Police Department under the Ministry of the Interior is a general investigating authority in criminal proceedings. Other pre-trial investigation authorities are also provided for: the State Border Guard Service under the Ministry of the Interior, the Special Investigation Service of the Republic of Lithuania, the military police, the Financial Crime Investigation Service under the Ministry of the Interior, Lithuanian Customs, and the Fire and Rescue Department under the Ministry of the Interior. Pre-trial investigation is carried out by officers from these authorities. The CPC indicates that pre-trial investigation officers are empowered to perform any procedural actions,[20] except for those that are expressly required to be executed by the public prosecutor or pre-trial investigation judge. Pre-trial investigation officers have duties to comply with the instructions of the public prosecutor and to inform the public prosecutor on the course of the pre-trial investigation.[21]

In some cases, a public prosecutor has the right to carry out some or all pre-trial procedural actions by him/herself. While these are not specified in the CPC, in practice, this usually occurs in serious criminal cases. The pre-trial investigation phase comprises evidence and data gathering, questioning, interrogation, victim recognition, searches, monitored telephone conversations and other procedural actions.[22] All evidence and documents relevant to the indictment in a particular case are gathered during the pre-trial investigation stage.

During the pre-trial investigation, a public prosecutor may at some point decide that the actions of a particular person constitute a crime and that he/she should be tried in a court.[23] The decision is made when the public prosecutor is certain that all

18 For example, the seizure of documents and the search of property are only permitted by the decision of the pre-trial investigation judge.

19 Article 165 of the CPC.

20 Article 172 of the CPC.

21 There is no evidence available to support the view that there exists any tension between the police and prosecutors.

22 Sections III and IV of the CPC.

23 If the pre-trial investigation is being carried out by an investigation agency, a public prosecutor is still provided with reports on the course of the investigation.

procedural actions have been carried out and that the guilt of the person is established. When the decision is made to charge someone, an indictment is drafted by the public prosecutor and presented to the person, who is then categorised as an accused.

The maximum term for a provisional arrest is 48 hours.[24] The legal period required is, in practice, implemented inaccurately, both by pre-trial officers and public prosecutors on the one hand, and pre-trial investigation judges on the other. The law allows for provisional arrest only in exceptional circumstances, and only when there is no possibility to address the court in order for the detention to be formally designated for that person. However, in practice, there are many cases where a person, who has not been caught during or immediately after a crime has been committed, is provisionally arrested and then subsequently released after 48 hours, without ever having been brought before a court. Pre-trial investigation judges do not carefully examine such practices, in the sense that they may constitute a breach of the CPC,[25] as well as of the ECHR. There is no available statistical data to substantiate the extent of such practices.

With regard to the examination of a case before a first instance court, the court examines the indictment and all the gathered evidence and makes a finding as to whether the criminal offence was committed, and whether the accused person committed the particular criminal offence, and thus determines whether the accused person is guilty of the crime and designates the punishment. When the court delivers its judgment, an accused person becomes a convicted person.

Examination of a case before a first instance court is a central and dominant stage of the proceedings, which directly corresponds to the gist of criminal proceedings in accordance with the CPC.[26] The guilt of an accused person must be proven beyond reasonable doubt.

24 Pursuant Article 140 of the CPC, a person who is caught committing, or just after having committed a criminal act, can be arrested provisionally for no longer than 48 hours. To arrest a person provisionally in these circumstances is a right of any person, who must then as soon as possible notify the police of such provisional arrest. A person, who is not caught committing or just after having committed a criminal act, can be arrested provisionally only in exceptional circumstances, and only when the following three conditions are present: (a) there are legal grounds for the detention; (b) there are legal grounds, provided in Article 119 of the CPC, to restrict the person's freedom; (c) there is no opportunity to address the court in order to formally designate detention for the person. The decision to arrest a person provisionally shall be made by public prosecutor or pre-trial investigation officer.

25 Article 140 of the CPC.

26 Article 1 of the CPC.

The next possible stage is the examination of a criminal case before the appellate instance court. That court reviews a judgment of the first instance court in accordance with an appeal lodged by a participant of the procedure. The appellate instance court reviews only those judgments of first instance courts that have not yet come into force. The appellate instance court reviews both the validity and reasoning of the judgment.

Execution of a judgment is by way of the designated punishment imposed by a court and is carried out when it comes into force. There are also some additional questions, relating to prisoners, which are dealt during this stage of the criminal procedure.

The Supreme Court of Lithuania may review judgments and decisions, which have entered into force and which have been reviewed by the appellate instance court – the cassation complaint procedure. Such a review is in accordance with the cassation complaint. Judgments and decisions are reviewed only in respect of issues related to the application of the law, and which are indicated in the cassation complaint. It should also be noted that there is an extraordinary stage in criminal procedure – a re-opening of a case due to: (i) discovery of new circumstances; (ii) a decision made by the ECHR; or (iii) obviously improper application of criminal laws.

The judicial criminal justice system consists of three levels: 54 local courts, five regional courts, the Court of Appeal of Lithuania and the Supreme Court of Lithuania. The administration of justice is organised in three levels: in first instance courts (mostly local courts and, for serious and very serious crimes, regional courts); in appellate instance courts (regional courts, where the first instance was a local court, and the Court of Appeal of Lithuania, where the first instance court was a regional court); in the cassation instance court (the Supreme Court of Lithuania). There is no individual complaint procedure before the Constitutional Court of Lithuania, which is a separate court from the judicial system. However, there is an increasing number of initiatives being introduced to make an individual complaint procedure before the Constitutional Court of Lithuania possible.

The CPC provides for two types of summary trial: (i) penal order procedure; (ii) expedited procedure.

(i) When a pre-trial investigation is finished, a public prosecutor has the right to address a court with a request to issue a penal order. Such a procedure is possible in criminal cases where a financial penalty is the only or optional sanction for a crime, the circumstances of the crime are clear, and the damage resulting from the crime has been (re)covered or there is an undertaking to (re)cover it. In such a case, the court only issues a penal order, which

is handed to the accused person. No court hearing is organised. In cases where the accused person does not agree with the financial penalty or with the court's penal order, he/she has a right within 14 days to ask the court to organise a court hearing of the case. The usual criminal procedure then follows. Theoretically, there is no penalty if the accused person does not agree with the court's penal order and asks for a normal criminal procedure.

(ii) Expedited proceedings are applied in cases where the circumstances of a committed crime are very clear. The criminal case is examined by a local court. A public prosecutor addresses the court the same day the crime was committed, or at least within 10 days from that time. In such cases, a public prosecutor lodges the request to examine the criminal case in an expedited procedure and the indictment is not delivered. A court hearing is organised with the participation of a public prosecutor, a defence lawyer, an accused and witnesses. The court examines all of the evidence directly and renders a judgment. The CPC does not require the consent of an accused for expedited proceedings. The CPC indicates[27] that, at the beginning of an expedited proceedings hearing, a judge is to ask the accused person whether he/she agrees to be tried in court at once, or wishes to have the court hearing adjourned. The accused may request an adjournment only for the purpose of having sufficient time to prepare the defence. In such a case, the court hearing of the expedited proceedings can be postponed for no more than 20 days.

The CPC provides that a criminal offence is an intentional (or unintentional, when expressly provided by law) act (action or omission) that is dangerous and prohibited by law.[28] Crimes are classified taking into account the form of fault. The CPC provides for several types of intentional criminal offence, depending on the level and nature of gravity:[29]

(i) criminal misdemeanours – these are criminal offences for which a criminal sanction does not exceed one year of imprisonment and which are expressly categorised by the law as a misdemeanour;

27 Article 428 of the CPC.
28 Article 11 of the CPC.
29 Article 11, Part 2 of the CPC.

(ii) minor crimes – these are intentional criminal offences for which a criminal sanction does not exceed three years of imprisonment;
(iii) severe crimes – these are intentional criminal offences for which a criminal sanction is from three to six years of imprisonment;
(iv) grave (serious) crimes (felony) – these are intentional criminal offences for which a criminal sanction is from six to 10 years of imprisonment;
(v) very grave (serious) crimes (felony) – these are intentional criminal offences for which a criminal sanction is more than 10 years.

1.4 Basic statistics of the criminal justice system

Official statistics show that crime levels for 2009 and 2010 have remained more or less the same. The number of registered criminal offences of persons held in prison institutions is indicated in table 1.[30]

Table 1.
Number of registered criminal offences of persons held in prison institutions, 2009–2010

	Total		Per 100,000 inhabitants	
	2009	**2010**	**2009**	**2010**
Number of registered criminal offences	83,203	77,669	2,492	2,363
Crimes	76,291	70,618	2,285	2,148
Criminal misdemeanours	6,912	7,051	207	215
Number of persons held in prison institutions at the end of the year	8,655	9,139	260	282
Persons in detention, waiting for a judgment	1,208	1,196	36	37
Convicted persons	7,447	7,943	224	245

The Department of Prisons of the Ministry of Justice has also issued statistics according to which, as of 1 January 2010, there were 8,655 persons in various prison institutions in Lithuania, 1,208 of whom were persons detained pending judgment (persons in pre-trial detention), 7,447 convicted persons (of which 106 had been

30 Department of Statistics of Lithuania.

convicted to life imprisonment), 124 under arrest punishment,[31] 188 juveniles, 327 women, and 118 foreigners. The average number of imprisoned persons is 8,266, which is higher than in 2008 (7,787).[32] As at 1 January 2011, there were 1,196 arrested persons.[33]

In 2010, the number of registered perpetrators[34] (24,512) increased by 1.6 per cent compared to 2009. There were 3,083 female perpetrators (11.5 per cent more than in 2009) and 21,318 male perpetrators (0.4 per cent more than in 2009).[35] According to the 2010 statistics, there were:

(a) 2,865 juvenile perpetrators (14.6 per cent less than in 2009);
(b) 51,565 victims of crime (9.7 per cent less than in 2009);
(c) 351 foreign registered perpetrators (64.7 per cent less than in 2009), the majority of which were Russians, Belorussians, Latvians, Polish and Ukrainians.[36]

According to court statistics, in 2010, first instance courts received 18,014 new criminal cases. During 2010, 17,669 criminal cases were solved, involving 2,821 penal orders of the court.[37] In 2010 there were 2,107 cases heard through the expedited

31 An arrest is a criminal punishment – the temporary deprivation of liberty, which is served in a police detention institution. An arrest may be designated from 15 to 90 days and, upon the decision of the court, might be served during weekends. An arrest cannot be designated for pregnant women and persons who are raising children up to three years of age.

32 Department of Prisons of the Ministry of Justice statistics at: http://www.kalejimudepartamentas.lt/?item=vkl_at_mt&lang=1.

33 The information was submitted by Department of Prisons of the Ministry of Justice in answer to questions submitted by the researchers for this report.

34 'Registered perpetrators' includes registered suspects (persons who are formally presented with an official suspicion).

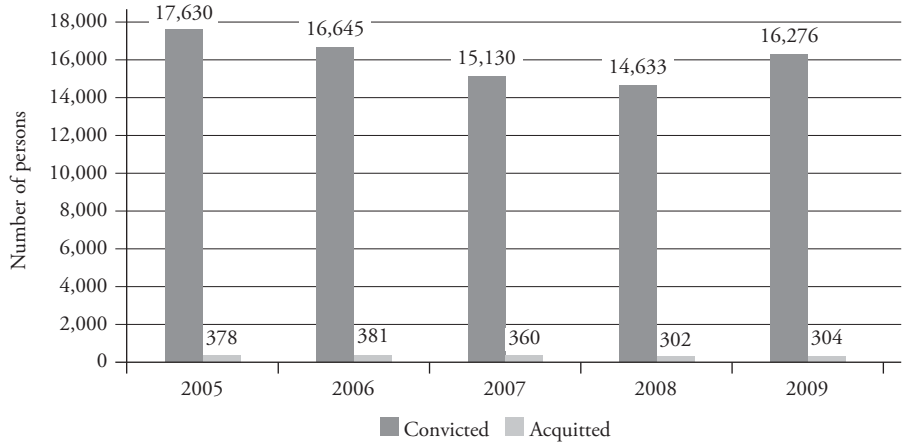
35 Ministry of Interior of the Republic of Lithuania statistics at: http://www.vrm.lt/fileadmin/Image_Archive/IRD/Statistika/txt_file.phtml?fv=201012/f-30-iti-201012.data.txt&ff=%3C!--|30-ITI|1|--%3E&tt=Duomenys%20apie%20ikiteisminio%20tyrimo%20%E1staigose%20u%FEregistruotus%20asmenis,%20%E1tariamus%20(kaltinamus)%20nusikalstam%F8%20veik%F8%20padarymu%20(Forma_30-IT%C1).

36 Ministry of Interior of the Republic of Lithuania statistics at: http://www.vrm.lt/fileadmin/Image_Archive/IRD/Statistika/txt_file.phtml?fv=201012/f-uzs-201012.data.txt&ff=%3C!--|UZS|6|--%3E&tt=Duomenys%20apie%20%E1tariamus(kaltinamus)%20ir%20nukent%EBjusius%20u%FEsienie%E8ius%20Lietuvos%20Respublikoje%20(Forma_U%DES).

37 Statistics of the administration of courts at: http://www.teismai.lt/lt/teismai/teismai-statistika/.

hearing procedure, which was 13 per cent of all criminal cases heard before courts.[38] Set out below are the numbers of persons convicted or acquitted by the first instance courts in Lithuania.[39]

Figure 1.
Number of persons, convicted and acquitted, by first instance courts, 2005–2009



2. Legal aid

When implementing Council Directive No. 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, Lithuania adopted the Law on State-guaranteed Legal Aid.[40] This Law established the provision of state-guaranteed legal aid to enable persons to adequately assert their violated or disputed rights and their legally protected interests. The new legal aid system, established on 1 May 2005, gave

38 Ministry of Interior of the Republic of Lithuania statistics at: http http://www.vrm.lt/fileadmin/Image_Archive/IRD/Statistika/txt_file.phtml?fv=20114/f-lrgp.20114.data.txt&ff=%3C!--|LRGP|1|--%3E&tt=Duomenys%20apie%20nusikalstam%F8%20veik%F8%20tyrimo%20rezultatus%20Lietuvos%20Respublikos%20prokurat%FBrose%20(Forma_LRGP).

39 Report on the activity of national courts of Lithuania, 2009 at: http://www.teismai.lt/dokumentai/bendroji_informacija/teismu%20veiklos%20apzvalga2009_aktuali.pdf. There has been no analysis undertaken as yet as to the reasons for such a low rate of acquittal in Lithuania.

40 Law on State-guaranteed Legal Aid, *Valstybės Žinios* (Official Gazette), 2000, No. 30-827, at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=350869. A new draft came into force on 1 May 2005.

an opportunity for more indigent clients to receive legal services paid for by the state. Legal aid is provided in criminal, civil and administrative cases.

The Law provides that the institutions managing state-guaranteed legal aid are: (a) the government of the Republic of Lithuania, (b) the Ministry of Justice of the Republic of Lithuania (the Ministry of Justice), (c) municipal institutions, (d) state-guaranteed legal aid services (the Services) and (e) the Lithuanian Bar. The government and the Ministry of Justice are principally regarded as policymakers in the legal aid system, whereas the Services and the legal aid lawyers are the main actors, directly participating in the structure of the legal aid system in Lithuania. The Services are budgetary state institutions founded by the Ministry of Justice, and have jurisdiction in Vilnius, Kaunas, Klaipeda, Šiauliai and Panevėžys, corresponding to the geographical areas of regional courts.

With a view to ensuring the implementation of the functions assigned to the Ministry of Justice in the field of state-guaranteed legal aid, the State-guaranteed Legal Aid Co-ordination Council (Co-ordination Council) was formed. This collegiate advisory body operates on a voluntary basis. The Co-ordination Council is made up of representatives of the Committee on Legal Affairs and the Committee on Human Rights of the Seimas of the Republic of Lithuania, the Ministry of Justice, the Ministry of Finance, the Association of Local Authorities in Lithuania, the Lithuanian Bar, the Lithuanian Lawyers' Society, the Judicial Council, and other institutions and associations whose activities are related to the provision of state-guaranteed legal aid or the protection of human rights. The regulations and composition of the Co-ordination Council are approved by the Minister of Justice. The main functions of the Co-ordination Council are the following: (1) to submit proposals on the implementation and improvement of the policy of state-guaranteed legal aid; (2) to analyse reports/submit proposals on the activities of municipal institutions in organising and providing primary legal aid; (3) to analyse/submit proposals on the activities of the Services; (4) to submit proposals on the need for state budgetary funds for the provision of state-guaranteed legal aid and on the efficient utilisation thereof; (5) to submit proposals on the adoption and amendment of the legal acts implementing the Law; and (6) to submit proposals on fees for lawyers providing secondary legal aid.

There are two ways in which a legal aid lawyer may become involved in a criminal procedure: (i) when criminal defence is mandatory in accordance with the CPC[41]

[41] Article 51 of the CPC.

and the defendant does not have a private lawyer; or (ii) when a defendant asks the pre-trial investigation officer, the prosecutor or the judge to have access to a defence lawyer and does not have his/her own private lawyer,[42] or a person directly requests the Services for access to a legal aid lawyer. When a suspect, accused or convicted person asks to exercise his/her right to a lawyer in a criminal case where criminal defence is mandatory[43] in accordance with the CPC, a pre-trial investigation officer, public prosecutor or judge informs the state-guaranteed legal aid co-ordinator of the necessity for a legal aid lawyer. Upon receipt of the notification, the co-ordinator must immediately select a legal aid lawyer to provide legal aid and notify this to the relevant pre-trial investigation officer, prosecutor or court. The lawyer chosen by the co-ordinator is assigned to the suspect, accused or convicted person by that pre-trial investigation officer, prosecutor or judge.

The legal aid lawyer is referred to the pre-trial investigation officer, prosecutor or judge by the co-ordinator. Some co-ordinators have a duty lawyers' list for weekends, others for the coming month. The pre-trial investigation officers' institutions and public prosecutors' officers are given the list at the beginning of the particular month and call the duty legal aid lawyer directly, when it is necessary. If the duty lawyer is unable to participate in the criminal case, the co-ordinator selects the legal aid lawyer and notifies the pre-trial investigation officer, prosecutor or court.

Where a suspect, accused or convicted person has already received legal aid at an earlier stage of the case for which selection of a legal aid lawyer is requested, the lawyer who had provided legal aid is normally selected as the defence lawyer. If

42 Article 50 of the CPC.

43 Article 51 of the CPC provides for the following grounds of mandatory participation of a defence lawyer in the criminal cases; (1) when a suspect or accused person is a juvenile; (2) when a suspect or accused person is blind, deaf, or has other physical or mental disabilities and is not capable of properly exercising the right to a defence; (3) criminal cases of persons who do not know the Lithuanian language; (4) when there are conflicts of interest between suspects or accused persons, and one of them already has a defence lawyer; (5) in criminal cases where a sentence of life imprisonment can be imposed; (6) in criminal cases that are being heard without the participation of the accused person, as provided by law; (7) when a suspect or an accused person is arrested; (8) when questions of extradition, transfer to the International Criminal Court, or a European Arrest Warrant are been decided; (9) in criminal cases of expedited proceedings. Article 51 also provides that a pre-trial investigation officer, prosecutor, or judge may decide that the participation of the criminal defence lawyer is mandatory when, without the participation of a defence lawyer, the rights and interests of the suspect or accused person would not be implemented appropriately. Article 322 of the CPC provides that, during an appeal of a criminal case, a defence lawyer shall participate in all cases.

the participation of a defence lawyer is mandatory in the procedure, the suspect or accused is not entitled to waive the right to counsel, thus ensuring that a lawyer is present during any pre-trial investigation action.

In criminal cases where a defence lawyer is not mandatory and a suspect, accused, convicted person or victim requests the Services for a legal aid lawyer, the decision to designate the lawyer is made by the Services. Where the right to request the Services to appoint a legal aid lawyer is explained by a pre-trial investigation officer, prosecutor or judge, the suspect, accused, convicted person or victim may also express their wish to instruct a lawyer directly to that pre-trial investigation officer, prosecutor or judge.

In cases of mandatory criminal defence as provided in the CPC,[44] the eligibility criteria[45] which are otherwise provided for in the Law on State-guaranteed Legal Aid, are not applied. The Law on State-guaranteed Legal Aid[46] also provides for several

44 Article 51 of the CPC.

45 There is no financial means test for criminal defence when the participation of defence lawyer is mandatory.

46 Article 12 of the Law on State-Guaranteed Legal Aid provides legal aid in the following cases: (1) the person is eligible for legal aid in criminal proceedings according to Article 51 of the Republic of Lithuania Code of Criminal Procedure, and in other cases specified by law, when the physical presence of a defence lawyer is mandatory; (2) the case concerns compensation for damage incurred through criminal actions, including where the issue of compensation for damage is heard as part of a criminal case; (3) the person receives a social allowance under the Republic of Lithuania Law on Cash Social Assistance for Low-Income Families (Single Residents); (4) the person is maintained in a care institution; (5) the person has a severe disability or incapacity for work that has been recognised, or has reached the pensionable age and for whom the level of considerable special needs has been established, as well as guardians (custodians) of these persons, where state-guaranteed legal aid is required for the representation and defence of the rights and interests of a ward (foster child); (6) the person has presented proof that he/she cannot dispose of his/her property and funds for objective reasons and that, for these reasons, the property and annual income which he/she can freely dispose of do not exceed the property and income levels established by the government of the Republic of Lithuania for the provision of legal aid under the Law; (7) the person suffers from serious mental disorders, when issues of their forced hospitalisation and treatment are being considered according to the Republic of Lithuania Law on Mental Health Care, as well as their guardians (custodians), where state-guaranteed legal aid is required for the representation of the rights and interests of a foster child (ward); (8) parents or other legal representatives of minor children, when the issue of their eviction is being considered; (9) minor children, when they independently apply to a court for the defence of their rights or interests protected under law in the cases specified by law, with the exception of those who have entered into a marriage in accordance with the procedure laid down by law, or have been recognised by the court as legal capable (emancipated); (10) other persons in the cases provided for under international treaties binding on the Republic of Lithuania.

additional cases in respect of which the eligibility criteria do not apply, with the result that no financial means test is undertaken in such cases.

In order to determine whether a particular person is entitled to receive legal aid (where the mandatory criminal defence rule is not applicable), the eligibility criteria concerning property and income levels must be met and verified by the Services, which makes the decision to provide legal aid. The amount of legal aid, after taking into account the person's property and income, are guaranteed and covered by the state as follows:

(a) 100 per cent – where the first level is established with respect to the person's property and income;
(b) 50 per cent – where the second level is established with respect to the person's property and income.[47]

According to a Decision by the Lithuanian government,[48] and its latest amendments,[49] in order to have 100 per cent of defence expenses covered, a family's basic annual income cannot exceed 1,853.57 Euro, with each dependant in the family allowing for an additional 695.08 Euro per year.[50] In order to have 50 per cent of expenses for defence covered, a family's basic annual income cannot exceed 2,780.35 Euro, with each dependent allowing for an additional 1,042.63 Euro.[51] If these financial limits are not satisfied, a person is not granted state-guaranteed legal aid. It should be noted that the financial eligibility criteria is low compared with the average standard of living in Lithuania.[52]

There are two lists of legal aid lawyers, who conclude an agreement to provide legal aid with the Services and who may subsequently be selected to provide legal aid by the Services. Separate agreements are concluded: (i) with lawyers who permanently

47 Article 14 of the Law on State-guaranteed Legal Aid.

48 Lithuanian Government Decision No. 468, adopted on the 25 April 2005. *Valstybės Žinios* (Official Gazette), 2006, No. 61–2181.

49 The last relevant amendment to the 25 April 2005 Decision was adopted on 11 June 2008, and came into force on 1 July 2008. *Valstybės Žinios* (Official Gazette), 2006, No. 61–2181, at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=388119.

50 When calculating in Euro in accordance to the Lithuanian official currency values, 1,853.57 Euro equates to 6,400 LTL and 695,08 Euro to 2,400 LTL (1 Euro = 3.4528 LTL).

51 2,780.35 Euro equates to 9,600 LTL and 1,042.63 Euro to 3,600 LTL.

52 The minimum monthly wage in Lithuania in 2011 was 231.70 Euro (800 LTL), which has not changed from July 2007; http://www.socmin.lt/index.php?1713385148.

provide legal aid solely to persons eligible for it ('permanent legal aid lawyers');[53] (ii) with lawyers who provide legal aid in cases of necessity ('legal aid lawyers in cases of necessity') – such lawyers are also entitled to have their own private clients. The Services ensure that permanent legal aid lawyers have a workplace in the premises, which must be located in or as close as possible to the registered offices of the Services, and provide them with the conditions for the use of other property necessary for the provision of legal aid. The Services do not play any role in legal aid quality assurance; the Bar is the only body that has this function. The number of the permanent legal aid lawyers – currently 72 – including civil, criminal and administrative cases lawyers, is set by a decision of the Ministry of Justice.[54] According to statistics from the Ministry of Justice, as at 1 July 2011, the number of criminal legal aid lawyers within the jurisdiction of each of the Services of Lithuania is set out in the table below.

Table 2.
Numbers of criminal legal aid lawyers in Lithuania as at 1 July 2011

Service	Vilnius	Kaunas	Klaipeda	Šiauliai	Panevėžys	Total
Number of permanent legal aid lawyers	12	10	5	5	5	37
Number of legal aid lawyers in cases of necessity	115	97	50	35	42	339
In total	127	107	55	40	47	376

All legal aid lawyers are assigned to a specific co-ordinator, who controls the particular territory and institutions of the criminal justice system. The co-ordinator drafts a duty schedule, usually monthly, and sends it to the institutions that he/she controls. In case of necessity, pre-trial investigation officers will call the particular legal aid lawyer directly, or go via the co-ordinator in accordance with the duty schedule, and stress the necessity for the legal aid lawyer in the particular criminal proceedings.

53 Permanent legal aid lawyers work in one office. There are five such regional offices in Lithuania (Vilnius, Kaunas, Klaipeda, Panevezys and Siauliai). Permanent legal aid lawyers conclude an individual agreement with the Services for the provision of legal aid services.

54 Decision of the Ministry of Justice No. 1R-27, 10 July 2007. *Valstybės Žinios* (Official Gazette), 2007, No. 78–3163.

Permanent legal aid lawyers are paid a fixed fee for providing legal aid services, which is currently approximately 1,700 Euro per month.[55] Legal aid lawyers in cases of necessity are paid at a specified rate for the provision of legal aid services, taking into account the complexity of the case (for example, the category of the case, the stage of the proceedings). The payment is calculated for each case, having a set number of hours, at a current hourly rate of 11.58 Euro. The exact cost of the case and the number of hours per case are regulated by the government. The remuneration rates are extremely low in comparison to that of private practitioners.

The amount of money designated for the legal aid in Lithuania from the beginning of the legal aid reform for the period 2005–2010 is as follows: 2005 – 2,276,414 Euro; 2006 – 3,225,788 Euro; 2007 – 3,565,860 Euro; 2008 – 4,505,126 Euro; 2009 – 3,836,017 Euro; 2010 – 3,906,105 Euro.[56]

There are no specific rules or regulations for evaluating or assessing the quality of legal aid services provided by legal aid lawyers (either permanent or in cases of necessity).

3. Legal rights and their implementation

3.1 The right to information

3.1.1 Information on procedural rights (the 'letter of rights')

The obligation to inform the parties to a criminal case of their procedural rights is of a general nature. This presupposes that a suspect or an accused must be informed of their rights not just when it is clearly required in the CPC, but every time a procedural action is carried out.[57] For instance, although Lithuanian law does not set out the procedure for informing an arrested person of the reason for his/her arrest and his/her rights, the officer has the obligation to do that at the moment of the arrest. In other words, a person must be informed of his/her rights immediately he/she becomes a participant to criminal proceedings.[58]

55 1,700 Euro equates to 6,000 LTL.

56 Report on the Organisation and Provision of the Secondary Legal Aid in 2009, Ministry of Justice, 2010.

57 Goda, Kazlauskas and Kuconis 2003, p. 97.

58 *Ibid*.

The CPC expressly provides that a suspect or accused be informed of his/her rights in the notice of suspicion that must be handed to or sent to him/her before the initial questioning. In addition to the information concerning the nature and cause of suspicion, the CPC requires that the notice specify the rights of the suspect.[59] Article 45 of CPC stipulates that the obligation to inform the parties to proceedings of their procedural rights and to ensure that they can exercise these rights, is imposed on judges, prosecutors and pre-trial investigation officers.

According to the results of a survey conducted in 2008, 47.44 per cent of polled officers said that they always inform a suspect of his/her rights, 30.77 per cent said that they inform a suspect of what the officer regards as 'important rights', two respondents said that they sometimes inform a suspect of their rights, and one investigator claimed that he never informs a suspect of his/her rights.[60] On the other hand, 25.36 per cent of sentenced persons who were surveyed claimed that an investigator formally asked them whether they understood the explanation regarding their rights but did not wait for a response, while 45.71 per cent said that they were not told about their rights or the possibility of implementing them.[61]

Lithuanian law does not expressly oblige officers to verify whether a suspect or accused has understood the notification of their rights. A notice of suspicion can be considered as official evidence that a person was informed of his/her rights, but not as official evidence that a suspect understood their meaning and application. In addition, there appears to be no general understanding among investigators as to how suspects should be informed of their rights. In an opinion poll, nearly 40 per cent of investigators responded that it is important to inform a suspect of every structural element of the right to defence; just under four per cent did not regard this as important; just over 20 per cent thought that it is the duty of defence counsel; while just over 37 per cent thought that it is necessary to do so only if a suspect asks. Interestingly, a corresponding poll of sentenced persons revealed that just over 37 per cent agreed with the position of the officers, to the effect that the 'rescue of a drowning man is his own concern'.[62]

As to the particular rights explained by officers, the results of the survey suggest that they only explain those rights that, in their opinion, are the most important. The

59 Article 187 of the CPC.

60 Gušauskienė 2008, p. 62.

61 *Ibid.*

62 *Ibid,* p. 63.

63 Gušauskienė 2008, p. 62.

right to counsel was explained by just over 58 per cent of those polled; the right to legal aid counsel by just over 55 per cent; the right to appeal by 47.5 per cent; the right of access to information about the pre-trial investigation by nearly 45 per cent; the right to waive the use of a counsel by 36 per cent; the right to free interpretation by nearly 24 per cent; the right to silence by nearly 28 per cent; the right to remove an officer from the pre-trial investigation, or a judge and other participants from criminal proceedings as specified by the CPC by nearly 29 per cent; the right to submit information by nearly 32 per cent; and the right to put questions to witnesses by almost 36 per cent. In the opinion of the officers surveyed, the least important rights are the right to presumption of innocence (just six per cent regarded this right as important) and the right to obtain expert evidence (just over nine per cent).[63]

The report of the Committee against Torture, Inhuman or Degrading Treatment or Punishment (CPT) also sheds light on how the right to be informed of procedural rights is implemented in practice. After visiting several Lithuanian detention centres, the CPT delegation noticed that forms setting out information on these rights (in Lithuanian) were displayed on the walls in the detention areas of certain police establishments. However, none of the police establishments visited had a stock of such forms for distribution to detained persons.[64] Information on rights was generally provided at the time of the first interrogation by an investigator (which, as already mentioned, could take place several hours after the person's apprehension), rather than at the time of the person's admission to the police establishment.[65]

3.1.2 Information on the nature and cause of the accusation

In Lithuania, a person is classed as a suspect if he/she has been arrested on suspicion of committing a criminal act, or is being questioned about an act that he/she is suspected of having committed, or he/she is summoned for questioning and a notice of suspicion is drawn up.[66] An accused is a person against whom a prosecutor has brought an

64 Taking into account that the report referred to in the following footnote follows the use of the terms in the ECHR, a detained person in this context should be understood as an arrested person.

65 Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14–18 June 2010, CPT/Inf (2011) 17, at: http://www.cpt.coe.int/documents/ltu/2011-17-inf-eng.pdf, paragraph 21.

66 Article 21 of the CPC.

indictment under law, or in respect of whom there is a prosecutor's application to punish pursuant to a penal order, or against whom a case is heard on the basis of a private accusation or in an expedited procedure.[67]

The ECHR requires that:

> Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.[68]

It sets out a similar requirement for those charged with an offence:

> ... to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.[69]

Similarly, the absolute right to be informed of the nature and cause of the suspicion is set out in the CPC, which provides that: 'Every suspect shall be entitled to be informed of the suspicions against him'.[70] The CPC also affirms that: 'the accused is entitled: to know the accusations and to be provided a transcript of the indictment'.[71] Another article establishing the fundamentals of human rights protection in criminal proceeding repeats the rights of both a suspect and an accused, specifying that:

> ... everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him and to be provided adequate time and facilities for the preparation of his defence.[72]

As to the moment when the duty to inform a suspect of the suspicion arises, the CPC provides that 'before the first questioning the notice of a suspicion has to be handed to a suspect under his signature'.[73] A notice of suspicion can only be drawn up when the decision to commence a pre-trial investigation is adopted, and has to be handed to the suspect before the initial questioning.[74]

67 Article 22 of the CPC.
68 Article 5 (2) of the ECHR.
69 Article 6 (3)(a) of the ECHR.
70 Article 21 of the CPC. The right is elaborated further in Article 187.
71 Article 22 of the CPC.
72 Part 7 of Article 44 of the CPC.
73 Article 187 of the CPC.
74 Goda 2003, pp. 496–97.

The right of an accused to know about the nature and cause of the accusation is realised when the accused receives a transcript of indictment.[75] The obligation on a prosecutor to issue a transcript of indictment to an accused is established directly in the CPC, which provides that: 'a prosecutor also hands or sends to the accused a transcript of indictment'.[76] The law does not prescribe any particular time when a prosecutor has to implement this obligation. The commentary on the CPC provides that a transcript of indictment has to be handed to the suspect, or sent immediately to him/her, when an indictment is drawn up.[77]

The situation is different when an indictment is not drawn up and a prosecutor decides to terminate the pre-trial investigation with a penal order, or apply the rules of expedited criminal procedure, and/or when a case is heard on the basis of a private accusation.[78] As mentioned above, a penal order is draw up by a judge:

> ... in case of criminal acts which are punishable only by a fine or where the penalty of the type is treated as alternative penalty.[79]

The CPC entitles a prosecutor 'to apply for the completion of proceedings by issuing a penal order'.[80] A prosecutor can file such an application only when a suspect does not object. Thus, although the CPC does not expressly so provide, a prosecutor must agree with the suspect on the essential elements of the prosecutor's application. As a result, when an accused consents to terminate the pre-trial investigation, he/she would already know the details of the accusation.[81] A pre-trial investigation can also be terminated by applying the rules of expedited procedure. The CPC provides that:

> ... if the circumstances of committing of a criminal act are clear and the case concerning the criminal act is subject to be heard before a district court, a prosecutor may on the day of commission of the criminal act or within ten days from the day of commission the criminal act can apply to the court which has jurisdiction to hear the case with an application to hear the case expeditiously.[82]

75 *Ibid*, p. 54.
76 Article 220 (4) of the CPC.
77 Goda 2003, p. 603.
78 *Ibid,* p. 54.
79 Article 418 (1) of the CPC.
80 Article 418 (3) of the CPC.
81 Goda 2003, p. 54.
82 Article 426 of the CPC.

In this situation a prosecutor is obliged to hand an accused a transcript of his/her application to terminate the proceeding through the rules of accelerated procedure.

In case of a private prosecution, the transcript of the victim's application must be sent prior to the conciliation hearing to the person who is accused of the commission of a criminal offence.[83]

Information regarding the suspicion or accusation in both cases is supplied in written form, namely in a notice of suspicion, and in a transcript of indictment. The CPC provides that a notice of suspicion must include:

> ... location, time, circumstance of a criminal act, the criminal law which provides liability for the committed act, the rights of a suspect.[84]

If a person is suspected of committing several criminal acts, the circumstances of all of them have to be indicated separately, specifying particular articles under which the criminal acts are qualified. If a person is suspected of committing a criminal act containing several episodes that are qualified under the same article, they have to be indicated in chronological order.

A suspect's signature confirms that he/she has received a transcript of a notice of suspicion. A problem frequently occurs in practice is that the signature becomes a formality, because a suspect does not understand the content of the suspicion and therefore is not able to defend him/herself properly. A survey conducted in 2008 showed that just over 47 per cent of polled sentenced persons alleged that the investigator who had informed them about the suspicion did not even try to ensure that they understood the content of suspicion (just over 43 per cent had the opposite opinion).[85]

The CPC prescribes that the indictment must above all include:

> ... a brief description of a criminal act: place, time, forms, motives, consequences and other important circumstances; information about a victim; the extenuating and aggravating circumstances for a suspect; the basic information on which the prosecution is based; an article (its paragraph and subparagraph) of the Criminal Code which provides liability for the committed act.[86]

83 Article 413 (1) of CPC.
84 Article 187 of the CPC.
85 Gušauskienė 2008, p. 62.
86 Article 219 of the CPC.

3.1.3 Detailed information concerning relevant evidence

The CPC provides that an accused, victim, plaintiff and an accused in a civil action, as well as their agents, are informed about the right to examine the dossier of a particular case in court and to make motions to the court.[87] The duty to inform arises from the moment a prosecutor adopts an indictment act. The information must be supplied in writing. There is a general requirement to do this as early as possible prior to the commencement of the court hearing. Before a case goes to court, a suspect must be supplied with the indictment.

The CPC also provides that an indictment must state: (i) the name of the court that is to hear the criminal case; (ii) the name, surname, date of birth, marital status, profession, work place of a suspect and, at the prosecutor's discretion, other personal information; (iii) a brief description of the criminal act: place, time, form, motives, consequences and other important circumstances, information about a victim, extenuating and aggravating circumstances for a suspect; (iv) the basic information upon which the prosecution is based; (v) that article (its paragraph and subparagraph) of the Criminal Code that creates liability for the committed act; (vi) the name and surname of counsel for the defence of the suspect, if he/she had a counsel during the pre-trial investigation; and (vii) the view of a suspect if he/she rejects the suspicion.[88]

There is no ongoing obligation on officials to provide information as the investigation or case develops. However, the CPC does entitle a suspect and his/her defence counsel to examine the material obtained in the pre-trial investigation.[89] At any time during the pre-trial investigation, a suspect and his/her counsel may make a request to the prosecutor to examine material from the pre-trial investigation. The prosecutor may refuse the request if such an examination could undermine the outcome of the pre-trial investigation. Specialists of criminal and criminal procedure law argue that the provision allowing a prosecutor to decide what kind of information should be provided to a suspect or his counsel is an obstacle to the proper implementation of the principle of equality of arms between the prosecution and the defence.[90] When making a decision to refuse to allow an examination of the whole or part of the material from the pre-trial investigation, a prosecutor must document it the decision, which may be

87 Article 220 of the CPC.
88 Article 219 of the CPC.
89 Article 181 of the CPC.
90 Kuklianskis 2005, p. 11.

appealed by the suspect or his/her counsel within seven days to a pre-trial judge. The pre-trial judge must examine such an appeal within seven days. If the prosecutor fails to apply the provision correctly, a senior prosecutor or a pre-trial judge, depending on the case, can annul his/her decision. Where a suspect is in custody, only his/her counsel has the right to examine material from the pre-trial investigation.

Another problematic issue concerns access to the entire case file during cassation proceedings. The CPC ensures the opportunity for access to a cassation appeal and collected additional material.[91] However, this rule does not provide access to the entire case file. This limits the defence of a person if he/she decides to change a defence lawyer.

3.2 The right to defend oneself

3.2.1 Choice of lawyer

The Constitution of the Republic of Lithuania and the CPC guarantee the right of a suspect, accused or convicted persons to defend him/herself. This right is ensured *from the moment of their arrest or the first questioning.*[92] A court, prosecutor and officer of the pre-trial investigation must ensure the opportunity for a suspect, accused and convicted person, in accordance with the measures and means provided by law, to mount a defence against the suspicion and charge, and must take all the necessary steps to ensure protection of their personal and property rights.[93]

In theory, in the case of an arrest, a suspect must be informed of his/her rights, including the right to defend him/herself at the moment of the arrest.[94] In practice, an arrested person is informed of the right to defend him/herself and can make use of this right from the moment that he/she learns of the suspicion. The suspicion is presented in writing and an arrested person has to verify that he/she has understood it, and his/her rights, by attesting his/her name, surname, signature and the date. The copy of the notice of suspicion is given to the arrested person. A suspect confirms that he/she has been informed of his/her rights by signing the minutes. He/she also indicates whether he/she needs a counsel.

91 Article 377 of the CPC.
92 Article 31 of the Constitution and Article 10 of the CPC.
93 Article 10 of the CPC.
94 Goda 2003, p. 136.

In its report on Lithuania, the Committee against Torture, Inhuman or Degrading Treatment or Punishment (CPT) stated that, as a general rule, detained persons benefit from the assistance of a lawyer only as from the first interrogation by an investigator (at the earliest)[95] – that is, several hours after their apprehension. In this connection, many police officers clearly stated that informing detained persons of their right of access to a lawyer was 'not their job', but rather that of the investigators. Thus, it appears that the right to defend oneself 'from the moment of arrest' is more theoretical than practical, because arresteded persons are not informed of the right.

The CPC elaborates the content of the right to defend oneself, providing that:

> ... every suspect or accused may 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 in accordance with the procedure provided by the law regulating provision of legal aid guaranteed by the state.[96]

The right to choose a lawyer is also detailed in the CPC, which provides that a suspect, accused and convicted person are entitled to select and obtain a defence counsel of their choosing. They may authorise a legal representative, or other persons whom they entrust, to obtain a defence counsel for them.[97]

In most cases where a person is arrested, the presence of a lawyer is not mandatory. If the person requests a lawyer at that point, the police must wait for the lawyer before conducting the initial interrogation. Unfortunately, there is no evidence as to how well this is implemented in practice. Since the possibility of a detained person contacting different lawyers and asking about their availability is restricted, his/her relatives play a crucial role. The right to notify a close relative from the outset of the deprivation of liberty is expressly guaranteed by the CPC.[98] Unfortunately, as the CAT noted in its report, the police often fail to comply with this provision. Despite the assurances of the Lithuanian authorities, a number of detained persons with whom the delegation spoke during the 2010 visit alleged that their close relatives had not been notified immediately, or even at all, by the police.[99] The right to choose counsel is not absolute.

95 Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) 2010, para. 19, p. 15.

96 Article 44 (8) of the CPC.

97 Part 2 of Article 52 of the CPC.

98 See Article 140 of the CPC.

99 Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) 2010, para. 19.

Where defence counsel chosen by a suspect, accused or convicted person cannot participate in the proceedings for more than five days, a pre-trial investigation officer, prosecutor or court has the right to advise that person to engage another counsel; where they fail to do so, the judicial officers must themselves appoint defence counsel. Where the defence counsel chosen by a suspect, accused or convicted person is not able to arrive within six hours to participate during the initial questioning, or during the examination where motives for arrest are presented, a pre-trial investigation officer, prosecutor or court has the right to advise that person to engage another counsel for this examination; where they fail to do so, the judicial officer must him/herself secure the duty counsel. In these circumstances, defence counsel is appointed taking account the wishes of an accused to have a specific counsel. In theory, the right to choose a counsel does not depend on the financial resources of a suspect/accused, although, in practice, it often is directly so linked.

3.2.2 Provisions and eligibility for free legal assistance

As mentioned above, the CPC provides that:

> ... every suspect or accused may 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 in accordance with the procedure provided by the law regulating provision of legal aid guaranteed by the state.[100]

Accordingly, the Law on State-guaranteed Legal Aid envisages that, where the physical presence of a defence lawyer in a criminal matter is mandatory, a pre-trial investigation officer, prosecutor or court must notify the Services or the co-ordinator indicated by the Services that the person requires a defence lawyer.[101] Upon receipt of the notification, the Services or co-ordinator indicated by the Services must immediately select a lawyer to provide secondary legal aid, and notify the details to the pre-trial investigation officer, prosecutor or court.

The contact details, including the name, of a designated legal lawyer are indicated in the decision of the Services. When the decision to designate a legal aid lawyer is received by a pre-trial investigation officer, prosecutor or judge, the detained person

100 Part 8 of Article 44 of the CPC.

101 Article 21 of the Law on State-guaranteed Legal Aid.

may not know about the appointment of the lawyer unless the lawyer makes contact with them. Thus, a problem arises in that there are no specific rules as to how a detainee contacts a legal aid lawyer, or how a detained person is informed of the name of the designated legal aid lawyer. Moreover, whilst the law requites the Services, when selecting a lawyer, to take into account a person's proposal regarding a specific lawyer,[102] in practice the will of the person is observed only in the case of the non-mandatory participation of a defence lawyer.

Another issue of concern relates to the fact that there is no guarantee that a suspect or accused be represented by the same legal aid lawyer during all phases of the procedure. A legal aid lawyer is designated for every new phase of the procedure, which means that a separate decision to designate a legal aid lawyer is made during the pre-trial investigation, the trial before the first instance court, proceedings before the appellate instance court, proceedings before the Court of Cassation and proceedings for the execution of a sentence. This may infringe the right to an effective criminal defence. In most cases, changes of the designated legal aid criminal lawyer are justified by the fact that the judge has already determined the date of court hearing(s), and the particular legal aid criminal lawyer who represented the accused during the pre-trial investigation phase may not be available on that particular date. This should not, however, be regarded as an excuse requiring a change of the designated legal aid criminal lawyer. On the contrary, it should be regarded as a breach of the continuity of the criminal defence in a criminal procedure.

If a person cannot exercise the right to choose a lawyer due to a lack of financial resources, and counsel is appointed, he/she has the right to ask for replacement of that counsel. The Law on State-guaranteed Legal Aid provides that counsel providing secondary legal aid may be replaced upon a written reasoned request of an applicant, or the lawyer him/herself, in the event of a conflict of interest, or of other circumstances that prevent the lawyer from providing legal aid in the instant case.[103] In a case requiring the mandatory presence of a defence lawyer, the request for a replacement is reflected in the minutes. In a case of non-mandatory presence of a defence lawyer, a suspect or accused submits a written reasoned request, and the decision on the replacement of the lawyer providing secondary legal aid is then made by the Services.

[102] Part 5 of Article 18 of the Law on State-guaranteed Legal Aid.

[103] Part 7 of Article 18 of the Law on State-guaranteed Legal Aid.

3.2.3 Arrangements for accessing legal advice and representation

The arrangements for accessing legal advice and representation are contained in the Law on the Bar of Lithuania,[104] the Law on State-guaranteed Legal Aid, and other legal acts. The arrangements for appointing and contacting a lawyer differ depending on whether a suspect or accused receives state-guaranteed legal aid.

If a person is not detained or provisionally arrested and does not need state-guaranteed legal aid, he/she is free to choose a defence lawyer, contact him/her by using any means of communication and agree on the provision of legal assistance *by concluding an agreement.*[105] If such a person wishes to receive state-guaranteed legal aid, he/she has to submit an application to the Services, with the documents substantiating his/her request attesting to his/her eligibility for secondary legal aid.[106] As mentioned above, the Services *select lawyers* from the lists of: (i) the lawyers who continuously provide secondary legal aid only to the persons eligible for it; and (ii) the lawyers who provide secondary legal aid in the case of necessity.

The arrangements may also differ depending on whether or not a suspect/accused is in custody. As noted above, if a person is in custody and the physical presence of a defence lawyer in hearing criminal matters is mandatory, a pre-trial investigation officer, prosecutor or court must notify the Services or the co-ordinator indicated by the Services that the person requires a defence lawyer. Upon the receipt of a notification, the Services or the co-ordinator indicated by the Service, must immediately select a lawyer to provide secondary legal aid and notify the details to the pre-trial investigation officer, prosecutor or court. On rest days and public holidays, as well as outside normal working hours of the Services, a lawyer to provide secondary legal aid is appointed by a pre-trial investigation officer, prosecutor or court, on the basis of the duty lists of the lawyers providing secondary legal aid in criminal matters compiled by the Services.

Another issue of concern is that, in practice, when a pre-trial investigation ends, it could take a month to adopt the decision to designate a particular legal aid lawyer for the trial before the first instance court. During this period, a suspect apparently does not have any access to a legal aid lawyer. This is a particularly crucial problem when a suspect/accused is deprived of his/her freedom of liberty and is detained.

104 Law on the Bar of Lithuania. *Valstybės Žinios* (Official Gazette), 2004, No. 50–1632.

105 Article 48 of the Law on the Bar of Lithuania.

106 Article 18 (1) of the Law on State-guaranteed Legal Aid.

The way in which these arrangements work in practice is reflected in various minutes, decisions and other documents. Fortunately, where a suspect/accused requests a lawyer, the police/prosecutor/court may not proceed with any procedural action before legal assistance is procured. Unfortunately, there is no evidence concerning the delay in contacting lawyers and no rules specifying the time period within which a lawyer should come to the police station after he/she has been contacted.

3.2.4 Right to consult and communicate in private with the lawyer

The CPC provides that a defence lawyer has the right to meet with a provisionally arrested or detained suspect without the presence of any other person, and without any limitations on the number or duration of the meetings.[107] The laws do not differentiate in this respect between the investigative and trial stages. There are no limitations on the right specified by the CPC.

In the case of sentenced persons, the Penal Code of Lithuania sets out a similar rule, which provides that the number of visits by lawyers is not limited. Every meeting with a lawyer takes place at the hour set by the administration of each penitentiary institution and cannot last for more than eight hours. In practice, a sentenced person might have a problem asking his/her lawyer to come to a penitentiary institution, because his/her ability to make a phone call may be limited. The right to make a phone call depends on the category of a sentenced person. Sentenced persons belonging to the ordinary category have the right to make one phone call per week; those belonging to disciplinary category can make one phone call per month.[108] The head of a penitentiary institution can allow one additional phone call if the sentenced person requests this for important reasons.[109]

The right to make a phone call is not limited in the following cases: (i) a sentenced person in a penitentiary institution classed as belonging to a 'light category' group; (ii) a juvenile sentenced person in a juvenile penitentiary institution classed as belonging to a 'light category' group; (iii) a sentenced person serving his/her sentence in an open colony; and (iv) pregnant women and mothers having a child up to three years old,

107 Article 48 of the CPC.

108 Articles 73, 75, 80, 85 and 86 of the Penal Code of the Republic of Lithuania. Sentenced persons in a penitentiary institution are classified into the groups of 'light category', 'ordinary category' and 'disciplined category' according to the criteria set in the order of the Head of the Department of Prisons of the Ministry of Justice No. 4/07–68. Being classified into a particular group directly influences the ambit of the rights of sentenced persons.

109 Article 101 of the Penal Code of the Republic of Lithuania.

serving their sentence in their rented or owned residence located not far away from a penitentiary institution and being constantly observed by the administration of the institution.[110]

If a sentenced person has already used his/her right to a phone call, he/she can communicate to a lawyer in written form. The Penal Code of the Republic of Lithuania entitles a sentenced person to an unlimited number of letters, and obliges the administration of a penitentiary institution to send such letters to recipients no later than within three working days from receipt of the letter, or the date of service.[111] Moreover, according to the Penal Code of the Republic of Lithuania, incoming and outgoing letters of sentenced persons can be checked upon a decision of the head of a penitentiary institution, or a ruling of a judge, in order to prevent criminal acts or other violations of the law, or to protect the rights and freedoms of other persons. The only statutory exception to this rule is set out in Article 100 of the same Code, which prohibits the checking of letters sent to state and local government officials and civil servants, as well as those to public and international institutions. Unfortunately, this exception does not apply to letters to lawyers.

3.2.5 Right to an independent and competent lawyer

One of the main principles governing the practice of advocate lawyer is the freedom and independence of their activities.[112] Under Lithuanian regulations, while carrying out his/her professional duties, a lawyer is obliged to be absolutely independent from any influence, particularly those that may arise due to personal interests or external influences. A lawyer cannot be subjected to any punitive, administrative, civil, economic or other sanctions for actions taken to implement his/her obligations to a client according to the requirements of the law and professional conduct. A lawyer cannot be liable to disciplinary procedures for his/her opinion benevolently expressed when carrying out his/her professional duties. Moreover, a lawyer is entitled to participate without restriction, on a contract basis, in his/her client's case, or represent the same in relations with third persons, except for those situations when a lawyer is fully or temporary excluded from the List of Practicing Advocates of Lithuania.[113]

110 Articles 74, 79, 91 and 152 of the Penal Code of the Republic of Lithuania.
111 Article 99 of the Penal Code of the Republic of Lithuania.
112 Article 5 of the Law on the Bar.
113 Article 4 of the Code of Professional Conduct for the Advocates of Lithuania.

Neither the Law on the Bar of Lithuania nor the Code of Professional Conduct for Advocates of Lithuania (the Code of Professional Conduct)[114] includes a specific obligation on a lawyer to act in the best interests of his/her client. However, this requirement is implicitly introduced in other provisions of a general and specific nature setting forth the obligations of a lawyer. For example, the Code of Professional Conduct obliges an advocate to honestly, carefully and reasonably counsel, defend and represent a client.[115]

Several special obligations on defence lawyers are included in the CPC, which provides that a defence lawyer must: (i) use all means and methods of defence provided by law in order to determine the circumstances exonerating an accused or mitigating his/her culpability, and provide adequate legal assistance to an accused; (ii) appear before a pre-trial investigation officer, prosecutor and court at the time indicated by them, and if a counsel for the defence, without good reason, fails to appear, he may be fined under Article 163 of the CPC; (iii) follow the procedure of criminal proceedings and court hearings established by law, comply with lawful requests of a pre-trial investigation officer, prosecutor, judge and court; (iv) maintain appropriate professional confidentiality; a defence counsel and his/her assistant has no right to disclose information that they obtained in the discharge of their defence duties; (v) after assuming the obligation to defend a suspect, accused or convicted person, a defence counsel has no right to relinquish this obligation, save in the cases when the circumstances specified in Article 61(1) of the CPC become known; (vi) not use unlawful means of defence.[116]

The quality of lawyers is ensured predominantly by the requirement to pass an examination in order to become an advocate, as well as continuing professional development requirements[117] and disciplinary proceedings.[118] Moreover, a person can go directly to a national court and claim damages against a lawyer.[119] The Law

114 Code of Professional Conduct for the Advocates of Lithuania, *Valstybės Žinios* (Official Gazette), 11 March 2005, No. 130–4681, adopted on 8 April 2005 at the General Meeting of Lithuanian Advocates.

115 Part 6 of Article 6 of the Code of Professional Conduct.

116 Article 48 of the CPC.

117 Part 1 of Article 39 of the Law on the Bar of Lithuania.

118 Article 52 of the Law on the Bar of Lithuania.

119 Part 3 of Article 58 of the Law on the Bar of Lithuania. See also Section 4.4 below for more discussion relating to legal aid and quality assurance.

on the Bar of Lithuania establishes several specific limitations on the legal activities of an advocate's assistant.[120] He/she can represent the client's interests in court in a particular case, and before other institutions, only subject to the written permission of the advocate (his/her supervisor of apprenticeship). An advocate's assistant may represent a client only in courts of first instance and not earlier than one year after the commencement of his/her apprenticeship as an advocate's assistant. Moreover, they cannot provide state-guaranteed legal aid.

3.2.6 Provisions for vulnerable suspects and defendants

Juveniles and persons with mental deficiencies are regarded as vulnerable groups that are subject to special provisions under Lithuanian law. The CPC does not use the term 'mentally vulnerable'. Instead, it refers to a person with mental deficiencies not being able to exercise his/her right to counsel.[121] The commentary on the CPC explains that these are persons who, due to serious illness, have difficulties to communicate, conceive and express their thoughts, as well as persons found by a court to be incapable due to psychological illness.[122] There are no special provisions for people who, although able to instruct a lawyer, may have limited intellectual capacity or a less severe mental illness.

Although the CPC does not the term 'juvenile', the term can be defined taking into account provisions of other legal acts. The Law on the Fundamentals of Protection of the Rights of a Child[123] provides that a child is a human being below the age of 18, unless otherwise established by law.[124] A person is considered to be adult on the first day after his/her 18th birthday. If there are no documents certifying a person's age, it is to be ascertained by means of forensic examination. If the forensic examination is only able to determine the year of birth, that person's birthday is considered to be the last day of the year.[125]

120 Article 34 of the Law on the Bar of Lithuania.
121 Article 51 of the CPC.
122 Goda 2003, p. 143.
123 *Valstybės Žinios* (Official Gazette), 1996, No. 33–807.
124 Article 2 of the Law on Fundamentals of Protection of the Rights of a Child.
125 Goda 2003, p. 143.

There are, however, some exceptions.[126] These are set out in Articles 90–94,[127] but also include sanctions such as warnings, compensation for or the elimination of property damage, unpaid reformative work and restrictions on conduct, which all may be applied against a person who was 18 at the time of commission of a criminal act, but below 21 at the time of the court proceedings. In such a case, the court, having taken into consideration the nature of and reasons for the committed criminal act as well as other circumstances including, where necessary, the clarifications or conclusions of a specialist, may decide that the person is to be regarded as a minor and thus the application of the specific criminal liability for minors would correspond to the purposes provided for in Article 80 of the Code.[128]

There are special provisions for the protection of juveniles and persons with mental deficiencies concerning legal assistance and court proceedings. These provisions are the same for mentally vulnerable suspects and accused as they are for juveniles, and relate to the participation of counsel and legal representatives.

The special provisions for the protection of juveniles are found in different articles of the CPC and the Law on the Fundamentals of Protection of the Rights of a Child.[129] First, in cases where a suspect or accused is a juvenile, the presence of a defence counsel is obligatory.[130] This guarantee applies when: (i) a suspect or accused is under 18 at the time of the pre-trial investigation or court proceedings; (ii) a suspect or accused has committed a criminal act while a juvenile, although he/she is already an adult at the time of a pre-trial investigation or court proceedings; or (iii) a person

126 Part 2 of Article 81 of the Criminal Code of the Republic of Lithuania.

127 These articles regulate the following issues; Article 90 – Special Features of the Penalties Imposed upon Minors; Article 91 – Special Features of Imposition of a Penalty upon a Minor; Article 92 – Suspension of a Sentence in Respect of a Minor; Article 93 – Release of a Minor from Criminal Liability; Article 94 – Release on Parole from a Custodial Sentence of a Person under the Age of 18 Years at the Time of Commission of a Criminal Act and Replacement of the Custodial Sentence in Respect Thereof with a More Lenient Penalty.

128 Pursuant to Article 80 of the CPC, the specific provisions regarding the criminal liability of minors have the following purposes: (1) to ensure correspondence of liability to the age and social maturity of these persons; (2) to restrict the possibilities of the imposition of a custodial sentence and broaden the possibilities of the imposition of reformative sanctions against these persons; (3) to help a minor alter his/her manner of living and conduct by co-ordinating a penalty for the committed criminal act with the development and education of his/her personality and the elimination of the underlying reasons for the unlawful conduct; and (4) to prevent a minor from committing new criminal acts.

129 Article 53 of the Law on the Fundamentals of Protection of the Rights of a Child.

130 Part 1 of Article 51 of the CPC.

is suspected or accused of committing several criminal acts, some of which have been committed when he/she was a juvenile, despite the fact that, at the time of a pre-trial investigation or court proceedings, he/she is 18 years old.[131] Secondly, in the case of a juvenile, there is an exception to the general rule allowing a suspect or accused to waive the right to counsel at any stage of the proceedings. A declaration by a juvenile waiving the right to counsel is not obligatory for a pre-trial investigation officer, prosecutor and court.[132] A counsel can be excluded only if the suspect or accused requests another alternate counsel or, if in opinion of a pre-trial investigation officer, prosecutor or court, the counsel manifestly improperly defends the interests of the suspect or accused.[133] Thirdly, there is an additional rule concerning the participation of the legal representatives of juveniles. They can participate in criminal proceedings and defend the interests of a suspect or accused only if their participation is not in conflict with the interests of a juvenile.[134]

In its report on the situation in Lithuania, the Committee against Torture, Inhuman or Degrading Treatment or Punishment (CPT) stated that during its visit the delegation heard allegations that juveniles had been questioned by the police and had signed documents without a lawyer (or parent) being present. In particular, a 17-year-old girl complained that she had asked to wait until her parents had arrived before signing the 'minute of apprehension', but the investigator had refused on the ground that the procedure should not be delayed.[135] The CPT reiterated its recommendation that steps be taken to ensure that detained juveniles are not required to make any statement, or sign any document, without the benefit of a lawyer and, ideally, another trusted adult being present to assist them.[136]

3.2.7 Differences between suspects/defendants who pay privately, and those who rely on legal aid

In theory, there is no difference between poor or legally-aided suspects and accused. In practice, however, in the case of a wealthy private client or high-profile legally-aided person, lawyers may be more diligent in seeking disclosure by the prosecution,

131 Goda 2003, p. 143.
132 Part 2 of Article 52 of the CPC.
133 Goda 2003, p. 148.
134 Part 1 of Article 53 of the CPC.
135 Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) 2010, para. 22.
136 *Ibid.*

perhaps due to the difference between fees for a private lawyer (between 100–400 LTL per hour) and a lawyer who provides state-guaranteed legal aid (approximately 40 LTL per hour).

3.3 Procedural rights

3.3.1 The right to release from custody pending trial

Pursuant to the CPC, there are eight provisional measures apart from detention: (1) curfew; (2) order to live separately from the person who suffered damage; (3) seizure of documents; (4) order to report periodically to the police; (5) recognizance; (6) observation/supervision by the commander of the unit where a soldier is doing his/her service; (7) a minor's committal to the supervision of his parents, guardians, or to other natural persons or legal persons that take care of children; and (8) bail.[137]

A curfew order and an order to live separately from the person who suffered damage may be imposed only pursuant to an order of a pre-trial investigation judge or court. The other provisional measures can be imposed pursuant to a decision of a prosecutor, pre-trial investigation judge or court. In urgent cases, provisional measures such as seizure of documents, an order to report periodically to the police, recognizance, observation/supervision by the commander of the unit where a soldier is doing his/her service and a minor's committal to the supervision of his/her parents, guardians, or to other natural persons or legal persons that take care of children, can be imposed by a pre-trial investigation officer who, upon the imposition of any of these provisional measures, is obliged to immediately inform a prosecutor.

Any of these provisional measures is to be employed taking into account the gravity of a criminal act allegedly committed by a suspect, his/her personality, whether he/she has a permanent residence and a job or any other legal source of revenue, his/her age, condition of his/her health, his/her marital status, and any other circumstances that might be relevant.[138]

The restrictions imposed upon a suspect/accused depend on the provisional measures employed. For example, when a person is released on bail, he/she is under an obligation to appear before a pre-trial investigation officer, prosecutor or court, not

137 Article 120 of the CPC.

138 Part 4 of Article 121 of the CPC.

to obstruct the conduct of proceedings, and not to commit further criminal offences. In the case of curfew, a suspect is obliged to stay at home during the prescribed time, not to attend public places and not to have contact with specified people. The precise conditions are set at the time of imposition of the provisional measure.[139]

Only one provisional measure – bail – is dependent on the payment of money. Bail is defined in the CPC as an amount of money paid by a suspect, his/her family members or relatives, or by other persons, enterprises or institutions, into a deposit account of a prosecution institution or court, with the purpose of securing the presence of a suspect, accused or convicted person during the proceedings, an unhindered pre-trial investigation and judicial hearing, the execution of the judgment, and the prevention of commission of further criminal offences.[140] The amount of money is determined by the officer who imposes this provisional measure, taking into consideration the criminal act, the extent of the impending penalty, the financial position of the accused, and the person who pays the bail money and the character of the suspect/accused person.[141]

Although there are no precise statistics that would indicate the number of persons released from custody pending trial, some guidance can be drawn from the statistics on the application of provisional measures. According to the official statistics, in 2010 there were 18,826 provisional measures imposed on suspects/accused,[142] in 2009 – 18,020,[143] and in 2008 – 16,671.[144] Although these numbers show a slight increase,

139 Article 132 of the CPC.

140 Part 1 of Article 133 of the CPC, taking into account Article 119 of the CPC.

141 Part 2 of Article 133 of the CPC.

142 Ministry of the Interior of the Republic of Lithuania statistics at: http://www.vrm.lt/fileadmin/Image_Archive/IRD/Statistika/txt_file.phtml?fv=201012/f-30-iti-201012.data.txt&ff=%3C!--|30-ITI|18|--%3E&tt=Duomenys%20apie%20ikiteisminio%20tyrimo%20%E1staigose%20u%FEregistruotus%20asmenis,%20%E1tariamus%20(kaltinamus)%20nusikalstam%F8%20veik%F8%20padarymu%20(Forma_30-IT%C1).

143 Ministry of the Interior of the Republic of Lithuania statistics at: http://www.vrm.lt/fileadmin/Image_Archive/IRD/Statistika/txt_file.phtml?fv=200912/f-30-iti-200912.data.txt&ff=%3C!--|30-ITI|18|--%3E&tt=Duomenys%20apie%20ikiteisminio%20tyrimo%20%E1staigose%20u%FEregistruotus%20asmenis,%20%E1tariamus%20(kaltinamus)%20nusikalstam%F8%20veik%F8%20padarymu%20(Forma_30-IT%C1).

144 Ministry of the Interior of the Republic of Lithuania statistics at: http://www.vrm.lt/fileadmin/Image_Archive/IRD/Statistika/txt_file.phtml?fv=200812/f-30-iti-200812.data.txt&ff=%3C!--|30-ITI|18|--%3E&tt=Duomenys%20apie%20ikiteisminio%20tyrimo%20%E1staigose%20u%FEregistruotus%20asmenis,%20%E1tariamus%20(kaltinamus)%20nusikalstam%F8%20veik%F8%20padarymu%20(Forma_30-IT%C1).

one has to take into account the fact that the number of suspects/accused has also increased. In 2008, there were 23,249 suspects/ accused,[145] in 2009 – 24,122,[146] and in 2010 – 24,512.[147] On the other hand, provisional measures are imposed in relation to more than 70 per cent of suspects/accused, and this percentage is increasing from year to year. In 2008, 71.7 per cent of suspects/accused were restricted by provisional measures, in 2009 – 74.7 per cent, and in 2010 – 76.8 per cent.

As to the imposition of detention as a provisional measure, the Ministry of the Interior reports that in 2010, there were 1,920 cases of detention,[148] constituting approximately 10 per cent of all provisional measures. In comparison, a recognizance was imposed in 12,038 cases[149] (64 per cent), an order to report periodically to the police in 3,073 cases[150] (16 per cent), bail in 120 cases[151] (0.6 per cent), and curfew in 46 cases[152] (0.2 per cent). Although detention is not the most frequently imposed form of provisional measure, its application is still very high in comparison to other countries.[153]

3.3.2 The right of a defendant to be tried in his/her presence

Article 246 of the CPC specifies the obligatory participation of an accused in a court hearing. In the event of the non-appearance of an accused at the trial, the court may adjourn or postpone the hearing. A court also has the right to require the attendance of the accused, to impose a provisional measure or to change an existing provisional measure to a stricter one.

145 *Ibid.*

146 Ministry of the Interior of the Republic of Lithuania statistics at: http://www.vrm.lt/fileadmin/Image_Archive/IRD/Statistika/txt_file.phtml?fv=200912/f-30-iti-200912.data.txt&ff=%3C!--|30-ITI|1|--%3E&tt=Duomenys%20apie%20ikiteisminio%20tyrimo%20%E1staigose%20u%FEregistruotus%20asmenis,%20%E1tariamus%20(kaltinamus)%20nusikalstam%F8%20veik%F8%20padarymu%20(Forma_30-IT%C1).

147 Ministry of the Interior of the Republic of Lithuania statistics at: http://www.vrm.lt/fileadmin/Image_Archive/IRD/Statistika/txt_file.phtml?fv=201012/f-30-iti-201012.data.txt&ff=%3C!--|30-ITI|1|--%3E&tt=Duomenys%20apie%20ikiteisminio%20tyrimo%20%E1staigose%20u%FEregistruotus%20asmenis,%20%E1tariamus%20(kaltinamus)%20nusikalstam%F8%20veik%F8%20padarymu%20(Forma_30-IT%C1).

148 *Ibid.*

149 *Ibid.*

150 *Ibid.*

151 *Ibid.*

152 *Ibid.*

153 For example, in Germany the reported percentage is two per cent: see Cape et al. 2010, p. 284.

The exceptions to this general rule are very limited and are applied only in cases where an accused is not in the territory of Lithuania and thus avoids appearing at court. The CPC envisages special procedural rules in the case of the non-participation of an accused in a court hearing. A judge who prepares the case for the hearing may take the decision that it is possible to properly examine the case even though the accused is not present, in which case the CPC requires the participation of a defence counsel.[154] If the decision is taken that a proper examination is not possible, the court hearing is postponed.

Unfortunately, there is no empirical data available as to the number of the trials that are conducted in the absence of an accused.

3.3.3 The right to be presumed innocent

The right to be presumed innocent is protected as a constitutional principle. The Constitution of the Republic of Lithuania states that:

> A person shall be presumed innocent until proved guilty according to the procedure established by law and declared guilty by an effective court judgement.[155]

The same provision is reiterated in the CPC, which affirms the fundamental principles of the protection of persons in criminal proceedings.[156]

The main features of this principle are the following: (a) a person cannot be considered guilty of a particular crime if there is no court judgment that has entered into force; (b) a person shall be found guilty of the committed crime only in accordance with the rules and procedures provided by law; (c) any compulsory measures that are applied to the suspect or accused shall not infringe the essence of the principle of the presumption of innocence; (d) in any procedural actions, the wording of filed documents shall avoid any indications that a suspect or accused is guilty of the specific criminal offence; (e) the principle of the presumption of innocence requires that any doubts that arise when investigating or examining a criminal case shall be explained, interpreted and applied in favour of the suspect or accused (*in dubio pro reo*).[157]

154 Articles 433–38 of the CPC.
155 Article 31 of the Constitution of the Republic of Lithuania.
156 Article 44 of the CPC.
157 Goda, Kazlauskas and Kuconis 2005, p. 51.

Although the importance of the principle has frequently been recognised by the Constitutional Court,[158] the Supreme Court and lower courts, public opinion indicates the fact that this does not guarantee its proper practical implementation. In its alternative report prepared for the United Nations Human Rights Committee, the Human Rights Monitoring Institute indicated that the media often infringes the principle of presumption of innocence, and continues to violate the principle even after the intervention of the responsible institutions.[159] A judge of the Supreme Court specialising in criminal law, J. Prapiestis, shares a similar opinion. The judge states that:

> ... pre-trial investigative actions are understood as the finding of a person's (even just having the status of a suspect) guilt. The society and sometimes even the highest authorities pre-condemn and pre-convict such a person. [...] In addition, even before the announcement of his conviction such a person loses his job and often liberty (due to detention), loses his reputation, his position in the society.[160]

The Lithuanian Parliament's Committee on Human Rights has also recognised the problem, admitting that 'very often cases are "investigated" by journalists and public opinion [and] the outcome of the case is shaped without a trial'[161]. Unfortunately, no specific measures are envisaged to improve this situation.

158 Decision of 16 January 2006 by the Constitutional Court of the Republic of Lithuania. The Constitutional Court emphasised that it is extremely important that state institutions and officials follow the presumption of innocence, and that public persons should refrain from referring to a person as a criminal until the guilt of the person for committing the crime is proved according to the procedure established by law, and he/she is declared guilty by an effective court judgment.

159 As an example, the Human Rights Monitoring Institute mentions the case of the murder of two children, which attracted a huge amount of publicity (*Alma Jonaitiene* case). One of the media channels called the suspect a 'murderess' who 'killed two of her children' before she was found guilty by the court. At the end of 2007, the Inspector of Journalistic Ethics declared that such a description of the suspect before her conviction had violated the presumption of innocence. However, even after a warning was issued to the owner of the media outlet, it continued to violate the principle in its subsequent publications; see http://www2.ohchr.org/english/bodies/hrc/docs/ngo/HRCI_Litthuania_HRC_Future.pdf.

160 Prapiestis, J., 'Smuggling Cases in Lithuania – A Rarity', at: http://www.alfa.lt/straipsnis/10887679/Prapiestis..Lietuvoje.kontrabandos.bylos..retenybe=2011-03-28_11-00/.

161 'Human Rights Committee: Is there enough respect for the principle of presumption of innocence in Lithuania?', at: http://www3.lrs.lt/pls/inter/w5_show?p_r=4463&p_k=1&p_d=111364.

3.3.4 The right to silence

The right to silence in Lithuania is considered as a constitutional guarantee within criminal procedure. The guarantee is found in the Constitution of the Republic of Lithuania, and is intended to prevent any form of forced testimony against oneself, one's family members or close relatives.[162] The CPC elaborates the right further.[163] A person has a right to refuse to give testimony and to actively participate in an inquiry if the procedural act is against the interests of that person, his/her family members or close relatives. In other words, the provisions give a person the absolute right to decide whether to give testimony, or to refuse to do so. Information submitted by that person can be used as evidence only if its submission is freely given.[164]

In recent years, there have been several changes introduced to the Articles of the CPC regulating the right to silence. On 28 June 2007 Article 82 of the CPC, regulating the giving of testimony, was amended to introduce a provision that entitled a person being questioned about his/her alleged criminal act to have a counsel, and to ask to be recognised as a suspect.[165] At the time of the amendment, witnesses did not have a right to counsel. As a result, the amendment has been positively regarded.[166] As from 21 September 2010, pursuant to the amendment introduced to Article 81 of the CPC, every witness has a right to have a legal representative.[167]

3.3.5 The right to a reasoned decision

The right to a reasoned decision in the Lithuanian legal system is directly protected by the Constitution of the Republic of Lithuania. The Constitutional Court has had a number of occasions to emphasise that such constitutional imperatives result from the fact that 'justice shall be administered only by courts', 'law cannot be unadvertised', 'a case must be examined justly', in addition to a presumption that every sentence, or other final decision, of a court has to be grounded by legal arguments. The argumentation has to be rational; the arguments have to explain the sentence of a court (or other final decision) sufficiently.

162 Part 3 of Article 31 of the Constitution of the Republic of Lithuania.
163 Articles 80 and 82 of the CPC.
164 Jurka 2006, pp. 35–36.
165 No. X-1236, ri-06-28, *Valstybės Žinios* (Official Gazette), 2007, No. 81–3312 (21 July 2007).
166 Sapalaite 2007, pp. 84–85.
167 No. XI-1014, 2010-09-21, Zin., 2010, No. 113–5742 (25 October 2010).

The requirement of legal clarity stemming from the principle of the rule of law means *inter alia* that a sentence cannot contain concealed arguments or unidentified circumstances that are important to the adoption of a just sentence. Sentences of the courts (or other final acts) must be comprehensible to participants in a case and to other persons. Justice is not administered if a court disregards this requirement.[168]

The CPC specifies the requirements of the content of a court's judgment or decision.[169] A judgment shall have three parts: (a) an opening part; (b) a descriptive part; and (c) a resolution part. Each of these parts has a strictly defined content, which must be followed in every court's decision. For example, the CPC elaborates the constitutional right by specifying a precise list of minimum information that has to be indicated in a judgment. The CPC obliges a court to state: (1) the circumstances of a criminal act found to be proven, indicating the place, time, manner of its commission, its consequences and other important circumstances; (2) the evidence upon which a court's conclusions are based and the grounds on which a court ruled other evidence irrelevant; (3) the grounds for the legal qualification of a criminal act and findings; (4) the reasons for a sentence, criminal sanction or educational sanction. The minimum requirements of argumentation are also specified for a judgment of acquittal and a judgment where a convicted person is exempted from a sentence.[170]

As mentioned above, the information that has to be indicated in a judgment is the minimum requirement. The does not prevent a court from indicating other important circumstances and arguments that it finds to be relevant to a particular case and to the findings it has reached.

In practice, national courts tend to draft the reasoning of their decisions taking account of the supervision of their judgments by higher courts. Unfortunately, it is widely accepted[171] by society that people often find it difficult to understand the content of decisions due to the heavy reliance on legal language by the judges.

168 Decision of 16 January 2006 of the Constitutional Court of the Republic of Lithuania.

169 Articles 304–307 of the CPC.

170 Part 2 and 3 of Article 305 of the CPC.

171 Interview with the assistant of the director of Lithuanian Human Rights Association, N. Orentaitė, at: http://www.slaptai.lt/gyvenimo-skandalai/4309-visuomeniniu-organizaciju-atstovai-buvo-isprasyti-is-sales.html; 'Members of public provided valuable ideas for the improvement of administration of justice', at: http://www.teisingumas.lt/naujienos/aktualijos/visuomenes-atstovai-pateike-vertingu-ideju-kaip-gerinti-administraciniu-teismu-veikla.

3.3.6 The right to appeal

The right to appeal is enjoyed by both the prosecution and the defence. The CPC explains the ambit of this right. Pursuant to the regulation, an acquitted person and his/her counsel and legal representative have the right to file an appeal against a judgment to the extent that it is related to the reasons and grounds for acquittal.[172] The counsel of a convicted or acquitted person has the right to file an appeal only when this is in conformity with the will of that person expressed in writing. The counsel of a person who is unable to exercise his/her right to defence due to his/her physical or mental deficiencies, or the counsel of a convicted or acquitted juvenile, may file an appeal irrespective of the wishes of the convicted or acquitted person.[173]

The CPC sets out the procedure and time limits for the filing of an appeal against a judgment. Appeals against a court's judgment that has not yet become effective are recorded in writing and signed by an appellant. An appeal against a judgment may be filed within 20 days from the day the judgment was pronounced. For a convicted person kept in custody, the time limit for the filing of an appeal runs from the day he/she is served with a transcript of the judgment. For an accused who did not participate in the hearing, the time limit for the filing of an appeal runs from the day a transcript of the judgment is sent to him/her.[174]

The CPC also provides the possibility for persons who have the right to file an appeal to apply to a court and request restoration of the *status quo ante*, if the time limit for an appeal has elapsed. Such an application cannot be filed more than six months from the pronouncement of the judgment or order. An order issued by a court or judge, dismissing the application to grant the restoration of the *status quo ante*, may be appealed to an appellate court.[175]

In practice, the number of appeals in comparison to the numbers of sentenced persons is very small. In 2008, there were 14,295 persons sentenced, in 2009 – 14,664, and in 2010 – 15,689.[176] In comparison, in 2008, appellate courts received

172 Part 2 of Article 312 of the CPC.

173 Part 5 and 6 of Article 312 of the CPC.

174 Article 313 of the CPC.

175 Article 314 of the CPC.

176 Department of Statistics of Lithuania at: http://db1.stat.gov.lt/statbank/selectvarval/saveselections.asp?MainTable=M3170107&PLanguage=1&TableStyle=&Buttons=&PXSId=4542&IQY=&TC=&ST=ST&rvar0=&rvar1=&rvar2=&rvar3=&rvar4=&rvar5=&rvar6=&rvar7=&rvar8=&rvar9=&rvar10=&rvar11=&rvar12=&rvar13=&rvar14=.

2,981 appeals against a judgment of the first instance courts, in 2009 – 3,213, and in 2010 – 3,567. Moreover, the statistics show that more than 88 per cent of all appeals against judgments are dismissed,[177] a factor that clearly discourages sentenced persons from appealing.

3.4 Rights relating to effective defence

3.4.1 The right to investigate the case

The equality of arms is one of the main principles of criminal procedure enshrined in the CPC. The Code provides that during the hearing the defence and the prosecution are equally entitled to adduce evidence, take part in the examination, make motions, challenge the arguments of the opponent, and voice their opinion on any issue arising that is relevant for its fair disposition.[178]

The CPC *inter alia* provides for the right of a suspect to submit documents and material relevant to the investigation.[179] The right to seek evidence and to participate in the investigation is expressly granted to an accused person. Article 44 of the CPC adds the right to both participants of a criminal proceeding to interview prospective witnesses, or to ask to interview them. A defence lawyer is expressly also granted all of these rights. He/she is permitted to interview prospective witnesses, obtain expert evidence and seek evidence without asking a prosecutor or other investigator. This right is not absolute, in the sense that in exercising these right, a defence lawyer should not violate other laws and the rights of other individuals (for example, the right to privacy). As to the professional limitations on a lawyer carrying out any of these activities, he/she must abide by the Code of Professional Conduct for Advocates of Lithuania and the Law on the Bar of the Republic of Lithuania.

The exercise of any of these rights does not, in theory, differ for a suspect/accused who is in custody in the sense that there are no limitations set by the law. However, there may be practical difficulties for an accused in custody to communicate with his/her lawyer and prospective witnesses. In practice, the possibility of investigating a

177 Statistics provided by the Administration of the courts pursuant to a personal request of the researches. In 2008, appellate courts adopted 2,122 rulings concerning appeals against judgments, 1,886 of which were dismissed; in 2009, 2,306 rulings of which 2,033 were dismissed; in 2010, 2,523 rulings of which 2,255 were dismissed.

178 Article 7 of the CPC.

179 Article 21 of the CPC.

case could also differ between suspects/accused who pay privately and those who rely on legal aid. The costs of secondary legal aid, from which the applicant is exempted, comprise *inter alia* the costs related to the drafting of procedural documents and the collection of evidence.[180] On the other hand, a legal aid lawyer has to prove the expenses in order to be compensated. Thus, suspects/accused who rely on legal aid become dependent on the ability and willingness of a legal aid lawyer to cover those expenses necessary for the investigation of a particular case.[181]

3.4.2 The right to adequate time and facilities to prepare the defence

The right to have adequate time and possibility for the preparation of the defence is one of the fundamental aspects of effective criminal defence. The principle is established in Article 44 of the CPC and further elaborated elsewhere in the CPC.

The CPC provides that a defence lawyer has the right to meet with an arrested or detained suspect without the presence of any other person, and without any limitation on the number or duration of such meetings.[182] The law does not differentiate in this regard between the investigation and trial stages. There are no limitations on the right established by the CPC. A lawyer acting for a suspect/accused also has a right to communicate in private with third parties (for example, witnesses and experts). However, in doing this, a lawyer cannot infringe other laws and the rights of other persons. The CPC also specifies that, where a new defence lawyer is appointed, a court should give sufficient time to prepare for the court proceedings.[183]

180 Article 13(2) of the Law on State-guaranteed Legal Aid. Although there is no precise definition of evidence in the CPC, the commentary suggests that there are such forms of evidence as testimony, a report of an expert examination, the finding of a specialist, and documents and objects. Thus, the investigation of facts, interviewing prospective witnesses and obtaining of an expert's opinion is included in the expression the 'seeking/collection of evidence', and should therefore be considered as eligible costs for state-guaranteed legal aid.

181 Montvydiene 2010, p. 207.

182 Article 48 of the CPC.

183 Article 250 of the CPC.

3.4.3 Right to seek evidence and interview prospective witnesses

The CPC establishes that evidence in criminal procedures is material obtained in a manner prescribed by law.[184] Evidence may only be such material as is obtained by lawful means and may be validated by the procedure laid down in the CPC. Admissibility of the material obtained is determined in every case by the judge assigned to the case. Only such material as proves or disproves at least one circumstance relevant for a fair disposition of the case may be regarded as evidence. Judges assess the evidence according to their inner conviction, based on a scrupulous and objective review of all the circumstances of the case in accordance with the law.

The CPC provides that the material in the criminal case file, together with the indictment, are sent to a court by a public prosecutor, as well as the list of witnesses and experts who are to be orally questioned during the court proceedings.[185] The judge can decide what additional evidence and/or witnesses should be summoned or gathered for the criminal case hearings. The right to seek evidence in court and to interview prospective witnesses is absolute, with the question always decided by the judge examining the criminal case. The CPC does not include any direct provisions prohibiting advocates, suspects or accused persons from asking for any other data or the summoning of the other witnesses.

Both parties are entitled to produce evidence and propose witnesses until completion of the assessment of evidence. Moreover, the CPC provides that an accused and his/her defence counsel are entitled to pose questions to witnesses.[186] Where a witness is summoned to a court at the request of one of the parties, the party that asked to summon the witness is entitled to question that witness first. A presiding judge can reject questions that are irrelevant to the case.

The way in which any evidence obtained illegally or unfairly is excluded at trial is reflected in the minutes of court proceedings and the decisions of courts of appeal.

3.4.4 The right to free interpretation and translation of documents

The right to free assistance of an interpreter for a suspect/accused who cannot understand or speak the language of his/her lawyer, an investigator or a court, is a

184 Article 20 of the CPC.
185 Article 220 of the CPC.
186 Article 275 of the CPC.

constitutional right, established in the Constitution of the Republic of Lithuania,[187] and affirmed in the CPC.[188] A suspect or accused also has a right to free translation of documents, and evidence, if he/she cannot understand the language in which they are written. The CPC provides that:

> ... a suspect, an accused or a convicted person as well as the other parties to the case are, in the manner laid down in this Code, to be presented with the documents of the case translated into their native language or any other language they know.[189]

The need for an interpreter, as well as for translation of documents/evidence (see below) is determined taking into account all of the information relating to a suspect or accused gathered prior to and during the pre-trial investigation, as well as his/her knowledge of the written and spoken language and reading skills. A pre-trial investigation officer, prosecutor and court cannot act as an interpreter, but are responsible for determining the need for an interpreter and/or translation. Interpretation and/or translation during the pre-trial investigation and court proceedings is free to the suspect/accused and is always paid by the state. The minutes are the written evidence as to how these rights are implemented. If either of these rights are breached, the judgment of a court in the proceedings can be annulled.

The CPC also regulates the competence and independence of interpreters and translators.[190] The Code sets out the procedure for disqualifying certain participants in the proceedings due to a lack of impartiality. The Code *inter alia* establishes that an interpreter/translator is not allowed to participate in the proceedings: (i) where he/she is a victim, private prosecutor, plaintiff, or defendant in a civil action, a relative of any of the above persons, a relative of a suspect, accused, convicted person or of their lawful representative, of a judge, an investigating judge, a prosecutor, a pre-trial investigation officer or a defence lawyer in this case; (ii) where he/she has participated in this case as a witness, a lawful representative of a suspect, an accused or convicted person, or as a representative of a victim, private prosecutor, plaintiff or defendant in a civil action; (iii) if he/she or his/her relatives have an interest in the outcome of the case; (iv) if persons participating in the proceedings disclose, in a reasoned

187 Part 3 of Article 117 of the Constitution of the Republic of Lithuania.

188 Parts 2 and 3 of Article 8; Part 7 of Article 44 and other articles of the CPC.

189 Part 3 of Article 8 of the CPC.

190 Articles 57–61 of the CPC.

manner, other circumstances that raise reasonable doubts about the impartiality of an interpreter/translator.

Under the Code, the decision on disqualification during a pre-trial investigation is made by a pre-trial investigation officer or prosecutor.[191] In court proceedings, the decision is made by the court hearing a case.[192] If an interpreter or translator is incompetent, a suspect/accused can ask to disqualify the interpreter/translator in accordance with the procedure set out in the CPC.[193] The sanctions for providing false or incorrect interpretation/translation are set in the CPC,[194] as well as in the Criminal Code of the Republic of Lithuania.[195]

4. The professional culture of defence lawyers

4.1 The Bar Association and criminal defence

The first Law on the Bar was adopted on 16 September 1992. The Lithuanian Bar Association (hereafter, the Bar) is an independent part of the Lithuanian legal system. The number of lawyers (advocates) is not limited in the Republic of Lithuania. There are currently 1,729 lawyers (advocates) providing legal services in Lithuania,[196] all of whom are members of the Bar, membership of which is compulsory.

The statutory conditions for becoming a lawyer and a member of the Bar are the following: (i) nationality of the Republic of Lithuania or a member state of the European Union; (ii) a bachelor's or master's degree in law, or a lawyer's professional qualification degree (one-cycle university education in law); (iii) a record of at least five years of service in the legal profession, or an apprenticeship as an advocate's assistant for at least two years. Service in the legal profession includes activities specified in the list of legal professions approved by the Government of the Republic of Lithuania. The length of service in the legal profession is calculated from the moment a person has acquired a bachelor's or master's degree in law, or a lawyer's professional qualification degree, and has started practising law; (iv) high moral character; (v) proficiency in

191 Article 60 of the CPC.
192 Article 59 of the CPC.
193 Article 58 of the CPC.
194 Article 163 of the CPC.
195 Article 235 of Criminal Code of the Republic of Lithuania.
196 Statistics as at 1 January 2011 provided by the Bar at: http://www.advoco.lt.

the state language; (vi) passing an advocate's qualification examination – this rule does not apply to persons who have a record of at least seven years of work as a judge or hold a degree of doctor or doctor *habilis* in social sciences (law); (vii) no health disorders that would prevent a person from performing duties of an advocate (the health requirements and the procedure of health checks for applicants and advocates are established by the Ministry of Health and the Ministry of Justice).

Within the Bar, there are no specialised sections for criminal defence lawyers or institutionalised specialisation with the legal profession.

4.2 The lawyer's role in criminal proceedings

Criminal defence lawyers may accept an assignment to defend a client's interests upon the application of a client or his/her lawful representative, from other persons when they apply on a client's behalf or with his/her consent, or when a competent institution assigns him/her to participate in a case. Criminal defence lawyers may provide defence as a designated legal aid lawyer pursuant to the rules discussed Section 2 (Legal Aid).

Although lawyers may act as defence counsel, the same lawyer may not act for two or more persons where the interests of the defence of one such person conflict with the interests of the defence of the other person. A lawyer's assistant may act as a defence counsel upon the instructions of the lawyer, provided there is no objection from the accused. A lawyer's assistant may not take part in the trial involving a grave or very grave criminal offence.

One person may have several, but not more than three, defence counsel. Where a suspect or accused has several defence counsel, at least one of whom is present, the hearing may proceed.

The basic responsibilities of a defence counsel in criminal proceedings are prescribed in the CPC.[197] A criminal defence lawyer has a right to participate in all procedural actions carried out with a suspect; to meet a suspect without the participation of third parties, with the number and length of those meetings unrestricted; to collect evidence necessary for the defence and to ask to include it to the case file; to read a criminal case file; to make complaints and requests; to use all means and methods of defence provided by law in order to determine the circumstances exonerating an accused or mitigating his/her culpability, and to provide to an accused with adequate legal assistance.

[197] Article 48 of the CPC.

More precise provisions, explaining the role of a defence lawyer, are provided in the Code of Professional Conduct, which indicates that although a defence lawyer is an independent participant in the proceedings in criminal cases, he/she may not select any position of defence without the client's knowledge. A defence lawyer (advocate) must consult a client and pay due regard to his/her instructions.[198] The Code of Professional Conduct establishes several professional obligations that are perceived as standards of practice for criminal defence lawyers. The Code[199] explains that where a client pleads guilty a defence lawyer must, after having evaluated all the evidence in the case and having drawn the same conclusion, analyse all factors that might mitigate the liability of the client in his/her statement of defence. On the other hand, where a client pleads guilty, and after having evaluated all the evidence in a case, a defence lawyer concludes that the guilt of the client is not proven or is in question, he/she is to maintain an independent position, irrespective of the client.[200]

When a client pleads not guilty and, upon becoming familiar with a particular case, a defence lawyer reasonably considers that there is sufficient evidence to justify the guilt of the client, he/she cannot persuade the client to plead guilty, as guilt or innocence only lies within the competence of a court. Instead, that advocate must explain to a client the right to refuse the advocate's services.[201] If a client pleads guilty and, after having evaluated all evidence, a defence lawyer reasonably considers that there are other minor attributes of a criminal act in a client's actions, a defence lawyer should explain the situation to the client, as well as the right to refuse his/her services.[202]

4.3 Perception of defence lawyers and their relationship with other legal professions[203]

The majority of the criminal defence lawyers interviewed for the purposes of the research were of the opinion that, as a rule, private defence lawyers (hired by a client) provide higher-quality defence services than those provided by lawyers paid for by

198 Article 6.9 of the Code of Professional Conduct for Advocates of Lithuania.

199 Article 6.10 of the Code of Professional Conduct for Advocates of Lithuania.

200 Article 6.11 of the Code of Professional Conduct for Advocates of Lithuania.

201 Article 6.12 of the Code of Professional Conduct for Advocates of Lithuania.

202 Article 6.13 of the Code of Professional Conduct for Advocates of Lithuania.

203 This section is based on interviews with criminal defence lawyers. Five lawyers were interviewed, made up of three legal aid criminal defence lawyers and two private criminal defence lawyers. The interviews were carried out in June 2011.

legal aid. The private defence lawyers interviewed expressed strong criticism of the work performed by legal aid defence lawyers. On the other hand, the opinion of the legal aid criminal defence lawyers interviewed was not so unanimous in this respect; however, they shared the opinion that legal aid criminal defence lawyers usually are not as 'client-centred', and thus do not necessarily make every effort when providing criminal defence services. The legal aid lawyers also expressed the view that the quality of criminal defence is influenced by the level of payment for legal aid work, which is poor; therefore, the quality also tends to be inadequate.

As to the relationship between lawyers and pre-trial investigation officers, the views were the same among both groups of lawyers who were interviewed. Both groups thought that pre-trial investigation officers had little respect for defence lawyers, and private criminal defence lawyers also felt that, sometimes, prosecutors treat a defence lawyer like a suspect/accused, although legal aid criminal defence lawyers regarded their relationship with prosecutors as mutually respectful as colleagues. The opinion towards judges was very similar among both groups of defence lawyers – judges regard defence lawyer as a colleague.

Private criminal defence lawyers were of the opinion that neither pre-trial investigation officers nor public prosecutors regarded a criminal lawyer as a necessary part of the procedure, but rather that a defence lawyer was more of an obstacle than a guarantee for a defendant in a criminal case. They also thought that judges regard criminal defence lawyers as more of a formal requirement, and generally do not take the opinions and arguments of defence lawyers seriously. The views of the legal aid criminal defence lawyers were different. In their opinion, a criminal defence lawyer is regarded by all actors in criminal cases (pre-trial investigation officers, prosecutors, judges) as a guarantor of the rights of defendants as provided by law, and therefore that they should be respected.

All the interviewed lawyers were of the opinion that pre-trial investigation officers find it more convenient and easier to work with a legal aid lawyer because those lawyers do not 'require the maximum' for their clients. They also all believed that prosecutors think that legal aid lawyers will not disturb their work.

As to judges' attitude towards defence lawyers, the views of the private criminal defence lawyers differed from the opinion of the legal aid criminal defence lawyers. Private criminal defence lawyers felt that judges, to a large extent, have a better opinion of private criminal defence lawyers than of legal aid criminal defence lawyers. The legal aid criminal defence lawyers shared the view that judges look for those lawyers who provide good quality services for a client. Such differences indicate that, among

lawyers themselves, there is a strong belief that it is not prestigious to provide legal services for poor people, and that legal aid criminal defence lawyers work with legal aid cases only because they are unable to find private clients.

All the lawyers shared the opinion that most members of society would, without any doubt, choose a private lawyer, since there is a strong perception that legal aid criminal defence lawyers would be incapable of properly defending a client. The legal aid criminal defence lawyers also shared the view that, to a certain extent, private criminal defence lawyers only offer superficial rather than effective criminal defence services.

In respect of payment for legal aid work, all the lawyers shared a strong opinion that payment is totally inadequate, and does not correspond to the services provided and the actual work necessary to be done in a criminal case.

4.4 Legal aid and quality assurance

As discussed in Section 2 above (Legal Aid), criminal legal aid is provided within the framework of a system of appointed counsels. There are two types of criminal defence lawyers who are eligible to defend upon assignment by the state – permanent criminal legal aid lawyers and criminal legal aid lawyers in cases of necessity. Permanent criminal legal aid lawyers work only in criminal cases, which are assigned to them by the state authorities, and do not take private clients. Criminal legal aid lawyers in cases of necessity (see Section 2 above) are eligible to provide legal aid and also take private clients in other criminal or civil cases.

The numbers of lawyers providing legal aid demonstrate that the provision of legal aid is unpopular among lawyers. There are several probable several reasons for this, including: (i) the low level of remuneration; (ii) the poor opinion of legal aid lawyers in society and among other their colleagues; and (iii) the generally poor performance of legal aid lawyers.

The legal aid system is managed by several actors. The responsibility for the provision of legal aid is shared between the Services, which compile the list of legal aid lawyers, and the authorities, which designate a defence lawyer in a criminal case. The Bar has responsibility for organising the verification of the quality of the activities of legal aid lawyers, in accordance with the rules for assessment of the quality of legal aid approved by the Lithuanian Bar Association, as agreed with the Ministry of Justice.

As there are no special rules for an assessment of the quality of legal aid, the general disciplinary procedure executed by the Bar applies. There is also no direct individual quality assurance mechanism in the legal aid system.

A disciplinary action may be instituted against an advocate for violations of the requirements of the Law on the Bar and the Code of Professional Conduct for Advocates of Lithuania, as well as for professional misconduct.[204] A decision to institute a disciplinary action is taken by the Lithuanian Bar Association, or the Minister of Justice.[205] Disciplinary actions against advocates are heard before the Court of Honour of Advocates. The person who has applied to institute a disciplinary action also has the right to participate when the Lithuanian Bar Association considers the need to institute an action, and when the action is heard. The procedure for hearing disciplinary actions against advocates is established by the Lithuanian Bar Association.[206] The Court of Honour of Advocates may impose the following disciplinary sanctions for the violations referred to above: (i) censure; (ii) reprimand; (iii) public reprimand; or (iv) invalidation of the decision of the Lithuanian Bar Association to recognise the person as an advocate.[207]

There were 43 cases received by the Court of Honour of Advocates for the period May 2010–May 2011, of which 38 were examined and decisions rendered. There were nine decisions to censure; five reprimands; nine public reprimands; three decisions not to impose any sanction; two decisions to terminate disciplinary proceedings; and four decisions to terminate disciplinary proceedings on the grounds of statutory limitations.[208] There were two public reprimands related to the quality of the provision of legal aid. The first arose after the lawyer, who was designated as a legal aid lawyer in a criminal case for a defendant, concluded a legal services agreement to also provide legal assistance to the victim in the same case. The Court of Honour of Advocates declared that such behaviour was a breach of the moral and legal commitments to the profession of advocates and to society, and discredited the name of the advocate.[209] The second disciplinary case arose where the lawyer providing legal aid was not sufficiently diligent, did not take any action in order to provide legal assistance to the client, delayed providing legal assistance, and did not appear at the court hearing without notifying the court or the client. The Court of Honour of Advocates declared that the behaviour of the lawyer constituted a breach of high moral character, a breach of the moral and legal commitments to the profession of advocates and to society, and discredited the name of an advocate.[210]

204 Article 52 of the Law on the Bar.
205 *Ibid*.
206 *Ibid.*
207 Article 53 of the Law on the Bar.
208 Report of the Court of Honour of Advocates, 14 April 2011.
209 *Ibid*
210 *Ibid.*

In the doctoral thesis that analysed the quality assurance in practice, I. Montvydiene concluded that the Court of Honour of Advocates had instituted disciplinary proceeding in various circumstances,[211] including where: (i) the advocate missed the time limit to seek an appeal;[212] (ii) there were significant spelling mistakes in the procedural documents, which made it difficult to understand the content of the text;[213] and (iii) the advocate was passive in representing the client's interests and did not make use of all legal means to protect the interests of the client.[214]

The disciplinary powers of the Bar can only be performed when a complaint is received by the Bar. Although general dissatisfaction with the activity of legal aid lawyers exists, the practice shows there are few disciplinary procedures launched against those legal aid lawyers who may be negligent.

In general, Lithuania lacks general quality assurance mechanisms with respect to legal services. Although the quality assurance function is assigned to the Bar, and the Bar must organise, in theory, the verification of the quality of activities of lawyers providing legal aid, this is not currently being done.

5. The political commitment to effective criminal defence

5.1 Perception of the criminal justice system

Based on available research, crime is the second most important reason why people do not feel secure (62 per cent of the respondents).[215] The top reason is increasing prices

211 Montvydiene 2010, p. 135.

212 Decision of 12 November 2008 of the Court of Honour of Advocates in the disciplinary case No. 1/2009 against the advocate J.S.; Decision of 12 November 2009 of the Court of Honour of Advocates in the disciplinary case No. 10/2009 against the advocate A.B.; Decision of 11 February 2010 of the Court of Honour of Advocates in the disciplinary case No. 20/2010 against the advocate A.Z.

213 Decision of 10 December 2009 of the Court of Honour of Advocates in the disciplinary case No. 8/2009 against the advocate A.T.; Decision of 13 May 2010 of the Court of Honour of Advocates in the disciplinary case No. 27/2010 against the advocate D.S.

214 Decision of 10 June 2009 of the Court of Honour of Advocates in the disciplinary case No. 1/2010 against the advocate R.R.

215 Analysis of cooperation between society and the criminal justice actors; Ministry of the Interior. 2008, at: http://www.vrm.lt/index.php?id=1336.

and inflation. These results do not, however, correspond to the number of reported criminal offences, which has been more or less steady since 2000.[216]

The public opinion and market research company 'Sprinter tyrimai' conducted a survey, asking respondents whether they supported the decision to restore the death penalty in Lithuania, which had been abolished 13 years earlier. Of the respondents, just over 29 per cent answered 'positively yes', some 20 per cent were 'more likely yes than no', some 19 per cent were 'more likely no than yes', just over 13 per cent were 'absolutely no', and almost 18 per cent did not have an opinion or did not answered the question. [217] These results seem to indicate that Lithuanian society strongly supports strict punishment within the criminal justice system.

According to sociological research on the evaluation of the institutions of the criminal justice system carried out in 2009 by the Ministry of the Interior, Lithuanian society was asked to express its opinion on the question how the rights of suspects are respected.[218] Some 38 per cent of respondents said that these rights are respected 'poorly', 38 per cent stated that it was 'difficult to say', and 24 per cent regarded the level of respect as 'acceptable'. The same question was put to people working in criminal justice system institutions and the results were as follows: 50 per cent answered 'acceptably', 28 per cent said 'difficult to say', and 23 per cent thought 'poorly'.[219] Judges, public prosecutors and police were asked whether the human rights of suspects are being respected and the results were as follows: 45 per cent of judges, 63 per cent of public prosecutors, and 48 per cent of police officers agreed with this statement.[220] These numbers indicate that the majority of public and of criminal justice actors believe that there is a poor respect for human rights within the criminal justice system.

As part of the 2009 sociological research, Lithuanian society was also asked to express its view on the work of public safety institutions (courts, prosecutors and the police). Some 50 per cent of those polled evaluated the courts as working 'poorly', 34 per cent as 'acceptably', and for 16 per cent it was 'difficult to say'. As to the work

216 See at: http://www.vrm.lt/fileadmin/Image_Archive/IRD/Statistika/index2.phtml?id=198&idStat=12&metai=2010&menuo=12&regionas=0&id3=1.

217 See at: http://www.spinter.lt/site/lt/vidinis/menutop/9/home/publish/MTEzOzk7OzA=.

218 It should be noted that the term 'suspect' is different from the term 'accused person', but that both may be covered by the general term 'defendant'. The term 'suspect' relates only to the pre-trial investigation phase of the criminal procedure.

219 See at: http://www.vrm.lt/fileadmin/Padaliniu_failai/Viesojo_saugumo_dep/naujas/KJ_vertinimas.pdf.

220 *Ibid.*

of prosecutors, 42 per cent evaluated public prosecutors as working 'poorly', 37 per cent as 'acceptably', and 21 per cent said that it was 'difficult to say'. The work of the police was similarly evaluated. Some 50 per cent of respondents evaluated the police as working 'poorly', 34 per cent as 'acceptably', and for 16 per cent it was 'difficult to say'.[221] In a study conducted in 2010, 39.2 per cent of people said that they trusted the police, and 23.2 per cent did not; 16.4 per cent trusted the public prosecutors and 45.3 per cent did not; and 14.6 per cent trusted the courts and 44.8 per cent did not.[222]

These results show that the general trust and confidence within the country regarding criminal justice system institutions is very low. Society's dissatisfaction with the courts is also underlined by the various NGOs that have been operating in Lithuania for several years.[223] There are various reasons given for this including corruption, the composition and selection of judges, and the lack of participation of general society in criminal justice matters.

5.2 The political commitment to criminal justice

The genesis of the internationalisation of the Lithuanian criminal procedure began with the ratification of the ECHR,[224] although the more striking changes, relating to the international standards of criminal procedure dealing with human rights and their restrictions, only occurred later. These are driven by the influence of the jurisprudence of the ECHR, and reflect a change from the initial sceptical attitude towards the possibility of direct application of the Convention in the spheres of criminal procedure and criminal law,[225] to its perceptible impact on law-making within practical application of the CPC.

The legal system experienced significant changes in 2003, when Lithuania joined the EU. Europe's values, as an integral factor of the EU, directly influence the evolution of EU law, because they become 'legalised'. The development of the national law of the EU member states is not only the 'concern' of the state alone.[226]

221 *Ibid.*

222 See at: http://www.vilmorus.lt/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=2&cntnt01returnid=20.

223 In many cases, as noted by the Human Rights Monitoring Institute, at www.hrmi.lt.

224 Azubalyte, 2010.

225 *Ibid.*

226 *Ibid.*

The repressive measures in the new Criminal Code of Lithuania and the CPC are combined with humanistic, rational and economic measures for defendants, although, in practice, it seems that repressive measures are still applied to a wide extent. A sentence of imprisonment is understood as the *ultima ratio* in criminal doctrine of Lithuania, as well as at a political level. The government of Lithuania made an undertaking in its 2008–2012 programs to orientate the criminal policy concerning the sentences applied by a court towards public works and other alternative sanctions, instead of imprisonment. Statistics regarding convicted persons in 2008 showed that Lithuania exceeded by a factor of two the average number of convicted persons in other EU states, and among all 27 of EU states was in 24th position.[227] These figures indicate that, in fact, imprisonment has not been regarded as the *ultima ratio*. There are, therefore, important areas of legal regulation where imprisonment as a form of sentence should be applied in a more limited manner.[228]

The CPC (adopted in 2002) and the Criminal Code (adopted in 2000) have been regularly amended since entering into force.[229] Most of the changes were in line with the increasingly stringent criminal policies, and expanded the application of imprisonment as a sentence, as well as areas of criminal responsibility. Criminal procedure law experts therefore argue that new laws should be implemented to revise the deficiencies of the existing regulations.[230]

6. Conclusions and recommendations

6.1 Major issues

While the legal framework of the Lithuanian system of criminal procedure does guarantee the most important rights of effective criminal defence, improvements in the practical implementation of these rights by the responsible institutions are still necessary.

227 For every 100,000 inhabitants, there were 1,797 convicted persons in Lithuania, compared to an average of 94.7 across all EU states; research on orientation of criminal policy to sentences and remedies, not related to the imprisonment sentences, 2010 at: http://www.teise.org/next.php?nr=500.

228 *Ibid.*

229 The Criminal Code and the CPC both entered into force on 1 May 2003.

230 Ancelis 2008.

There is a strong demand for an adversarial trial process in Lithuania. The lack of a proper application of this principle at the trial stage of criminal proceedings is demonstrated by the significant rate of criminal convictions, and the high percentage of dismissals of appeals against judgments, which clearly discourages sentenced persons from appealing. Acquittal rates are very low.

There commonly exists a general prejudice towards accused persons in both the courts and broader society. The low acquittal rate is regarded as one of the consequences of this prejudice. Despite its importance in theory, the principle of the presumption of innocence is not widely respected and is continuously violated in practice.

Following the reform of the legal aid process, a new state guaranteed legal aid system was created in Lithuania. While it is regarded as a major improvement that helps to more effectively implement defence rights for indigent clients, the legal aid system needs further revision, mostly in respect of the quality assurance of criminal legal aid services and the continuity of the criminal defence throughout all phases of the criminal procedure.

There are also other shortcomings that have to be addressed at the earliest possible time, including the notification of the designated lawyer to the defendant, particularly when the defendant is detained, access to the lawyer during different phases of the criminal procedure, restrictions on defendants when choosing a legal aid lawyer, and to be represented by the same lawyer during all criminal phases in criminal procedure, and the inadequate remuneration of the legal aid lawyers. The performance of criminal legal aid lawyers in criminal cases is not satisfactory in all cases and there is no quality assurance mechanism for criminal defence. There is no competition among legal aid lawyers, and the services provided in certain cases therefore do not meet an appropriate general standard.

There are no established clear rules on how the fundamental rights of the defendant are explained to that person and no verification requirement. Indeed, it is generally the case that no such explanation at all takes place at the moment of his/her provisional arrest.

The use of preventive measures rather than pre-trial detention appears to be quite high, which is regarded as a positive factor. However, the use of preventive measures as such in criminal cases is very high, and in a certain number of criminal cases is not legally grounded; they are rather applied as a matter of routine practice. Detention as a coercive measure is also applied too often. The courts fail to assess the individual circumstances of the defendant when deciding on pre-trial detention, instead relying

to a large extent on the seriousness of the offence of which the defendant is suspected, as well as the possible applicable punishment upon conviction.

6.2 Recommendations

1. Introduce measures to change the punitive attitude of society towards convicted persons, and to increase the use of preventative measures in respect of criminality and crimes.

2. Revise the practice of imposing penalties and coercive measures, and introduce the necessary legal changes to reduce the use of imprisonment and detention for, respectively, convicted persons and detainees.

3. Take appropriate measures to hold to account those who violate the principle of the presumption of innocence, with the aim of preventing future violations of the principle.

4. Introduce measures to ensure the earliest possible notification to the defendant of the appointment of a lawyer (particularly when the defendant is detained), access to a lawyer during different phases of the criminal procedure, reduction of the restrictions on defendants when choosing a legal aid lawyer, representation by the same lawyer during all phases in the criminal procedure, and the adequate remuneration of legal aid lawyers.

5. In order to raise the professional standards of criminal defence lawyers, develop an effective system for individual and general quality assurance of legal aid lawyers.

6. Introduce a standard 'letter of rights' into the CPC and ensure that the rights in the letter are explained to the suspect/accused in a comprehensible manner and at the very beginning of police custody

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Nadejda
Hriptievschi

CHAPTER 6 MOLDOVA[1]

1. Introduction

1.1 Basic demographic information

Moldova is a parliamentary republic with a post-socialist legal system. It is a unitary republic; however, due to a political conflict that broke in 1992, a tiny part in the east of the country – Transnistria – has separated and controversially proclaimed its independence. This report reflects the system only in Moldova, and does not include Transnistria, over which Moldova has no *de facto* authority.

The population of Moldova is just over 3.5 million. There are slightly more females than males.[2] Just over two million people live in rural areas and slightly fewer than 1.5 million live in urban areas. Approximately 630,060 people, or 17.84 per cent of the population, is aged 15 years or under. The major centres of population are the capital, the municipality of Chișinău, with 789,500 people (22.17 per cent) of the country's population, and the municipality of Bălți, with 148,900 people (4.18 per cent).[3]

According to the last census, carried out in 2004, 75.8 per cent of the population identified themselves as Moldovans, 8.4 per cent as Ukrainians, 5.9 per cent as Russians,

1 This country report has been reviewed by Vasile Rotaru, criminal defence lawyer, Lecturer, Law Faculty, State University of Moldova.

2 According to the National Bureau of Statistics, at the beginning of 2011 the stable population was of 3,560,430, out of which 1,848,324 were female and 1,712,106 were male at http://www.statistica.md. This figure does not include Transnistria, a breakaway region of Moldova. As noted, data from Transnistria is not included in this report.

3 Information sourced from the National Bureau of Statistics.

4.4 per cent as Gagauz, 2.2 per cent as Romanians, 1.9 per cent as Bulgarians, 1 per cent as other nationalities, with 0.4 per cent not declaring anything. In the two most populated centres the situation is as follows: in Chișinău – 67.6 per cent are Moldovans, 13.9 per cent Russians, 0.9 per cent Gagauz and 4.5 per cent Romanians; in Bălți – 52.4 per cent are Moldovans, 23.7 per cent are Ukrainians, 19.2 per cent are Russians, 0.2 per cent are Gagauz and 1.8 per cent are Romanians. The concentration of Ukrainian and Russian minorities is higher in Bălți, and the number of those who identified themselves as Romanians is higher in Chișinău. It is important to note that the 2004 census was criticised for bias and flaws in methodology; however, this is the only available relevant data for the country at the moment.

As to poverty rates, in 2010, approximately 734,900 people or 21.9 per cent of the population lived in absolute poverty (improved by 4.4 percentage points compared to 2009), and 46,300 people or 1.4 per cent of the population lived in extreme poverty.[4]

1.2 The nature of the criminal justice system

The Moldovan criminal justice system is a quasi-adversarial system, and defence powers are significantly limited at the pre-trial stage (the defence lawyer is entitled to full access to the case file only at the end of the criminal (pre-trial) investigation,[5] and

4 Information Note on Poverty in Moldova in 2010, Ministry of the Economy, Republic of Moldova, July 2011. Extreme poverty line (food poverty line) represents the monetary value of the nutrition norms (both calories and food products) recommended by nutritionists and approved by the government. Absolute poverty line includes both food and non-food products and services and is calculated as extreme poverty line divided by share of expenditures for foodstuffs in total expenditures of the households' spending.

5 There is no obligation on the criminal investigation body to present evidence to the defence during the pre-trial investigation, apart from evidence collected through means in which the defendant actively participated (there are no discovery rules as such). The lawyer and the defendant see the protocols of procedural actions carried out at the request of the defence. They should see the evidence brought by the prosecutor to justify the pre-trial arrest; however, in practice this right is not routinely observed. The lawyer and the defendant get full access to the evidence collected by the criminal investigation body only at the end of the pre-trial investigation, when the case file is ready to be sent to court – it is only at that moment that it is presented to the defendant and his/her lawyer.

has limited investigative[6] and administration of evidence powers). The pre-trial stage is mostly written and led by the criminal investigation body. The adversarial nature of the court procedure is expressly provided for by national legislation.[7] The system has gone through extensive reform since Moldova gained its sovereignty in 1990 and independence in 1991, constantly seeking, at least as has been declared by policymakers, to comply with the European standards, mainly derived from the European Court of Human Rights (ECtHR) jurisprudence and various recommendations by the United Nations, the Council of Europe and, more recently, European Union experts. Many elements of the post-Soviet system are still present in practice, as well as in various legal provisions.

Criminal procedure is regulated in detail by the Criminal Procedure Code (CPC) and other related laws, given the values it protects and the potential areas that are violated if they are not adhered to. Traditionally, the relevant actors in the criminal justice system attach great importance to the provisions of the CPC.[8] In practice and in law, there are many provisions that are not in the CPC, but are applied in criminal process. The saying 'theory is one thing and practice is completely different' is still accepted by those involved in the system of criminal justice (criminal investigation bodies, defence lawyers and even judges). The drive to find accused persons guilty, irrespective of procedural violations during the investigation, still stands out as one of the leading features for both investigators and judges.

To understand the current issues and trends in the criminal justice system, a review of the main periods of reform of the justice system and, implicitly, the criminal justice system, is relevant. These periods can be divided as follows:

6 The defence lawyer can request and present objects, documents and information necessary for providing legal assistance, including talking to people if they agree, can request various documents from organisations that hold the relevant information, can request a specialist's opinion and present written and oral information, as well as objects and documents that can be used as evidence (Art. 100, CPC). However, these rights are rather limited due to the difficulties that lawyers encounter while collecting the evidence (institutions often refuse to present the requested information). Moreover, many lawyers are discouraged from presenting any evidence, since they depend on the prosecutor to accept the respective evidence. Lawyers can appeal the prosecutor's decision to the investigative judge. For more analysis on this issue, see Section 3.4.1.

7 Art. 24 of the Criminal Procedure Code (CPC); Art. 10 (3) of the Law on Judicial Organisation.

8 This view has been emphasised in the decision of the Constitutional Court of 22 January 2008, which stated that: '(1) The criminal procedure is regulated by the provisions of the Constitution of the Republic of Moldova, international treaties to which it is a party and the present Code ... (4) The procedural legal norms from other national laws can be applied only if included in the present Code'.

1) 1990–1994 – the period was marked by the adoption of the Declaration of Sovereignty, the Declaration of Independence, and the Concept for Judicial and Legal Reform on 21 June 1994, and culminating with the adoption of a new Constitution on 29 July 1994. During this period, the main changes in the criminal justice system were the adoption of a new Law on Police (1990), which introduced the name 'police' instead of militia; the adoption of a new Law on the Prosecution Office (1992), and changes in the appointment system of judges. This period cannot be categorised by major qualitative changes in the way in which the criminal justice system functioned, but the focus changed from protecting state interests towards protecting the rights of the individual.
2) 1994–2001 – marks the first real wave of reforms of the justice institutions, largely based on the Concept for Judicial and Legal Reform. During this period, the European Convention on Human Rights (ECHR) was ratified, as were the main United Nations and Council of Europe human rights treaties, which largely determined the changes in the national legal system. A package of new laws regulating the judiciary also was adopted.[9] The judicial system was changed from two to four levels of jurisdiction. The Constitutional Court was created; it is not formally part of the judiciary and is the only entity that exercises constitutional jurisdiction in Moldova. A Supreme Council of Magistrates (SCM) was created, an independent body exercising the judiciary's self-administration. Judges were given the power to issue arrest warrants[10] and the principle of adversarial proceedings in criminal procedure was introduced, replacing the inquisitorial Soviet system.

   In addition, a new Law on the Bar was adopted, which created a new Bar and proclaimed its independence. A new Law on the Prosecution Office was also adopted, but it made only cosmetic changes to the prosecution system.
3) 2001–2009 – this period is marked by many controversial initiatives and changes in the criminal justice system. It was also the period when the

9 For example, the Law on Judicial Organisation, Selection and Attestation of Judges, the Law on the Status of the Judge, the Law on Disciplinary Liability of Judges, and the Law on the Supreme Court of Justice.

10 Law No. 1579 of 27 February 1998, amending the CPC of 24 March 1961.

Communist Party ruled the country. In 2001, the period of arrest without charge was extended from 24 to 72 hours, and the exclusive right of judges to issue arrest warrants was expressly provided for in the Constitution.[11] In 2002, the Constitution was amended to allow changes to the organisation of the judicial system, which was amended from four to three levels of jurisdiction. While the main motivation of this change was to increase the access to justice of the people, it resulted in an overburdened judicial system, particularly since too many cases came before the Supreme Court of Justice, which transformed it in practice into a trial court, significantly curtailing its ability to examine and ensure unified judicial practice.

The major new codes, including the Criminal Procedure Code (CPC) and a new Administrative Offences Code, were adopted and entered into force, concluding the judicial reform efforts initiated in 1994. The CPC included many new institutions that are meant to increase the protection of rights in criminal procedure, such as the investigative judge and criminal investigation officer, and increased the powers of supervision of the criminal investigation by the prosecutor. The Criminal Code included new alternatives to detention. At the same time, the criminal procedure became more complicated.

This period has also been categorised by reference to a process of 'mass cleansing' of the judiciary after 2002, as reported by the Moldovan Association of Judges, during which seven judges lost their posts and the president of Moldova refused to renew the mandates of 57 other judges.[12] This has left a deep mark on the judiciary in terms of its independence from the legislative and executive branches. Under some internal, but mainly

11 Law No. 351 of 12 July 2001, amending the Constitution of 29 July 2004.

12 International Commission of Jurists, Moldova: The Rule of Law in 2004, Report of the Centre for the Independence of Judges and Lawyers, Annex I, at 6 (2004); *Declarația Parlamentului privire la starea justiției în Republica Moldova şi măsurile necesare îmbunătățirii situației în domeniul justiției* (this Parliament Declaration regarding the state of affairs in the Judiciary and the measures necessary for improving the situation in the judiciary), adopted by Parliament decision No. 53 of 30 October 2009, also refers to the 'elimination from the judiciary, in 2002–2003, of a considerable number of honest and qualified judges, based on political criteria, and promotion of candidates obedient to the government'). One of the deputies and an ex-president of a district court in Chişinău, Ion Pleşca, mentioned that 84 judges had been dismissed for no reason; transcript of the Parliamentary hearing of 30 October 2009, available at http://www.parlament.md/news/plenaryrecords/30.10.2009/.

external pressure, particularly from the Council of Europe and the European Union, in 2005 the governing party initiated a series of positive changes regarding the organisation of judiciary. However, most of these changes were rather formal and did not reach the hearts and minds of many judges. The biggest problems remained the underfunding of the system, so-called 'telephone[13] justice',[14] and increased perceptions of corruption among judges.[15] This period is also characterised by deep political infiltration of the criminal justice system and the use of the system as a way to control political opponents, or the main industries, in the country.

4) 2009–present – during this period a coalition government was created (Alliance for European Integration) and, for the first time in eight years, parties other than the Communist Party are ruling. In September 2009, the new government was installed and its successor government[16] included an ambitious program of justice reform in its four-year plans, the main goals of which are to eliminate corruption in the justice system, ensure judicial independence and effectiveness, remove the political dependence of the prosecution office, reform police in line with international recom-

13 Telephone justice refers to cases when the judge is influenced in his/her decision by other persons or branches of power that ask the judge to decide the case based on this request, rather than the case materials.

14 See recent evidence about 'the return of telephone justice in Moldova' in OSCE Trial Monitoring Programme for Moldova, OSCE Mission to Moldova, six-month analytic report: 'Preliminary Findings on the Experience of Going to Court in Moldova', at 31 (2006), available at http://www.osce.org/documents/mm/2006/11/24340_en.pdf; Redpath and Hriptievschi, *Criminal Justice Performance from a Human Rights Perspective: Assessing the Transformation of the Criminal Justice System in Moldova*, Soros Foundation–Moldova, at 54 (2009), available at http://www.soros.org/initiatives/brussels/articles_publications/publications/report-criminal-justice-20091130/report-criminal-justice-20091130.pdf.

15 See, for example, Transparency International – Moldova, *Masuram coruptia: de la sondaj la sondaj* (Measuring corruption: from survey to survey) (in Romanian), Chișinău: 2008, available at http://www.transparency.md/content/blogcategory/16/48/4/8/lang,ro/. Another recent study found that 42 per cent of people who went to court in 2009 may have bribed a judge. See Redpath, *Victimization and Public Confidence Survey. Benchmarks for the development of criminal justice policy in Moldova*, Soros Foundation – Moldova, Chișinău: Cartier, 2010, available at http://www.soros.md/publication/2011-01-04.

16 The plan of the government that was installed in September 2009 and of the more or less the same government installed in January 2011, after early parliamentary elections in November 2010 (Alliance for European Integration 2) are very similar regarding the issue of justice reform.

mendations, and to ensure access to justice for all. The current political discourse is dominated by allegations of corruption and the political dependence of judges[17] and other actors of the justice sector,[18] hence the need for reform of the justice sector.

On 25 November 2011, the Parliament approved a Strategy for Justice Sector Reform for the period 2011–2016. The strategy's main goal is to create and build an accessible, efficient, independent, transparent, professional justice sector, with high public accountability consistent with European standards, so as to ensure the rule of law and the protection of human rights. A separate pillar of the reform strategy is devoted to the criminal justice system, aimed at streamlining the pre-trial investigation phase and increasing the capacity of the criminal justice system to effectively

17 Parliament's Declaration on the state of Justice in Moldova and the necessary actions for improving the state of affairs in the justice field, Parliament's Decision of 30 October 2009. The new government mostly attributes the current state of affairs within the judiciary to the previous eight-year long communist regime policies.

18 The *prosecutors* are viewed by politicians as too dependent on the hierarchically superior prosecutor and, ultimately, the Prosecutor General is regarded as a political figure. The 2011–2014 government program and the justice sector reform strategy consider attributing the status of magistrates to prosecutors and amending the procedure of appointment of the General Prosecutor, in order to exclude the possibility for appointments and dismissals to be based on political criteria. The *police* have always been the instrument of the governing party in Moldova. The police have been severely criticised by the then opposition after the parliamentary elections of 5 April 2009. On April 7 of that year, peaceful anti-governmental demonstrations turned violent when a group of demonstrators stormed the government and Parliament buildings. The police initially resisted, but were later ordered by the president to leave both buildings, which were attacked by the protesters. However, on the evening of April 7, the state response was overwhelming – it started a brutal and arbitrary campaign by the police and security forces, which arrested hundreds of people, irrespective of their connection to the looting or demonstrations. The campaign lasted a few days, with arrested people, mostly youngsters, being tortured and subjected to other ill-treatment (for a thorough documentation of these events, see Bencomo, *Entrenching Impunity: Moldova's Response to Police Violence During the April 2009 Post-Election Demonstrations*, Soros Foundation – Moldova, Swedish International Cooperation Agency, Chișinău: Cartier, 2009, available at http://www.soros.md/docs/HR%20Report_Final_cover.pdf. Although these events gave rise to severe criticism of the Ministry of Interior, and reforms were promised by the new government, there has been little by way of follow up. To date, no light has been shed on the April 2009 events. A strategy for reforming the Ministry of Interior was adopted at the end of 2010. No visible changes have yet occurred. Lawyers usually are not viewed as an equal part of the criminal justice sector (the relevant reforms related to the Bar and lawyers are addressed in section 4 of this report).

19 Redpath and Hriptievschi 2009, p. 66.

investigate crime, while adequately protecting human rights. It remains to be seen how the respective objectives will be implemented.

At the end of 2011, the Ministry of Justice put before Parliament a draft law amending the CPC in several respects. The most relevant amendments with respect to effective defence rights are the following: excluding the ability of the defendant to give false testimony; the introduction of a simplified procedure, including a hearing based on the evidence collected at the pre-trial investigation stage when the defendant pleads guilty (in such circumstances, the sentence is reduced by 25 per cent); limiting the grounds for submitting a cassation in annulment (an extraordinary appeal); the introduction of two new extraordinary means of appeal, namely rehearing the case after the ECtHR has issued an adverse judgement against Moldova, and cassation in the interest of the law; and reframing the status of bail (release on bail) from an alternative to pre-trial arrest to a pre-trial measure.

The most recent and relevant study on the population's perception of criminal justice professionals and institutions is the Criminal Justice Performance Study, carried out by the SFM in 2008. The study reveals the following ratings with respect to (poor) performance: legislators received the lowest ranking of 35 per cent, followed by public order police (30 per cent), criminal police (29 per cent), prisons (28 per cent), prosecutors (27 per cent), judges (25 per cent) and lawyers (19 per cent).

As regards the criminal justice system as a whole, of those willing to answer, 35 per cent gave a negative rating, 35 per cent a neutral rating, and only 30 per cent gave a positive response.[19] The survey also found that any level of interaction with the police tends to have a negative impact on the perception of the police. This finding has been confirmed by 2010 victimisation survey results.[20] On the contrary, actual experience with the court has led to a more positive perception of judges, which suggests that people generally have low expectations of the court system.[21]

The 2010 victimisation survey had some disturbing findings regarding bribery in Moldova. As noted above, it concluded that 42 per cent of people who went to court in 2009 may have bribed a judge. This finding is supported also by the fact that 41 per cent of people suggested that 'it is very likely' that a person could

20 *Ibid*, p. 14.
21 *Ibid*, p. 50.

solve a problem by offering a bribe to a judge.[22] Although the survey indicated that, overall, 'only' 20 per cent of the population were responsible for the bribes paid in the country,[23] these figures are nonetheless alarming.

1.3 The structure and processes of the criminal justice system

Clarification of Relevant Terminology:

Arrest/apprehension and pre-trial arrest

Moldovan legislation provides for two procedures where a person is deprived of his/her liberty before trial:

1) Arrest/apprehension – in criminal cases, a person can be kept in custody for up to 72 hours before being brought before an investigative judge (pending an arrest warrant).[24] This is similar to other former-Soviet systems,[25] and the corresponding English term would be police custody. The test for apprehension is 'reasonable suspicion'.

   In administrative offences, the general term of arrest/apprehension is three hours, except that those charged with an offence punishable with administrative arrest can be held for up to 24 hours before being brought before the judge. Only foreigners or stateless persons who break the rules for remaining in the country can be arrested by an administrative procedure for up to 72 hours.[26]
2) Pre-trial arrest applies only to criminal cases. The arrest warrant is issued by the investigative judge, at the request of the prosecutor, for a period of up to 30 days, which can be extended to six months if the person is charged with an offence for which the maximum sentence is 15 years imprisonment, and up to 12 months if the person is charged with an offence for which the maximum sentence is 25 years or life imprisonment.[27]

22 Redpath 2010, p. 31.
23 *Ibid*, p. 35.
24 Art. 166 (2) of the CPC.
25 *Retinere* in Romanian; *Zaderjanie* in Russian.
26 Art. 435 of the Administrative Offences Code.
27 Art. 187 of the CPC.

Suspect / accused / defendant

Moldovan legislation differentiates between three types of defendant. A *suspect* refers to the pre-trial stage only, and relates to the person against whom there is some evidence of having committed a crime but who is not yet charged.[28] It applies for a period up to a maximum of:

1) 72 hours if the person is arrested following the approval of the prosecutor;
2) 10 days if the person was arrested (preventive or home arrest) pursuant to a warrant issued by the investigative judge; and
3) three months (six months with the approval of the General Prosecutor) for a person who is at liberty and is recognised as a suspect by an ordinance of the criminal investigation body.

The *accused* also refers only to the pre-trial stage, and means a person who is charged (under an ordinance of the prosecutor), up until the moment that the criminal investigation is discontinued or completed and the case file is sent to court (with the indictment) for examination. The prosecutor draws up the charge when the collected evidence is sufficient and he/she has concluded that the respective person has committed the crime.[29]

The *defendant* refers to the court stage and means the person who has already been indicted and brought to court.

All three statuses/notions of defendant have more or less the same rights.[30] In this chapter, the term 'defendant' refers to all three types. When relevant, a note will be made to specify if the provision refers only to a suspect, accused or defendant respectively.

The criminal process in Moldova has three mandatory procedural stages: the criminal investigation (pre-trial) phase, the first instance trial, and the enforcement of the criminal sentence. Optional additional procedures include the ordinary appellate stage (appeal and cassation) and extraordinary appellate stage (cassation in annulment and extraordinary review of the case).

28 Art. 63 (1) of the CPC.

29 Art. 282 of the CPC.

30 The differences mainly refer to the different rights specific for more advanced procedural stages, for example, accused have the right to ask for prosecution witnesses to be heard, the defendant has rights related to court stages.

The *criminal investigation* is the phase during which specialised criminal investigation bodies[31] collect evidence regarding the crime and the person(s) alleged to have committed a crime, in order to decide whether to send the case to court. The following specialised bodies are involved in carrying out the criminal investigation: criminal investigation bodies of the Ministry of Interior;[32] the Customs Department; the Centre for Combating Organised and Economic Crimes (CCCEC); and the Prosecutor's Office. Criminal investigation officers of the respective bodies (except the Prosecutor's Office) conduct the investigation under the supervision of prosecutors. The prosecutors may also conduct the investigation in certain cases assigned to them by law,[33] and can also decide to take over criminal investigation of any case in order to ensure an objective and complete criminal investigation.[34] The latter power is a controversial one, as it may make the assignment of cases quite subjective if misused by the prosecution. Prosecutors play a dominant role in the criminal process, particularly so at the pre-trial arrest hearing.

Investigative judges are responsible for ensuring that the rights of suspects/defendants are respected during the criminal investigation. For example, they have the competence to approve certain preventive measures, such as arrest warrant or bail, and to approve certain investigative actions, for example, telephone tapping. The primary criticisms relating to investigative judges are that they issue poorly reasoned decisions regarding pre-trial arrest, that their examination of requests is superficial due to a high workload, and that they are biased in favour of the prosecution. Many prosecutors see an overlap between the prosecutor's functions and those of the investigative judge.[35]

31 In this report, the term 'criminal investigation body' is used to refer both to the criminal investigation officer and the prosecutors, unless it is specified that only one of these is concerned.

32 Most investigations are carried out by the criminal investigators of the Ministry of Interior, within which the General Department of Criminal Investigation is responsible for the overall organisation of the criminal investigation.

33 See Art. 270 of the CPC, which applies to crimes committed by the president of the country, by minors, and by police officers.

34 Art. 270 (9) of the CPC.

35 This institution was introduced in 2003. To date, it does not seem to be fully and well integrated into the Moldovan system, mostly due to the mistakes at the very beginning of the reforms, when insufficient time was provided for recruitment, and a condition of previous prosecutorial or criminal investigation experience was introduced. This led to the recruitment of former prosecutors and criminal investigators as investigative judges. Although this condition was later dropped, this does not yet influence the picture; most investigative judges are still former prosecutors or criminal investigation officers; see also Redpath and Hriptievschi 2009, p, 45 and 54.

Criminal investigation officers open criminal cases (either when the criminal investigation body is informed about a crime, or on its own initiative when the investigative body has itself discovered that a crime might have been committed). After the investigation officer initiates a criminal case, the prosecutor must confirm or reject within 24 hours the opening of the criminal case, and simultaneously also determining the duration of that investigation. There is no official timeline for the criminal investigation. However, there are strict time limits as to how long a person can be a suspect or under arrest, so that the criminal investigation is somewhat shaped according to these terms.

The basic stages of criminal proceedings at the investigative stage include the following:

1) Opening of the criminal case. If the suspect is arrested, the criminal case must be opened within three hours. This is not expressly provided for in the CPC, but follows from the procedure of arrest. A criminal case can also be opened when the defendant is not yet identified (for example, in circumstances where the case is opened on the facts then existing);
2) Charging of the defendant. When the person is charged, he/she is informed of what he/she is accused. When the criminal investigation officer considers that there is sufficient and concluding evidence that the crime was committed by a certain person, the officer makes a proposal for the charging of the person, which must be confirmed by the prosecutor, who subsequently (within 48 hours from the moment it issued the charge) must inform the defendant about the charge;
3) The completion of the criminal proceedings – either the case is dropped/terminated, or the indictment is drafted and is presented, together with the case materials, to the defendant, before submitting the case to the court. After the indictment, the defence is granted access the all the materials of the case file.

A criminal investigation in Moldova generally has the following characteristics: it is predominantly inquisitorial,[36] with adversarial elements;[37] there is an unclear

[36] For example, the defence gets full access to case materials only at the end of the criminal investigation.

[37] For example, the lawyer can be present during all investigative acts where his/her client participates; the lawyer and the defendant do participate at the pre-trial arrest hearing and can bring evidence at that time; the lawyer and the defendant are given the opportunity to question a witness heard during the pre-trial investigation when the prosecutor requests the investigative judge to hear the

division of procedural functions between the criminal investigation officer, the head of the criminal investigation body, the prosecutor and superior/higher prosecutor, and limited procedural independence and hierarchical subordination of the criminal investigation officer and the prosecutor;[38] confidentiality and predominantly written forms of procedure.

Although not a formal stage in criminal procedure, many cases start with a so-called informal or pre-investigative inquiry,[39] before the criminal investigation is initiated. According to the investigators interviewed for this report, all cases that are initiated based on a complaint (usually submitted by the victim) are first informally verified before the case itself is opened. During this inquiry, the criminal investigation body (usually the criminal police) collects evidence and also questions various possible witnesses, including the potential defendant. However, since this informal procedure does not have any formal procedural status, interviewed persons are not availed of any right to a lawyer, to keep silent or other rights. However, they can refuse to provide testimony.

witness in special circumstances, such as when the witness will not be able to participate at the trial or needs witness protection services.

38 According to the CPC, criminal investigation officers have the task to carry out operative investigative measures, including the use of audio and video, filming, photography and to carry out other actions of criminal investigation, provided by the CPC, in order to discover the crimes and the persons who committed those crimes, establish facts, and document the procedural actions, which can be used as evidence in the criminal case (Art. 55 CPC). The 2003 CPC has considerably reduced the powers of the criminal investigation officers, assigning to the prosecutor the main decisions in a criminal case, such as confirmation of initiation of a criminal investigation or refusal to initiate one, charging the accused, changing and supplementing the charge, withdrawing the charge against a person, initiation of the criminal investigation, closing the criminal investigation and drafting the indictment. Although this change was well intended, namely to raise the quality of the criminal process by having the prosecutor closely involved in the case from the very beginning, in practice it seems that it has instead made criminal investigation officers less motivated to do a good job. In addition, the criminal investigation officer is subordinated horizontally to the prosecutor who leads the criminal investigation and vertically to the chief of the criminal investigation body and the hierarchically superior criminal investigation body. In this structure, the prosecutor requires quality from the criminal investigation officer, while the chief of the criminal investigation body usually requires quantitative indicators, on which the statistics about crime discovery depend (see more details in Redpath and Hriptievschi 2009, p. 32).

39 The informal or pre-investigative inquiry is an institution inherited from the Soviet system, carried out by a series of law-enforcement, administrative and security authorities, as 'primary investigation bodies'. This part of the procedure is largely unregulated; however, fresh evidence is usually collected at this procedural stage and the case further depends to a great degree on this stage. Most of the violations of procedural law occur at this stage and the prosecutor and the criminal investigator do not have sufficient power over the primary investigation bodies.

The main criticisms of the criminal investigation stage relate to a number of issues including the continuation of the informal or pre-investigative inquiry; the double subordination of the criminal investigation officer to the head of the criminal investigation body (usually the police commissar, who is principally concerned with quantitative indicators), and the prosecutor (who is responsible and interested in a qualitative investigation, but does not have full control over the investigation); the lack of a real procedural independence of the prosecutors and over-dependence on their superiors; cumbersome rules and hence limited possibilities for utilising simplified procedures or alternatives to full criminal prosecutions.[40]

From the defendant's perspective, the main problems with the criminal investigation stage concern delays in appointing a lawyer, unjustified arrests, late access to the case file, unjustified pre-trial arrest warrants, and very limited powers of the defence to collect evidence. The strategy for justice sector reform for the period 2011–2016 includes several directions aimed at increasing the efficiency of the criminal investigation stage and respect for human rights during this procedural stage.

A *first instance trial* has the following phases: preliminary hearing, judicial examination, closing arguments, deliberation and pronouncement of the sentence. Judges of the Courts of Appeal and the Supreme Court of Justice are specialised by fields – for example, criminal, civil, administrative offence – while judges from the district courts hear all types of cases.[41] The main problems from the defence perspective regarding the first instance trial stage concern the influence on judges of the case file materials, which are prepared by the prosecutor with little input from the defence, and the widespread practice of poorly reasoned judgments.

The *ordinary appeals* (appeal and cassation) allow a re-examination of the case (facts and law in appeals, but only issues of law in cassations). Any trial participant can appeal the trial court decision, as well as any person whose legal interests have been affected by any of the court measures or actions. The general norms regarding trial hearings apply to appeals and cassations, with some specifics requirements. The Courts of Appeal can re-examine the case, including new evidence brought by the parties, and is not bound by the interpretation of the evidence by the first instance

40 For more details, see the expert team: Vitkauskas, Pavlovschi and Svanidze, *Assessment of Rule of Law and Administration of Justice for Sector-Wide Programming in Moldova, Final Report 2011*, (in English and Romanian), available at http://eeas.europa.eu/delegations/moldova/documents/press_corner/md_justice_final_report_en.pdf.

41 The need for specialisation has been voiced several times and is included in the strategy for justice sector reform for the period 2011–2016.

court. Thus, the appeal court can uphold the first instance court judgment, or quash it in full or in part and adopt a new judgment. It cannot send the case for retrial.

The main problems from the defence perspective refer to the usual practice of the Courts of Appeal, especially the Chișinău Court of Appeal, to quash the first instance judgment, give a new appreciation of the evidence and adopt a new sentence without hearing the witnesses in court, relying only on their statements as recorded in the case file. This practice was found by the ECtHR to be contrary to the right to a fair trial.[42] The Courts of Appeal and the Supreme Court of Justice continue to appoint legal aid lawyers at very short notice, which has a negative impact on the quality of representation. This practice also has been recently criticised by the ECtHR.[43]

The *enforcement of the final judgment* is a mandatory stage of the criminal process, which starts when the court judgment becomes final, and includes the court's activities related to the enforcement/application of the judgment, as well as solving some issues that appear during and after the execution of the criminal sentence.[44] For example, during this stage, the court reviews issues regarding the postponement of the execution of the sentence, annulling the sentence due to health reasons, execution of the sentence when there are other sentences not yet executed, rehabilitation before the completed term of the sentence and various other issues.[45]

Regarding the court system, Moldovan courts are organised into three levels: first level – district courts, second level – courts of appeal, and third level – Supreme Court of Justice. The district courts are the courts of first instance with general jurisdiction. District courts hear all criminal cases provided by the special part of the Criminal Code, except those cases assigned by law to other courts;[46] hear requests and complaints against the decision and actions of criminal investigative bodies; and examine issues related to the enforcement of the criminal sentence and other matters assigned by law.[47] Investigative judges, in charge of supervising that the rights of suspects/defendants are respected during the criminal investigation stage, are placed in the district courts.

42 See ECtHR 5 July 2011, *Dan v. Moldova*, No. 8999/07, paras. 32–34.

43 See ECtHR 17 January 2012, *Levinta v. Moldova* (*No. 2*), No. 50717/09, para. 49.

44 Dolea et al. 2005a, p. 36

45 See Art. 469 of the CPC for details.

46 See below the cases assigned to Courts of Appeals and the Supreme Court of Justice. For example, crimes of genocide or inhuman treatment are assigned to the Courts of Appeals by Art. 38 of the CPC.

47 Art. 36 of the CPC.

The Courts of Appeal can examine as a first instance court a small number of cases assigned to them by the CPC.[48] In addition, as appeals courts, they hear appeals from the district courts; they also can hear cassations against the district courts' judgments that cannot be subject to appeal. In either its first instance or appeal functions, the Courts of Appeal can examine both the merits and the legal aspects of a case.

The Supreme Court of Justice (SCJ) examines as a first instance court criminal cases where the defendant is the president of the country; examines as a cassation court the cassations against first instance judgments (after the appeals stage) against courts of appeal decisions, as well as other cases provided by law; and examines the cases appealed through the extraordinary appeals, including cassation in annulment.[49] The SCJ should examine only the legal aspects of a case, apart from cases against the president of the country, where it can examine the merits. However, the practice shows that the SCJ has transformed itself largely into a first instance court.[50]

In addition to examining individual cases, the SCJ has the right to call on the Constitutional Court to pronounce on the constitutionality of a legal act, or in respect of cases where there has been a claim of unconstitutional action. The SCJ also has the competence to issue explanatory decisions on matters of jurisprudence, in order to promote uniform implementation of criminal law and criminal procedure legislation. These decisions play an important role in shaping the jurisprudence of the country.[51] Lastly, the SCJ has the competence to examine requests regarding the transfer of cases examined in one court to another,[52] as well as conflicts of competence among the Courts of Appeal or courts for which the SCJ is a common superior court.[53]

48 Art. 38 (1) of the CPC assigns several crimes provided by the special part of Criminal Code to the Courts of Appeals: all crimes against peace, the security of humanity, and war crimes; terrorist acts; financing terrorism; banditry; creation of, or leading a criminal organisation; treason; espionage; usurpation of State power; armed rebellion; incitement to overthrow or change the constitutional order of the Republic of Moldova; and attempts on the life of the president, speaker of parliament or prime minister.

49 Art. 39 of the CPC.

50 This is one of the arguments used to justify the Ministry of Justice's proposal to amend the law on SCJ, including to reduce the number of judges, currently amounting to 49 judges and seven judges assistants (http://www.csj.md/content.php?menu=1345&lang=5.

51 However, as stated above, more recently, the SCJ has not been playing a very significant role in shaping the jurisprudence, due to its high workload and consequent little time to undertake an in-depth analysis of the jurisprudence of the lower courts.

52 Art. 39 of the CPC.

53 Art. 45 of the CPC.

The draft law that would further amend the CPC[54] would impact on the competence of the district courts, Courts of Appeals and the SCJ. The Strategy of Justice Sector Reform also provides measures for changing the composition of the SCJ and strengthening its role in unifying the legal practice of the country.

District courts are situated in the centre of each of the administrative units in the country and in each sector of Chişinău.[55] There are five Courts of Appeals,[56] and one SCJ, which is located in the capital city, Chişinău.

The criminal investigation (pre-trial stage) plays an important role in Moldovan criminal procedure, since this is when evidence is collected and the case file is prepared, to be subsequently submitted to the court. The case file that reaches the court is the first thing that a judge will see and, consequently, it will have a significant influence on that judge's understanding and perception of the case. The parties can produce new evidence in court, which they must list during the first preliminary hearing, and can subsequently ask for its admission during the court examination of the case if the judge has refused to admit it during the preliminary hearing.[57] Evidence can also be introduced later in the trial.

The prosecution can amend the charge during the case examination at first instance and at the appeal stages. It can also do so at any time if it is amended to a more lenient charge and does not affect the right to defence. The prosecution can amend the charge to a graver one where the evidence examined in court indicates that the defendant has committed a more serious crime than that for which he/she was initially charged. In this case, the charge is amended through an ordinance, which must be presented to the defence, and sufficient time must be allowed for the defence to become acquainted with it and prepare the defence for the new charge.

If, during the examination of the case, it became clear that the defendant committed another crime, that new circumstances have appeared that might influence the legal qualification of the acts committed by the defendant, or it becomes clear that the defendant committed the crime together with another person against whom the criminal investigation was unjustifiably terminated, the court suspends the

54 Submitted to the Parliament at the end of 2011.

55 According to Annexes 1 and 2 of the Law on Judicial Organisation, Moldova has 46 courts of first instance, including five District Courts in Chişinău.

56 The Courts of Appeals of Bălți, Bender (Căușeni), Cahul, Chişinău and Comrat – since this report refers only to criminal cases, the Economic Court of Appeals is excluded.

57 See Arts. 327, 345 (list of evidence), 346 and 347 (examination of the list of evidence) of the CPC.

examination of the case for a month and sends the case back to the prosecutor to restart the criminal investigation and present a new charge to the defendant. The court can send the case back for investigation only at the request of the prosecutor; this rule follows from the adversarial principles applied to court stage. The prosecutor can ask for an extension of up to two months.[58]

The CPC establishes the *principles of immediacy, oral evidence and adversarial procedures* for the criminal procedure of a case examination.[59] The principle of immediacy means that: (1) the court can base its conclusions only on facts that were examined, established and perceived directly by the court; (2) the judgment can be based only on evidence examined before the court; and (3) evidence obtained during a criminal investigation cannot be used as a basis for the judgment if it was not also examined by the court with the parties' participation. Consequently, a judgment finding guilt cannot be based on doubts or, exclusively or in part, on statements of witnesses given during the criminal investigation and read in court in their absence, if the defendant did not have the opportunity to orally question that witness.[60]

The CPC further regulates in detail when the defendant or witness pre-trial statements can be used in court. The *defendant's pre-trial statements* can be read in court, and/or video or audio reproductions of these statements presented, at the parties' request, in cases where: (1) there are essential contradictions between the court and pre-trial statements; and (2) the case is examined in the absence of the defendant. The same rule applies for statements provided prior to the court stage or to the investigative judge, if the defendant was informed of the possibility of reading them in court.[61] Thus, a defendant's pre-trial statements can be read in court only after he/she has given evidence in court, and it has become clear that there are essential differences between the statements, and a party therefore requires that the court read the pre-trial statements. Moldovan practice also suggests that when the defendant decides to remain silent at trial, the prosecutor can ask the court to allow a reading of the pre-trial statements, but this does not deprive the defendant of the opportunity to give statements at later stages if he/she so decides.[62]

58 Art. 327 of the CPC.

59 Art. 314 of the CPC.

60 Dolea et al. 2005b, Art. 314, p. 479. The defence is given the opportunity to question the witness at the time the witness statement is taken during the criminal investigation stage, in circumstances when the presence of the witness is impossible at the trial (Art. 109 of the CPC).

61 Art. 368 of the CPC.

62 Dolea et al. 2005b, Art. 368, p. 527.

Pre-trial statements by witnesses can be read in court in cases where: (1) there are essential contradictions between the pre-trial and court statements; and (2) when the witness is absent from the court hearing and his/her absence is justified either by an absolute impossibility to be present in court, or when it is impossible to ensure the witness' security, provided that the witness was heard by the defendant, or in accordance with the rules provided in Articles 109 and 110 of the CPC.[63] The Plenary SCJ has stated that witnesses' pre-trial statements can be read in court in the absence of the witness if there was a meeting where the defendant had an opportunity to ask questions, if during the case hearing the parties did not have questions for the witness, or if the witness cannot appear in court due to security reasons.[64]

The extent to which these norms are followed in practice requires further research. The most recent and comprehensive relevant report is the OSCE Trial Monitoring Programme carried out in 2006–2008, which stated that:

> ... on several occasions monitors noted that judges approved prosecutors' requests to read the statements of witnesses given at criminal investigation stage, in the absence of these witnesses, in spite of defence lawyers' objections that there was no evidence that it was impossible to summon the witness to court.[65]

1.4 Expedited hearings and guilty pleas

There are two court proceedings that are relevant from the perspective of 'expediency', namely the examination of the case in an *in flagrante delicto* procedure, and the plea bargain.

In cases of *in flagrante delicto* ('caught in the act') – where crimes are discovered at the moment they were committed – the criminal investigation is practically omitted (the criminal investigator draws up a protocol concerning the crime, which is sent to the prosecutor within 24 hours; the prosecutor can either charge the defendant based

63 Art. 371 of the CPC. Art. 109 of the CPC specifies the general method of hearing/questioning a witness and Art. 110 describes how a witness should be heard when his/her security is in danger.

64 Plenary Supreme Court of Justice explanatory decision regarding the respect of criminal procedure norms when adopting the judgments, No. 10, of 24 October 2000.

65 *OSCE Trial Monitoring Programme for the Republic of Moldova. Final Report* (which analysed the findings of the trial monitoring programme for the period April 2006 to November 2008), released by the OSCE Mission to Moldova, OSCE/ODIHR 2009, electronic version available at http://www.osce.org/documents/mm/2010/07/45526_en.pdf, p. 58.

on the information in the protocol and send the case file to the court, without drawing an indictment, or can order further investigation, for not more than 10 days, except in cases where more time is required). The examination in the first instance is conducted according to the general rules; however, the assignment of the case is carried out in a shorter time, as well as the drafting/presentation of the judgment. This procedure is applied only in respect of adult defendants, charged with minor, less grave and grave offences.

The available data indicates that the proportion of such cases is relatively low. For example, in cases where the prosecutor conducted the criminal investigation, there were 13 cases of an *in flagrante delicto* procedure out of a total of 1,840 cases sent to court in 2009, and one case out of a total of 1,614 in 2010. In cases where the prosecutor supervised the criminal investigation, there were 347 cases of an *in flagrante delicto* procedure out of a total of 8,322 cases sent to court in 2009, and 152 cases out of a total of 8,894 in 2010.[66] Together, this means that in 2009, there were 360 cases of an *in flagrante delicto* procedure out of a total of 10,162 cases sent to court (3.5 per cent), and 153 out of a total 10,508 in 2010 (1.5 per cent).

The *plea bargaining procedure* implies an agreement between the defendant and the prosecutor by which the defendant agrees to plead guilty in return for a reduced sanction. The sanction is not negotiated with the accusation and is determined by the judge based on the materials in the case file and the court hearing.[67] The plea bargaining agreement is made in written form, with the mandatory participation of the defence lawyer. Plea bargaining is possible in three categories of crimes: serious, less serious and minor. The court is obliged to verify whether the plea bargain is carried out according to the law and willingly by the defendant, and that there is sufficient evidence that confirms a finding of the guilt of the defendant. The plea bargaining agreement can be initiated by either of the parties, and can be concluded at any time from the moment of the charge until the judicial examination of the case has commenced in court.

Although criticised at the beginning, the plea bargaining procedure seems now to have become an important part of the system, with more than 40 per cent of cases reaching the court being completed by plea bargaining procedures, as reported by the Prosecutor General's Office in table 1.

66 Prosecutor General's Report 2010, p. 34.

67 See Chapter III of the CPC, Arts. 504–09.

Table 1.
Plea bargains in Moldova, 2009–2010

	2009	2010
Total number of sentences/findings of guilt	8,545	8,464
Plea bargaining procedures	3,840	3,755
Percentage of plea bargains out of the total number of sentences	44.94	44.36

Source: Prosecutor General's Annual Report for 2010.

The proposed draft amendments to the CPC provide for the introduction of an additional simplified court procedure.[68]

The defendant also has an opportunity to *reconcile with the victim*, which ends the criminal case with no criminal record being recorded against the defendant. This possibility is available only for certain types of minor or less grave offences. Reconciliation of the parties is possible in such cases from the moment the criminal investigation has been initiated until the moment the judges withdraw for deliberation.[69] At the time of the adoption of the Criminal Code, which introduced this procedure, criminal investigators and prosecutors were initially resistant to allowing parties to use it. This was mainly due to the way their performance was measured at the time, focusing on the number of cases and disregarding reconciliation. However, since 2005, the use of this procedure has begun to increase.[70]

1.5 Level of crime and prison population

All crimes are classified by the degree of seriousness, depending both on the nature of the crime and the degree of prejudice or damage caused by the crime. The degree of seriousness determines the severity of punishments, along with other factors. The

[68] The draft law proposes instituting a procedure for examining a criminal case based on the evidence collected at the pre-trial investigation stage. This procedure shall be applied in cases when the defendant pleads guilty and has no objections to the evidence collected at the pre-trial stage. Consequently, the court will only hear the case to determine the criminal sanction, without examining the evidence as in the ordinary procedure. In such cases, the sentence will be reduced with 25 per cent.

[69] Art. 109 of the Criminal Code.

[70] Redpath and Hriptievschi 2009, pp. 46–47.

current Criminal Code provides five categories of crimes ranked by their seriousness.[71] The level of crime over the past six years is presented in table 2.

Table 2.
Crime levels, 2005–2010

	2005	2006	2007	2008	2009	2010
Registered crimes	27,595	24,767	24,362	24,788	25,655	33,4021[72]
Percentage decrease/increase compared with the previous year	–4.3	–10.2	-1.6	+1.7	+3.5	+30.2
Registered crimes per 100,000 inhabitants	769	692	682	695	720	937

Source: National Bureau of Statistics at*:* http://statbank.statistica.md/pxweb/Dialog/Saveshow.asp. The decrease/increase in registered crimes is taken from the Prosecutor General's Reports for 2005–2010.

The figures indicate that the level of crime dropped in the period 2005–2007,[73] with a slight increase in 2008 and 2009. However, this statistical data should be viewed with some caution. There are substantiated allegations that the crime levels have not been accurately reported for several years, particularly due to the methods of recording

71 Art. 16 Criminal Code, as amended by Law No. 277 of 18 December 2008, provide for the following categories of crimes: (1) minor crimes, which have a maximum sentence of two years of imprisonment (no change); (2) less serious crimes, which have a maximum sentence of five years of imprisonment (no change); (3) serious crimes, which have a maximum sentence of 12 years of imprisonment (previously 15 years); (4) very serious crimes, which are crimes committed with an intent and which may receive more than 12 years imprisonment (previously, more than 15 years); (5) exceptionally serious crimes, which are crimes committed with intent and which may attract a sentence of life imprisonment.

72 According to the Prosecutor General's Annual Report for 2010, the increase of registered crimes is due to several objective factors, including the economic situation (patrimonial/economic crimes) and the change of focus in the criminal justice system, focusing on prevention and true registration of crimes, rather than hiding of crimes by not registering them, as had been the previous practice of the criminal justice system (police). The increase of crimes on 2010 is mainly in less grave crimes (4,258 crimes or 27.5 per cent), followed by minor crimes (2,764 or 71.5 per cent), very grave crimes (456 or 108.1 per cent), grave crimes (244 or 4.3 per cent) and particularly grave crimes (27 or 18.6 per cent).

73 This followed the general trend of a decrease in the number of registered crimes since 2000: 2000 – 38,267 crimes; 2001– 37,830; 2002 – 36,302; 2003 – 32,984; 2004 – 28,846 (National Bureau of Statistics data).

crime utilised by the police. For example, the SFM Criminal Justice Performance report of 2009 concluded that:

> ... some 11% of Moldovans (1 in 9) say that they personally have been a victim of crime in the last three years. This equates to 314,000 crimes, or 104,667 crimes each year over three years. Yet, over the period of 1996–2006 Moldovan statistics recorded an average of 33,242 crimes per year, or 99,726 crimes over three years. This suggests that crimes may have been under-recorded by the Moldovan criminal justice system – only a third of crimes appear to have been recorded.[74]

In 2010 these suspicions were confirmed by the Prosecutor General's Office, when reporting on an increase of 34.6 per cent of recorded crimes during the first eight months of 2010.[75]

The motivation for the Ministry of Interior to seek to 'hide' crimes with little prospect of being solved stems from the emphasis that has been placed on high detection (discovery/solving crime) rates, which has driven the Ministry, particularly since 2001. Apart from the distortion of the criminality rates, this has had a very negative impact on the effectiveness of criminal investigations. Investigators were driven by numbers and reporting, and hence were less concerned with the quality of the investigation. The drive to reach a certain number of discovered/solved crimes is also one of the reasons that criminal investigators (directly or through primary investigation bodies) use illegal methods to obtain confessions. The figures speak for themselves – for example, the overall success rate in solving crimes in Moldova in 2008 was 80 per cent, with some districts reporting 96 per cent.[76]

The emphasis on high detection rates has been acknowledged as a negative practice by the new Minister of Interior, appointed by the new government at the end of 2009. The Ministry adopted a new regulation on performance indicators, partially in response to this problem, and initiated a reform of the police. However, it is too early to make any assessment of how this has changed the reported crime levels and the recording of crime.

Another reason for the distortion of the crimes statistics might be the fact that it is the Ministry of Interior that is responsible for the collection of statistical data

74 Redpath and Hriptievschi 2009, p. 14.

75 Press release of the Prosecution Office of 23 September 2010, available in Romanian at http://www.procuratura.md/md/newslst/1211/1/3611/.

76 Redpath and Hriptievschi 2009, p. 32 (interviews with criminal investigators).

and its submission to the Prosecutor General. On the other hand, the Prosecutor General's Office, through its specialised departments, ensures 'collection, procession, systematisation, analysis, dissemination and publication of statistical information regarding the criminality and activity of the Prosecution bodies'.[77] It is unclear to date who is ultimately responsible for issuing generalised statistical information about criminality in the country – the Ministry of Interior or the Prosecutor General's Office. The National Bureau of Statistics, the body responsible for collating the overall country statistics, has limited access to information on justice and crimes.

The National Bureau of Statistics provides the following data on incarceration rates, which shows a decrease in 2008 compared to 2006, and a slight increase in 2009 and 2010 compared to 2008.

Table 3.
Incarceration rates in Moldova, 2006–2010

	2006	2007	2008	2009	2010
Number of convicted persons	12,434	9,764	7,367	7,721	7,815
Number of convicted persons per 100,000 inhabitants	347.2	273.3	206.5	216.7	219.5
Number of detainees in penitentiaries[78]	6,647	6,521	5,470	5,285	4,985
Number of detainees in penitentiaries[79] per 100,000 inhabitants	186.6	182.5	153.3	148.3	139.9

Source: National Bureau of Statistics, at: http://statbank.statistica.md/pxweb/Dialog/Saveshow.asp.

The Penitentiary Department of the Ministry of Justice has provided slightly different figures regarding the total number of detainees. However, since the National Bureau of Statistics does not provide disaggregated data for sentenced and non-sentenced detainees, or data on the number of pre-trial detainees, the Penitentiary Department data is provided below, which shows a significant decrease in the pre-trial arrest rates since 2006.

77 See Art. 141 of the Law on Prosecution, No. 294 of 25 December 2008.

78 This does not include persons in pre-trial detention.

79 This does not include persons in pre-trial detention.

Table 4.
Detainees in Moldova, 2006–2011

	2006	2007	2008	2009	2010	2011
Total number of persons detained in penitentiaries (as of 1 January of the respective year)	8,867	8,679	7,895	6,830	6,535	6,324
Persons detained in criminal investigation pre-trial detention facilities (as of 1 January of the respective year)[80]	3,210 (36.2%)	2,684 (30.9%)	2,297 (29.1%)	1,360 (19.9%)	1,250 (19.1%)	1,339 (21.1%)

1.6 Public and political perceptions about crime

There is no regular survey of crime that is undertaken by Moldovan authorities. The first survey on public attitudes about the criminal justice system was carried out during 2008 by the Soros Foundation–Moldova,[81] which also undertook a victimisation and public confidence survey over the period March to April 2010.[82] The 2008 survey suggested that the respondents have either included crimes against them from earlier than the previous three years (a survey phenomenon known as 'telescoping'), or that the official crime statistics include only about one-third of crimes that actually occur on a yearly basis.[83] Both surveys showed similar results regarding people's perceptions

[80] For the period 2006–2008, data (for the country) sent by the Ministry of Justice in a letter of 16 May 2008, Legal Parliamentary Commission and the attached statistical reports and responses to the specific questions addressed within the research project of the Soros Foundation–Moldova (which led to the 2009 Criminal Justice Performance report) (Ministry of Justice Letter of 16 May 2008). For the period 2009–2011, data sent by the Department of Penitentiary Institutions of the Ministry of Justice in a letter of 6 June 2011, in response to the Soros Foundation–Moldova's request for data regarding the penitentiary system.

[81] Redpath and Hriptievschi 2009, p. 4. The survey was carried out on a sample of 1,600 respondents, a number designed to be representative of Moldova population of 3.5 million. The survey covered questions relating to citizens' experiences of crime and criminal justice over the period 2005–2007.

[82] Redpath 2010, p. 5. The survey was carried on a sample of 3,018 interviewees, which was also representative of the Moldovan population.

[83] Redpath and Hriptievschi 2009, p. 14 – Eleven per cent of Moldovans (approximately one in nine) say that they have been a victim of crime during the previous three years, which would mean 104,667 crimes per year, while official statistics between 1999–2006 recorded an annual average of 33,242 crimes.

about changes in crime levels: 31 per cent in 2010 and 30 per cent in 2008 said crime has increased, and 31 per cent in 2010 and 34 per cent in 2008 said crime has decreased. 'This is despite the fact that since 2000 there has been a large overall decrease of 34% in the total number of crimes recorded by the Ministry of the Interior, and an overall decrease of 7% in the last five years.'[84]

The *level of fear of crime* is also very high in Moldova, compared to the types of crimes most often committed. About 11 per cent of Moldovans do not feel safe at home during the day, 26 per cent do not feel safe at their home during the night, and 51 per cent do not feel safe walking in the streets at night.[85] As for the types of crimes, even though the registered crimes for the period 2000–2009 do not indicate that crime has become more violent, 46 per cent of people said that it had indeed become more violent.[86]

This high level of fear of crime could be explained by various factors, including the distrust of the population in the criminal justice system and, hence, the reluctance to report crimes,[87] the media usually reporting only on violent crime, the inherited fear of crime from the 1990s, when the state was unable to control criminality, which had increased dramatically after the fall of the Soviet Union. There is no official analysis of the type of persons who commit crime. Theft remains the most common crime (even if it has decreased over the years), suggesting that poverty and personal economic circumstances represent the most usual motivation to commit a crime.

The level of fear of crime is at odds with the previous government's claim to have considerably reduced crime, as indicated by its statistical data referred to above. The opposition has voiced criticism over the new government's inability to control crime rates, particularly regarding the increase of crime in 2010, reversing the previous decrease, and the series of violent crimes widely reported by the media since 2009. As noted above, one of the reasons for low crime rates could have been the fact that not all crimes were registered. In any event, it would be important to continue carrying out victimisation surveys that would allow for a better appreciation of the concerns of the general population.

84 Redpath 2010, p. 6. The survey was carried on a sample of 3,018 interviewees, which was also representative of the Moldovan population.

85 Redpath and Hriptievschi 2009, pp. 11–12. The authors compared this data with data from the 1992–2005 ICVS (International Crime Victims Survey) and 2005 EU ICS (the European Crime and Safety Survey) surveys, and Chișinău scores higher fear than such cities as Rio de Janeiro and Johannesburg, considered among the most dangerous cities in the world.

86 Redpath 2010, p. 7.

87 Redpath and Hriptievschi 2009, p. 14.

Table 5.
Registered crimes, by types of crimes (selected as reported by NBS)

Registered crimes	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Total crimes	38,267	37,830	36,302	32,984	28,846	27,595	24,767	24,362	24,788	25,655	33,402
Murder	413	411	401	356	303	268	255	216	233	240	265
Grievous bodily harm or harm to health	447	394	335	417	355	395	409	408	385	369	416
Rape	215	189	204	320	336	280	268	281	306	264	368
Theft	21,345	20,748	18,428	15,065	12,682	11,506	9,419	9,724	9,642	9,136	13,646
Burglary and robbery	2,932	2,590	2,341	1,801	1,450	1,449	1,102	868	1,161	1,208	1,389
Drug crimes	2,031	1,897	2,481	2,390	2,148	2,106	2,101	2,182	2,126	1,879	1,794
Hooliganism	1,060	1,163	1,356	1,316	1,062	965	848	780	772	767	955

Source: National Bureau of Statistics, at: http://statbank.statistica.md/pxweb/Dialog/Saveshow.asp.

2. Legal aid

2.1 Management and organisation of the legal aid system

The legal aid system in Moldova was changed significantly by the Law on State-guaranteed Legal Aid (hereafter, Legal Aid Law) of 26 July 2007.[88] Prior to this law, there was no clear division of responsibilities between the bodies involved in the legal aid system: the Ministry of Justice, the Bar, the criminal investigation bodies and the court, all having some functions related to legal aid administration or delivery. Following the entry into force of the Legal Aid Law, thus far the management of the legal aid system is functioning. Legal aid was provided only in criminal cases until January 2012, when the non-criminal legal aid provisions entered into force.

There are three bodies with responsibilities for legal aid management: the National Legal Aid Council, the territorial offices of the National Legal Aid Council and the Ministry of Justice.

The *National Legal Aid Council (NLAC)*, which is a legal entity of public law, is responsible for administering the legal aid system throughout the country.[89] The NLAC is a collegial body composed of seven members.[90] A diverse representation was deliberately chosen, as an additional guarantee of its independence. The Council members are not employed either by this body or the Ministry of Justice – they only meet for the NLAC meetings, which take place not less than once every three months.[91]

The Legal Aid Law entrusted the Council with very important functions, whilst at the same time not providing for any remuneration either for its members or permanent staff. The law only provides for the Ministry of Justice to provide secretarial assistance to the NLAC. This would have been a more or less acceptable option (albeit

88 The Law on State-guaranteed Legal Aid entered into force on 1 July 2008 (one year was provided for creating the conditions for entry into force), apart from the provisions regarding civil and administrative legal aid, which entered into force on 1 January 2012.

89 Article 11 of the Legal Aid Law.

90 The members are comprised of two members from the Ministry of Justice, two from the Bar Council, one from the Superior Council of Magistrates, one from the Ministry of Finance and one chosen by the Ministry of Justice through a public nomination process among NGOs and academia. (Article 11 of the Legal Aid Law, as well as the Regulation of the National Legal Aid Council, adopted on 24 January 2008, and the Regulation regarding the procedure of selecting the members of the National Legal Aid Council from NGOs and academia, approved on 11 February 2008).

91 Article 13 of the Legal Aid Law.

with questionable operational independence) if the Ministry had at least a specialised department dedicated to legal aid. However, so far this has not been the case. Moreover, the Ministry does not even have a full-time person to act as the Council's secretary, the function being carried out by the person who is also responsible for notaries and Bar issues within the Ministry.[92] A draft law was submitted to the Parliament at the end of 2011 that provides for the creation of an administrative apparatus for the NLAC.

The main functions of the NLAC include: implementing the legal aid policy in the state; determining the financial criteria and mechanisms for eligibility for legal aid, subject to the subsequent approval of the government; establishing the admission criteria for lawyers willing to be included in the national registry for legal aid providers; determining the payment mechanism and amounts of fees and other costs to be paid to legal aid lawyers; ensuring the quality of legal aid services, including by establishing standards for the providers involved in the legal aid system; and determining assessment criteria for monitoring the legal aid services, in co-operation with the Bar.[93]

There are five *territorial offices of the NLAC* set up in the five appeal court jurisdictional districts covering the country. These offices have a distinct legal personality, being organisationally and methodologically subordinated to the NLAC. Their purpose is to implement the legal aid policies adopted by the NLAC in the territory of their jurisdiction. They are in charge of the determination of eligibility, appointment of legal aid lawyers, making the duty schedules of lawyers for urgent legal aid, reviewing the lawyers' reports and making payments, co-ordinating the primary legal aid in their jurisdiction, and collecting necessary statistical data and submitting activity reports to the NLAC every three months.

The *Ministry of Justice (MoJ)* remains the policymaking body in the field, reporting to the government and the Parliament, with the NLAC advising the MoJ on legal aid policies and overseeing the implementation of these policies. The NLAC

92 So far, the NLAC has managed to work well and achieve impressive results, given all the constraints it has, due to the dedication of some of its members and the fact that it received technical assistance (particularly in regards drafting secondary legislation and training personnel and justice actors on the new rules, as well as contributions to remuneration of NLAC and territorial offices staff) from the Soros Foundation–Moldova, as well as the Joint Programme between the Council of Europe and the European Commission on Increased Independence, Transparency and Efficiency of the Justice System of the Republic of Moldova.

93 The mechanism is not yet fully elaborated, and issues relating to quality are monitored by the staff from the NLAC's territorial offices, who primarily look at whether the files correspond with the generally accepted criteria, and to the accuracy of the submitted financial reports.

is directly dependent on the MoJ for its operating budget, as it is the MoJ that has the final authority on the legal aid budget that is proposed. Although the NLAC should present its annual report to the MoJ, the government and the Parliament,[94] it does not really have direct access to the government and Parliament. The NLAC also remains dependent on the MoJ for its daily operations for as long as it does not have its own working apparatus (or sufficient donor support).

2.2 Spending on criminal legal aid

The legal aid budget for 2009 was 370,639 Euro,[95] which represented 0.10 Euro per capita.[96] In 2010, there was a slight increase to 399,561 Euro[97] (0.11 Euro per capita).[98] It is important to note that the legal aid budget was not cut, but even increased, albeit relatively insignificantly, in a context of cuts in almost all other budget areas in 2010 compared to 2009.

The legal aid budget to date includes management-related expenses and delivery of criminal legal aid, since the right to legal aid in non-criminal cases only became effective in January 2012. The NLAC does not have data for 2009 and 2010 divided by the types of legal aid or phases. It has, however, indicated the following data relating to the management of the legal aid system: in 2009, 76 per cent of the budget was spent on the delivery of criminal legal aid and 24 per cent on management;[99] in 2010 the corresponding numbers were 79 per cent and 21 per cent, respectively.[100] The total legal aid budget has been increased considerably since 2006, which was prior to the adoption of the legal aid law, when the budget was 3,503,100 MDL (225,415 Euro), to 8,500,000 MDL (520,295 Euro) in 2011.

Since the management costs have been relatively steady and only criminal legal aid was provided until the end of 2011, one could conclude that there has been a steady increase in the spending on criminal legal aid of 2.4 times (by 140 per cent). In terms of beneficiaries of criminal legal aid, statistical data also shows a significant

94 Art. 12 (1)(lc) of the Legal Aid Law.

95 5,754,100 Lei (MDL – the currency of Moldova) Euro conversion rate at 15.5248 on 1 September 2011, according to http://www.statistica.md.

96 The population at the beginning of 2009 was 3,567,512, according to http://www.statistica.md.

97 6,552,600 MDL with a Euro conversion rate of 16.3995, according to http://www.statistica.md.

98 The population at the beginning of 2010 was 3,563,695, according to http://www.statistica.md.

99 4,399,000 MDL and 1,355,100 MDL respectively, out of the total budget of 5,754,100 MDL.

100 5,150,100 MDL and 1,402,500 MDL respectively, out of the total budget of 6,552,600 MDL.

increase, namely 6,000 beneficiaries received legal aid in 2006,[101] in 2010 – 23,007 and in 2011 – 25,587, which means an increase of 4.2 times (by 320 per cent) in 2011 compared to 2006.[102] The approved budget for 2012 is 22,800,000 MDL, out of which 8,306,800 MDL is planned for criminal legal aid,[103] slightly less than in 2011.

2.3 Methods of delivering criminal legal aid

The Legal Aid Law distinguishes between two main categories of legal aid:[104] (1) primary legal aid[105] (equivalent to legal advice/consultation); and (2) qualified legal aid (equivalent to legal advice and representation).[106] The Law also mentions urgent legal aid as a type of qualified legal aid.[107] The regulation defines urgent legal aid as the legal aid that is provided to any person in a criminal or administrative offence procedure/process during the arrest/apprehension period,[108] including during a court hearing regarding pre-trial detention.[109] The NLAC and its territorial offices also use the terms of urgent and ordinary legal aid.[110]

101 According to the NLAC chairman, in an interview conducted for an assessment of the Legal Aid Law, August 2011. There was no clear statistical data collected prior to the entry into force of the Legal Aid Law.

102 NLAC Annual Activity reports for 2010 and 2011.

103 According to the secretary of the NLAC, January 2012.

104 Article 2 of the Legal Aid Law

105 Primary legal aid means the provision of information about the legal system of Moldova, the normative acts, the rights and duties of subjects of law, information about the ways to realise the rights through judicial and non-judicial means, consultation/advice on legal problems, assistance with drafting legal documents, and other forms of assistance that are not covered by the qualified legal aid.

106 Qualified legal aid means the provision of legal consultation/advice, representation and/or defence before criminal investigation bodies and courts in criminal, administrative offences, civil or administrative cases, and representation before public authorities

107 Urgent legal aid *per se* is not defined by the Legal Aid Law, but it is defined by the Regulation on the Procedure of Requesting and Appointing a Lawyer to Provide Urgent Legal Aid, adopted by the National Legal Aid Council (NLAC) decision No. 8, 19 May 2009, published on 6 July 2010.

108 The arrest/apprehension period in Moldova is currently up to a maximum of 72 hours.

109 Only the first hearing qualifies for urgent legal aid – the other hearings are already provided for within the mandate/power of a lawyer providing qualified legal aid.

110 Although the law does not make this differentiation, the NLAC and its territorial offices use two terms to distinguish between the types of the qualified legal aid: urgent legal aid – provided only during the arrest/apprehension period and before the first hearing regarding a pre-trial arrest; ordinary legal aid – legal aid that is provided after the urgent legal aid period.

The Legal Aid Law establishes a mixed system of delivery, including paralegals and specialised NGOs for primary legal aid and public defender offices, private lawyers and specialised NGOs for the qualified legal aid. Criminal legal aid can only be delivered by lawyers, be it private lawyers or public defenders.[111]

The law defines a *public defender* as a person who has qualified as a lawyer according to the Law on the Bar and who was admitted to provide legal aid on the basis of special admission criteria. Public defenders receive a fixed monthly remuneration from the relevant territorial office of the NLAC. All public defenders are requested to provide urgent legal aid. In 2009, there were 19 public defenders, which represented 1.4 per cent of all lawyers and 6.85 per cent of lawyers that provided legal aid. In 2010 and 2011, there were only seven public defenders working for the Public Defender Office in Chișinău.[112]

Private lawyers who provide legal aid on request are those lawyers who can enter into contracts with the Territorial Office if they are interested to provide legal aid and are registered in the national registry for legal aid providers. They are paid for handling cases. Private lawyers have so far been the main method of delivery of qualified legal aid.

For a lawyer to provide legal aid, he/she must apply to the NLAC, which reviews the applications on a continuous basis. The lawyer must submit the following documents: a request to participate in the provision of legal aid, a copy of his/her identity papers and a copy of his/her lawyer's licence. These are very easy conditions to meet, so that virtually any candidate can be accepted. This system of almost guaranteed acceptance was chosen to ensure that sufficient lawyers joined the system, as the lawyers were initially resistant to the new system and boycotted it for the first few months. The NLAC can change the criteria and conditions for selection should the system generate sufficient providers and quality concerns require a revision.

Urgent legal aid is provided by duty lawyers, who are legal aid lawyers who agree to apply to be on the list of duty lawyers, which is drawn by the NLAC territorial offices for each region/sector (court jurisdiction) on a monthly basis. The duty lawyers

111 As a result of the amendments to the Civil Procedure Code, since January 2012 only qualified lawyers can represent persons in court (as compared with the previous situation, when anyone could act as a representative in court based on a power of attorney confirmed by notaries).

112 Until 2012, the Public Defenders' Office (PDO) was paid for by public and private funds: office maintenance and rent were covered by the legal aid budget, while the lawyers' honoraria were paid by the Soros Foundation–Moldova within the framework of a project on improving the legal aid system in Moldova. During 2009–2010, there were another 10 public defenders specialised in juvenile cases who worked for approximately one year before joining the private lawyers providing legal aid, as their funding by UNICEF–Moldova was stopped at that time. From January 2012, the PDO in Chișinău, with seven public defenders, is funded from the legal aid budget.

are called through the territorial office during office hours and directly by the criminal investigation body or the court outside of office hours. Duty lawyers are assigned irrespective of the financial status of the person, if that person does not call a private lawyer. A duty lawyer shall be provided to the client within three hours from the arrest (*de facto* deprivation of liberty).

2.4 Eligibility for criminal legal aid and appointment procedures

Any arrested person in a criminal or administrative offence procedure is eligible for urgent legal aid,[113] which is provided free of charge to all arrestees/detainees, irrespective of their financial status. Both at the investigative and court stages, any defendant charged with an offence that requires *mandatory legal representation*[114] is

[113] Article 19 (1)(b) of the Legal Aid Law regarding eligibility for qualified legal aid specifies that it is available to "any person who needs urgent legal aid in cases of arrest in a criminal or administrative offence process". Article 20 of the Legal Aid Law specifies that legal aid is provided irrespective of income level, in cases provided for in Article 19 (1)(b)–(d).

[114] Artticle 69 (1) of the CPC states the following: 'Participation of a lawyer in criminal proceedings is mandatory in the case when:

1) requested by the suspect/defendant[113] (*note: this provision is very broad, encompassing practically any case. This was the reason for its exclusion from the Legal Aid Law, see below the explanation*);
2) the suspect/defendant cannot defend him/herself because of deafness, blindness, dumbness or other serious disabilities of speech, hearing, sight, as well as other physical or mental disabilities;
3) the suspect/defendant does not know or knows insufficiently the language in which the case is conducted;
4) the suspect/defendant is a minor;
5) the suspect/defendant is an enrolled soldier (military);
6) the suspect/defendant is charged with a grave, very grave or exceptionally grave offence;
7) the suspect/defendant is arrested or is sent for a psychiatric expertise in a medical institution;
8) the interests of the co-suspects / co-defendants are contradictory and at least one is represented by a lawyer;
9) the victim's or civil party's lawyer takes part in the respective case;
10) the interests of justice require the participation of a lawyer at the hearing at first instance, appeal or cassation/recourse (recurs), or during the extraordinary modes of appeal (*note: the judge decides on the circumstances relevant to the interests of justice, based on the interpretation of the legislation in Article 71, para. 2 of the CPC and the SCJ explanatory decision on the right to defence in 1998, which is now largely outdated*);
11) the suspect/defendant is a mentally irresponsible person or he/she became mentally ill after committing the incriminating offence;
12) the criminal procedure refers to rehabilitation of a deceased person at the moment of examining the case.

eligible for legal aid without a means test. Article 19, para. 1 (1c) of the Legal Aid Law confirms that defendants have the right to mandatory defence based on Article 69, para. 1 (2–12) of the CPC. This provision encompasses all the reasons provided for in the CPP apart from one, namely Article 69, para. 1, which states that the participation of a lawyer in criminal proceedings is mandatory when 'the defendant requested a lawyer'. The Legal Aid Law rightly excludes this provision from those reasons that mandate legal aid irrespective of the person's financial status, differentiating between mandatory defence and legal aid eligibility provisions.

However, the CPC does not distinguish between the different reasons for receiving mandatory legal representation provided in the Article 69, and the procedure for providing a lawyer. In particular, it does not provide that, in cases where legal representation is requested by the defendant and is not covered by paragraphs 2–12 of Article 69 of the CPC, legal aid is conditional upon the financial status of the defendant. Hence, in practice, it would be very difficult for the territorial offices of the NLAC to refuse legal aid if requested, based on Article 69, para. 1 (1) (that is, simply at the request of the defendant). The head of the territorial office in Chișinău stated in an interview that there had, to date, not been a single refusal to provide legal aid. This indicates that all cases that require mandatory legal representation are also automatically eligible for legal aid, irrespective of the person's financial status.

For other cases that do not fall under the provisions for mandatory legal representation, legal aid is available if the interests of justice so require, and the person is unable to hire a private lawyer. Based on the current legislation and practice, means testing is applied only in respect of cases involving minor or less grave offences.

In addition to mandatory legal representation provisions, the CPC requires *the presence of a lawyer for many procedural actions*, such as recognition as a suspect, presentation of the charge and interview after the charges are issued. When the defendant does not have a lawyer, the territorial office is contacted to provide one. The relevant CPC provisions practically reduce cases of self-representation to zero, as well as the means testing, as criminal justice actors make every effort to ensure that a lawyer is representing a person, even if only formally (for example, there are still some instances when statements are taken prior to lawyer's arrival and the lawyer is only invited to sign the papers to ensure their legality).

The main motivation of criminal investigators is not so much the rights of the defendant, but rather to ensure criminal investigation actions cannot be further contested due to the lack of a lawyer. When lawyers are invited too late and they agree to sign the papers without checking the details of the case or challenging

the violations, the presence of the lawyer is rather detrimental to the client.[115] The requirements regarding the lawyer's presence are well intended and adequate for ensuring an effective defence of the defendant. The problem is how these provisions are implemented in practice – providing a lawyer for every case irrespective of the merit and the defendant's financial situation is simply too expensive and unsustainable in the long term. Resources are spread too thinly and too little is paid to legal aid lawyers, instead of paying more to do their job better. However, this would of course mean reducing the instances when a legal aid lawyer is provided.

The *means test* is regulated by the Legal Aid Law and other secondary legislation.[116] The beneficiary should have a lower income than the level provided by the government for eligibility for legal aid.[117] According to a government decision,[118] qualified legal aid is provided to persons whose average monthly income is lower than the minimum existence level per capita in the country. When calculating the average monthly income, the income for the past six months prior to the month in which the legal aid application was submitted is considered. The average monthly income is calculated from the monthly average income of the family to the number of family members. The amount of the minimum existence level is determined on the basis of National Bureau of Statistics data and is calculated according to the Regulation approved by Government Decision No. 902 of 28 August 2000. For the third quarter of 2011 the average minimum level was 1,386.4 MDL (approximately 85 Euro).

The detailed methodology for calculating the income and determining eligibility for legal aid, as well as the template declaration that should be filled in by the person requesting legal aid, are provided for in Government Decision No. 902.[119] The beneficiary completes the declaration and also needs to attach one of the following documents, as relevant:

- A certificate regarding his/her family (how many family members, age);
- A certificate from the work place(s) regarding his/her monthly income, obtained during the previous six months;

115 Interview with private lawyers providing legal aid on request.

116 Art. 19 (1)(a) and (e); Art. 21 of the Legal Aid Law; Government Decision No. 1016 of 1 September 2008 regarding the approval of the Regulation on the methodology for calculating the income for providing state guaranteed legal aid, published on 5 September 2008.

117 Article 20 of the Legal Aid Law.

118 Government's Decision on the Methodology for a Means Test Regarding Eligibility for Legal Aid 2008.

119 Government's Decision on the Methodology for a Means Test Regarding Eligibility for Legal Aid 2008.

– A certificate from the National Agency for Social Assistance regarding the monthly social benefits received.

In practice, the means test relies on the defendant's declaration. It is not checked by the NLAC territorial offices due to a lack of resources and access to the relevant databases.

At the court stage, judges typically insist on the defendant having a lawyer in every case. Hence, even if the case is relatively simple and the defendant would be able to represent him/herself, the judge would usually call for a lawyer (this might be even from the court itself) or adjourn the hearing and request the relevant NLAC territorial office to appoint one.[120] This practice also extends to the criminal investigation stages. As indicated by the territorial offices, many criminal investigation officers or prosecutors help the defendant to fill in the legal aid application, advising on points that would qualify for mandatory representation, even if the case does not require mandatory representation.

The insistence of judges and criminal investigators on there being a lawyer present is based, on the one hand, on the wide provisions of the CPC requiring the presence of a lawyer to legitimise the respective procedural action and, on the other hand, the established practice that certain procedures at the pre-trial stage and court hearings must take place with a lawyer present. The interviewed judges could not recall any hearing in recent times where a lawyer was not present, although they mentioned that there are sometimes difficulties in securing a lawyer. The interviewed criminal investigators and prosecutors also complained that they often have to wait for the lawyer in order to interview the person, press the charges, or recognise the person as a suspect or accused.

There is no official data on the proportion of the population who may be eligible for legal aid. The interviewed judges and criminal investigation bodies estimated that around 80 per cent of defendants receive legal aid. Although this figure is a very rough estimate, it does indicate the high demand for legal aid. In the past three years, between 240 and 350 lawyers were involved in the legal aid system (for criminal legal aid only), which is a relatively low number to cover the estimated demand for legal

120 See, in this regard, the findings of the OSCE Trial Monitoring Programme for the Republic of Moldova. Final Report (which includes the findings of the trial monitoring programme for the period of April 2006–November 2008), released by the OSCE Mission to Moldova, OSCE/ODIHR 2009, electronic version available at: http://www.osce.org/documents/mm/2010/07/45526_en.pdf, p. 65 (OSCE TMP 2009).

aid. This seems to suggest that the old practice of having a lawyer sign the protocols without even being present at the procedural action still continues (so-called 'pocket lawyers'). This was confirmed by the judges, criminal investigation officers and lawyers interviewed in this study.

However, they all mentioned that this phenomenon has significantly reduced since the entry into force of the Legal Aid Law. The main reason, as these lawyers put it, is the monitoring of quality by the territorial offices of the NLAC. Whilst they do not check the quality of the legal service provided, they do review the factual information presented in the lawyers' reports, which must be submitted before payment. Some co-ordinators of the territorial offices go as far as cross-checking the reports submitted by the lawyers with the actual court case files. This has the effect of disciplining legal aid lawyers, at least to a certain degree. Undoubtedly, much still needs to be done to increase the quality of the rendered services.

2.5 Remuneration for criminal legal aid

According to the NLAC, the average time per case worked by private lawyers providing legal aid on request is 41 hours, with a remuneration of 70 MDL or approximately 4.2 Euro per hour.[121] The average cost per case is, accordingly, 2,870 MDL or 175 Euro.[122] Private lawyers providing legal aid on request are paid per case, calculated in units of 20 MDL (1.23 Euro) for those procedural actions in which the lawyer has participated. The units have been calculated on an hourly basis, but the payment is not dependant on hours. The regulation on the remuneration for legal aid services provides for a concrete number of units to be paid for the different types of lawyer's actions undertaken. Not all procedural actions or other activities undertaken by the legal aid defence lawyer are paid. For example, only a maximum of five meetings with the detained client per case are covered and one meeting for clients that are not detained. Also, the regulation on legal aid remuneration establishes a maximum fee of 200 MDL (approximately 12 Euro per day), except when the lawyer provides legal aid in more than one case during the same day, subject to a maximum of five cases per day.[123]

121 Calculated at an exchange rate of 16.3995 MLD per Euro.

122 Data provided by the NLAC in response to the Soros Foundation– Moldova's letter of inquiry of 5 May 2011.

123 See points 9–12 of the Regulation regarding the amount and method of remuneration for legal aid, approved by NLAC decision No. 22 of 19 December 2008, published on 23 January 2009, with subsequent amendments.

The regulation on payment for legal aid[124] provides that private lawyers providing legal aid services are to be compensated for travelling time only if they are required to travel to a different location. In this case, travel is paid according to the rules provided for business trips of employees of organisations and institutions. These rules are quite bureaucratic from an accounting perspective and provide low rates of reimbursement, which is why lawyers rarely make a claim. Neither profit costs nor waiting time are payable. Only if the hearing is adjourned for reasons that do not depend on the lawyer is the latter entitled to receive a fixed remuneration (three units), which is not applicable if the lawyer attends different cases at the same court during the same day.

It is difficult to compare legal aid fees with private market fees, as there are no published average costs of private lawyers for criminal cases. There is only one recommendation by the Bar,[125] considered by many lawyers as outdated and inappropriate, which recommends for criminal cases a minimum fee of 5,000 MDL for taking the case (twice as much as the average paid for legal aid cases), plus a fee payable for each court hearing. Compared to this recommendation, legal aid remuneration is very low.

However, in interviews, lawyers providing legal aid services pointed to the fact that the private market varies, and only a small number of lawyers are charging fees close to the recommendations. For many lawyers, legal aid is attractive as a more or less stable income, and for young lawyers as a way of gaining experience. Some lawyers expressed that view that even if legal aid fees are low, these are still attractive for those lawyers who are not doing more than what is paid for, which does raise a question about the quality of legal aid. Anecdotal evidence also suggests that some legal aid lawyers still either request additional payment from the client, even if this is prohibited by law, or suggest that the client refuse legal aid and instead retain the lawyer on contract, if the client has the money.

By law, the remuneration of the public defenders is determined by the NLAC. From 2006 to the end of 2011, the public defenders' honorarium was paid by non-state funding (Soros Foundation–Moldova), the state providing the offices for free and

124 Regulation regarding the amount and method of remuneration for legal aid, approved by NLAC decision No. 22 of 19 December 2008, published on 23 January 2009, with subsequent amendments.

125 Bar Council's recommendations for the amount of fees charged for different categories of cases, adopted by the Bar Council on 29 December 2005, published in *Avocatul Poporului* (People's lawyer), No. 1, 2006.

covering office maintenance costs. Since January 2012, public defenders are paid a fixed remuneration of 6,785 MDL monthly from the legal aid budget in exchange for providing qualified and urgent legal aid. This is the gross amount, subject to further taxes and deductions required by law. The PDO as a whole (of seven lawyers) has to ensure provision of a minimum 21 cases monthly, both criminal and non-criminal. The office space and costs are also paid from the legal aid budget.

It remains to be seen if this is a sufficient remuneration level to ensure high quality, continuous, representation by public defenders. *Prima facie*, the current agreement regarding the funding of the PDO is a good one, providing a remuneration level for lawyers comparable to other justice sector actors. However, what it does not take into account is the fact that public defenders are treated like employees with a fixed remuneration; on the other hand they do not benefit from any social service guarantees available to other justice sector actors. This is an issue for further consideration.

3. Legal rights and their implementation

3.1 The right to information

The right to information *about the nature and cause of the accusation* is provided for by domestic law.[126] Any suspect has the right to know why he/she is suspected and has the right, *immediately* after he/she has been arrested (or apprehended), or after he/she has been informed about the decision to apply a preventive measure or to recognise him/her as a suspect, to be informed, in the presence of a lawyer, in the language that he/she understands, about the content of the suspicion and the legal qualification/nature of the criminal actions for which he/she is suspected. Moreover, immediately after arrest or after he/she is informed about the decision to apply a preventive measure or recognised as a suspect, he/she has the right to receive a copy of the respective decision or arrest protocol.[127]

Any accused has the right to be informed of the crime for which he/she is charged and when charged, as well as immediately after the arrest, or after he/she has been informed about the decision to apply preventive measures, to receive from the

126 Constitution Art. 25 (5); CPC Arts. 64 (2) (1), 66 (2)(1), 167 and 282.

127 Art. 64 (2)(1) and (3) of the CPC.

criminal investigative body a copy of the charge.[128] Once the indictment is drawn up by the prosecutor, the latter presents a copy of it to the defendant and his/her legal representative, who is noted in the information annexed to the indictment. The defendant can make a reference/response to the indictment, which is annexed to the case file.[129]

The right to information about the nature and cause of the accusation is an absolute one. The defendant is informed verbally, but must also be provided with a copy of the relevant procedural act,[130] where the nature and cause of the accusation is described briefly. The respective orders/protocols are signed by the person who draws the respective procedural action and the defendant, or alternately, a written note confirming that a copy of the act was presented to the defendant is annexed to the case file.[131] Hence, if the person (and/or his/her lawyer) has signed it, one could assume that the nature of the suspicion had been explained to him/her.

In practice, the signature proves that the protocol was communicated and explained to the defendant. This is why criminal investigation bodies and the court are keen on having the lawyer present to ensure the legitimacy of the act and, consequently, to prevent the defence from alleging a violation of the right to information, unless this applies to another stage of the process. The interviewed lawyers stated that the criminal investigation bodies do not in practice clearly explain the accusation; it is in practice typically just a pro-forma and symbolic, rather than substantive, procedure.

128 Arts. 66 (2)(1) and 282 of the CPC.

129 Art. 296 (5) and (6) of the CPC.

130 Arrest protocol/order regarding the preventative measures applied/the order regarding the recognizance as a suspect (any of these three in the case of a suspect); the order regarding the charge (concerning the accused) and the indictment (concerning the defendant).

131 Art. 66 (2)(2) of the CPC states that, immediately after the arrest or after having been informed of the decision on preventative measures or of recognizing him/her as a suspect, the suspect has the right to receive from the criminal investigative body a copy or that decision or the protocol regarding arrest. The order of applying a preventative measure or recognizing a person as a suspect is explained to the suspect who then signs it. Art. 167 (1) of the CPC states that the arrest protocol must be signed by both the person that drew up the report and the suspect. The suspect might refuse to sign it, in which case a note is made regarding that. Although not expressly provided for in the CPC, in practice the defence lawyer also signs the protocol. Regarding the accused, the prosecutor charges the defendant and explains its content. The prosecutor, defendant and defence lawyer and other persons take part in this procedural action sign the protocol regarding the charge. The date and time of charging is noted in the order regarding the charge (Art. 282 of the CPC). A copy of the indictment is presented to the defendant, with a written note about this being annexed to the case file (Art. 296 of the CPC).

If the relevant criminal investigation body has not informed the defendant of the accusation, the lawyer could ask for an annulment of the arrest protocol, the decision recognising the person as a suspect, or the defendant's charge order.[132] In such a circumstance, all other procedural actions taken regarding that suspect or defendant would also be null and void. However, since this breach can be repaired at a later stage, and is not included in the types of procedural errors that cannot be corrected, the criminal investigation body could again draw up the listed documents and repeat the other procedural actions. As a result, very few lawyers raise violations relating to the right to information.

The CPC also provides for the right of the defendant to written information about his/her rights,[133] which is to some extent similar to the *information on procedural rights or 'letter of rights'* used in various jurisdictions. The information to be provided to arrested persons must be in a language that he/she understands.[134] In practice, there is no approved model of the letter of rights. Criminal investigation bodies copy the CPC provisions regarding the rights of the defendant on separate pages, and this is presented to the defendant. The information is usually printed in Romanian (the state language) and Russian. The terminology is complicated; no explanation of the written rights is included. There is no express obligation to verify whether the defendant has understood the information provided, but rather an obligation on the public official to explain the rights and answer any questions, with a corresponding right of the defendant to receive an explanation.

The presentation of the information about rights is mentioned in the arrest protocol, and is confirmed by the signatures of the defendant and the relevant criminal investigation body. The lawyers interviewed for this study confirmed that the presentation of the information on procedural rights is a very formal procedure,

132 Relying on Art. 251 of the CPC.

133 Arts. 64 (2)(2), 167 (1) (concerning suspects), 66 (2)(2) and 282 (2) (concerning the accused and defendant) of the CPC provide more or less similar wording, namely that 'immediately after arrest or recognition as a suspect/charged as defendant, to receive from the person that has arrested/ the criminal investigation body information in writing about the rights according to this article, including the right to silence and not to incriminate oneself, as well as explanations about all his/ her rights'. Art. 277 (2) of the CPC provides that 'the criminal investigation body is obliged to present the suspect, defendant, victim, injured party, civil party, civil responsible party and their legal representatives in writing, confirmed by their signatures, information about their rights and obligations according to this Code and to give explanations regarding any of these rights and obligations'.

134 Art. 11 (5) of the CPC.

usually performed in a rush by the criminal investigation body. The information is written is small letters, in language exactly like that contained in the CPC. Very rarely do the criminal investigation bodies explain to the person exactly what the written rights mean.

When a person is recognised as a suspect in more than one sensitive case, the investigation body that deals with several cases concerning that person deliberately fails to inform him/her of all the cases and does not join them. This practice has been repeatedly criticised by the ECtHR.[135]

As to the right to detailed information concerning the relevant evidence/material available to the police/prosecutor/examining magistrate – *the right of access to, or copies of the file* – this right is limited at the pre-trial stage. The defendant and the lawyer see the full case file only at the end of the criminal investigation. There are no discovery rules that apply for the criminal investigation body, or for the defence. The CPC, in the article referring to the confidentiality of the criminal investigation, provides that criminal investigation materials cannot be made public, except with the authorisation of the person that conducts the criminal investigation and only to the extent that this person considers possible.[136] In practice, the confidentiality of the criminal investigation is typically strictly followed by the criminal investigators. The limited access to the case file is one of the main reasons why lawyers are not particularly active during the pre-trial stage procedures.

Suspects and defendants must be informed throughout the criminal process about any decision referring to their rights and interests, and are to receive copies, at their request, of these decisions.[137] Hence, as a matter of law, at the pre-trial stage, the defendant has the right to see *only* the evidence obtained through a procedural action in which he/she participated immediately after that action is completed and the

135 See ECtHR 5 March 2010, *Leva v. Moldova*, No. 12444/05, paras. 57–63.

136 See Art. 212 of the CPC 'confidentiality of the criminal investigation'.

137 The relevant law is Art. 64 (2)(17) of the CPC, which provides that the suspect has the right to be informed by the criminal investigative body about all adopted decisions that are related to his/her rights and interests, and to receive, upon request, copies of these decisions; Art. 66 (2)(26) of the CPC, which provides that he/she has the right to be informed by the investigative body about all adopted decisions that refer to his/her rights or interests, as well as to receive copies of the decisions that apply preventive measures and other procedural measures of constraint to him/her, copies of the indictment (rechizitoriu), or other documents regarding the end of the criminal investigation, copies of the civil complaint, the first instance judgement, the appeal and cassation, the decision by which the judgment became final, and the decision of the court that examined any case via the extraordinary modes of appeal.

protocol is drawn up, since it has to be signed by the defendant,[138] as well as to see the order for an expert report and the results, and possibly to also add further questions to the terms of any order for an expert report.

However, in practice, the lawyers interviewed said that access to the respective decisions is often not promptly forthcoming, and often lawyers must insist, and wait extended periods of time, until the criminal investigation body present the respective documents. Practical arrangements also impede effective access to the case file, such as the lawyer not having a device to copy the respective documents, since there is a general lack of copy machines in police stations.

At the end of the criminal investigation, but before the case is sent to court, the defendant is granted full access to the case file, apart from material that is protected,[139] and materials that might negatively influence a minor.[140] The presented materials are bound/sewn into a file, numbered (pages) and noted in a special register.[141]

There is no obligation to inform the defendant about material that is to be or not to be put before the court. However, any material that is excluded by the prosecutor from the criminal case file must be mentioned in the prosecutor's ordinance, which is included in the case file.[142] Hence, theoretically, the lawyer can see what was excluded and can ask to see these materials. The lawyers interviewed could not recall any case where evidence that was of interest to the defence was excluded by the prosecutor from the case file. However, they could also not recall ordinances regarding the exclusion of the materials. This might explain why the lawyers do not recall problems with excluded material – it might be for the simple fact that they do not know that there was anything relevant for the defence and hence cannot challenge any exclusion.

One of the most controversial issues concerns access to the *materials regarding the preventive arrest of the defendant*. Although the defendant has the right 'to get acquainted with the materials sent to court for confirming his/her preventive arrest',[143]

138 See, for example, Arts. 66 (2)(20) and 260 of the CPC.

139 Art. 293 (5) of the CPC. The investigative judge, at the request of the prosecutor, may limit the right of the lawyer and defendant to see materials necessary for the protection of the state, commercial or other protected secrets, as well as for the protection of the life, corporate integrity and liberty of the witness or other person.

140 In such cases, the legal representative/lawyer has access to the case file; Art. 482 of the CPC.

141 Art. 293 of the CPC.

142 Art. 290 of the CPC gives the prosecutor the right to exclude from the case file evidence that was collected in breach of either the CPC or the defendant's rights.

143 Art. 66 (2)(21) of the CPC.

and the lawyer has the right 'to get acquainted with the materials presented to the court by the criminal investigation body to justify the request for arrest or preventive arrest of the client (whether suspect or defendant)',[144] the lawyers do not in practice receive the relevant materials. The lawyers are usually called to the arrest hearing without receiving any documents about the charge.

Before representing the client, diligent lawyers usually ask for time for a *confidential meeting with the client*, and to review the documents presented by the prosecutor. The extent to which this is allowed varies considerably. The experience of the lawyers interviewed is that the lawyer usually sees only the request for arrest, which is vague and contains the general language of the CPC, without specifying the exact reasons upon which the prosecutor has requested the arrest. The lawyers do not obtain any detailed information about the reasons why the prosecutor requires a pre-trial arrest, nor any evidence supporting that request. As a consequence, all that the defence lawyers can realistically do is to almost spontaneously, and without much opportunity for careful consideration, raise reasons in court as to why the defendant should not be arrested.

One reason for this might be the inadequate legislation. In particular, among the specific provisions referring to the examination in court of the request for arrest, there is no reference to the right of the defence to see the materials that are relied on by the prosecutor when requesting the pre-trial arrest warrant.[145] The CPC is currently being amended to include an express provision requiring the prosecutor to present all the relevant materials for substantiating the request for arrest to the lawyer, when submitting the respective request to the court.[146] It remains to be seen if this amendment will solve the practical problems. From the interviews with lawyers and the criminal investigation officers, it seems that the main reason for withholding the information from the defence lies with the unjustified and exaggerated focus on the

144 Art. 68 (2)(3) of the CPC.

145 Arts. 307 and 308 of the CPC only provide that the prosecutor submits a request (*demers*) for issuing a pre-trial arrest warrant, or for the prolongation of the existing warrant. The prosecutor must include in the request the reasons upon which he/she requires a pre-trial arrest warrant, home arrest or prolongation of the warrant. He/she must attach to the request the materials that prove that the request is justified. Further, the provisions specify that, when presenting the request for a pre-trial arrest warrant in court, the prosecutor must ensure that the suspect/defendant is present at the hearing, and must inform the lawyer/legal representative. There is no express provision requiring the prosecutor to present the defence with the request and supporting materials.

146 The draft law on amendments to the CPC, submitted to the Parliament at the end of 2011.

confidentiality of the criminal investigation. This is deeply ingrained in the mentality of criminal justice actors, who tend to regard the discovery of materials as a threat to the effectiveness of the investigation.

3.2 The right to a lawyer

Throughout the proceedings, the parties have the right to be assisted by a lawyer, chosen or appointed.[147] Any procedural action carried out without a lawyer, if the presence of a lawyer at the respective action was mandatory, is declared null and void.[148] Examination of a case without the participation of the prosecutor, defendant, as well as the lawyer, interpreter or translator, when their participation was mandatory, represents a justified reason to appeal the decision in cassation order.[149]

Every defendant has the right to be assisted by a lawyer from the moment he/she is informed about the suspicion or charge.[150] When arrested, both a suspect and a defendant have the right to a legal consultation with a lawyer in private before the first questioning.[151] The right to be assisted by a lawyer includes the right to have the lawyer present during the police interview. No statement can be given by the defendant

147 Art. 26 of the Constitution; Art. 17 (1) of the CPC, which provides that, throughout the criminal procedure, the parties (suspect, defendant, injured party, civil party, civil responsible party) have the right to be assisted or, depending on the case, represented by a chosen defender or a lawyer who provides state-guaranteed legal aid services.

148 Art. 252 (2) of the CPC.

149 Art. 427 (1)(4) of the CPC.

150 In particular, Art. 64 (2)(1) of the CPC states that the suspect has the right to know what he/she is suspected of and, in this regard, immediately after arrest, or after he/she has been informed about the preventive measure or recognition as a suspect, shall be informed in the presence of a lawyer, in a language that he/she understands, about the content of the suspicion and the legal qualification of the criminal actions of which he/she is suspected. In addition, Art. 66 (2)(5) of the CPC specifies that, from the moment he/she is informed about the procedural act that recognised him/her as a suspect, or is charged, there is a right to be assisted by a lawyer chosen by her/him, and if he/she does not have financial means to pay for the lawyer, to be assisted by a lawyer who provides state guaranteed legal aid services, free of charge, as well as, in cases permitted by law, to renounce at the lawyer and self-represent him/herself.

151 In particular, Arts. 64 (2)(4) and (2)(3) of the CPC specify that the suspect/defendant has the right when arrested to receive consultation from the lawyer before the first questioning as a suspect/defendant.

without the presence of the lawyer. Where a person is arrested in administrative proceedings, the right to legal assistance is similar to under criminal procedure.[152]

If not under arrest, defendants are summoned to the criminal investigation body or court by a written note or telephone, telegraph[153] or electronic means. The 'summons' must contain the name of the body that sent it, the name and procedural status of the summoned person, the object of the case, the address from where the summons was sent and the address where the person is summoned to appear, including the consequences of not appearing. The person shall be summoned in such a way so as to allow at least five days from the moment of receiving the summons until the person is to appear, except in urgent cases, when no such term is required.[154] The summons does not notify the defendant of the need to invite a lawyer.

In practice, the interviewed lawyers and criminal investigation officers noted that the most common way of summoning is via telephone, and the defendant is usually told to come with a lawyer or that a lawyer will be provided. If the defendant does not come with a lawyer, he/she is given time to call a lawyer of his/her choice, or a legal aid lawyer is invited. The extent to which this right is respected – namely waiting for the lawyer without questioning the defendant – is variable. The lawyers interviewed for this study noted that there are still cases when the defendant starts being questioned before the lawyer has arrived. A good lawyer would usually ask for a private meeting with the client and would decide whether the client should provide a statement, and would request the questioning to begin again, in effect dismissing everything that was stated prior to his/her arrival.

Both the suspect and the defendant have the right to have confidential meetings with his/her lawyer, without limitation as to number of meetings or their duration.[155] Any arrested suspect or defendant has the right to a private consultation with his/her lawyer prior to the first questioning. Moreover, the criminal investigation body is obliged to ensure that appropriate conditions exist for a confidential meeting between the apprehended person and his/her lawyer before the first interrogation.[156]

152 In administrative offence proceedings, the arrested person benefits from the rights provided for by law, including the right 'to be interrogated in the presence of a lawyer if s/he accepts or requests to be interrogated; to have private confidential meetings with the lawyer, without limitations of their number and time'; (Arts. 433 (4) and 384 (2)(f) and (g) of the Administrative Offences Code).

153 This is still provided by law, although in practice it is not used anymore.

154 Arts. 235–237 of the CPC.

155 Arts. 64 (2)(6) and 66 (2)(6) of the CPC.

156 Art. 166 (2/1) of the CPC.

The right to a private meeting with the lawyer is not routinely respected and is an exception rather than a rule. There are various reasons for not complying with this right, including the resistance of the criminal investigation bodies to allow a private discussion with the lawyer, the lack of appropriate facilities and the lawyers themselves not insisting on this right. The lawyers and clients usually talk in the corridors of police commissariats, or in the criminal investigation officer's office. Even if the officer leaves the room, there is always the fear that the conversation is recorded. Usually, the officers share their office – hence even if the relevant officer in charge leaves the room, other officers may still be present.

Naturally, this does not enable the lawyer to establish good contact with the client, particularly if he/she is a legal aid lawyer. The latter is provided to the client through the roster of legal aid lawyers, hence not chosen by the defendant, which is why legal aid lawyers are often perceived as 'police lawyers'. Many lawyers themselves do not routinely insist on a private conversation with the client.[157] A lawyer interviewed for this report explained that this was due both to the lack of appropriate facilities and the fact that 'often this is useless because the defendant has already told everything to the investigator before the lawyer arrived'.

Although the law seems quite clear regarding the right and duty to appoint a lawyer, this legal framework applies only once the criminal case is opened. Moldova still has the practice of carrying out investigative measures/actions before the criminal case is opened. These measures are not regulated in detail by the CPC, which allows the primary investigation bodies to take a statement from 'persons' without restriction, even though these persons may become suspects or other parties if a criminal case is subsequently opened.[158] These 'persons' do not have any procedural status at that

[157] The lawyers at the PDO in Chișinău have made it a rule to always have a private discussion with the client before the first questioning. They work in two sectors of the capital city, more or less with the same criminal investigation officers and prosecutors. They have several times raised with the commissar and the main prosecutor of these two sectors the issue of the lack of facilities for confidential meetings with the clients, and have been promised that measures will be taken to allocate special rooms for private communication with lawyers. No progress has been yet achieved in this respect, except that most of the officers at least do not refuse when the public defender asks for a private discussion with the client (which is still, however, usually held in the corridor).

[158] In particular, Art. 273 (2) of the CPC specifies that the primary investigation bodies have the right to 'apprehend the perpetrator, collect the *corpus delicti*, solicit information and documents necessary for detecting the crime, *subpoena people and obtain from them declarations* (emphasis added), proceed to the evaluation of the damage and carry out any *other actions that cannot be delayed* (emphasis added), with drafting the protocols about the activities carried out and the detected/ ascertained circumstance'.

stage, and practically none of the rights guaranteed to a party within the criminal process. Hence, even if the person interviewed may later on become a suspect, when interviewed by the primary investigation body, he/she is not provided with the opportunity to call or have a lawyer appointed, nor with information about the right to remain silent and other procedural guarantees available to the suspect/defendant. Whether these statements are included in the case file varies from case to case.

The lawyers interviewed for this study confirmed that these statements are usually included in the case file. By law, this information should not be accepted as evidence. However, once this information is included in the case file, this already influences the judge. The lawyer can object to, and request the exclusion of such statements, if included in the case file, but this rarely happens. Even if these statements are not included in the case file, the primary investigation body has already used the information provided by the person summoned according to this procedure in order to collect additional information, including information provided by a person who subsequently may become the accused in the case.

3.2.1 Arrangements for appointing lawyers to represent arrested suspects/defendants

Every suspect or defendant has the right to be assisted by a lawyer *from the moment he/she is informed about the suspicion or charge* (the moment when he/she is informed about the procedural act that recognised them as such). Where a person is arrested, the lawyer shall be present within three hours from the moment of arrest.[159] If the person does not have a lawyer of his/her choice, a duty lawyer is assigned. The procedure for assigning the duty lawyer is provided in detail in the CPC, as well as the NLAC regulations.[160] If the person is detained during the office hours of the territorial offices of the NLAC, the criminal investigation body requests them to appoint a lawyer. Outside working hours and during weekends and public holidays, the criminal investigation body directly contacts the duty lawyer from a list provided on a monthly basis by the territorial office to each police commissariat, prosecution office and the courts (for whom it is relevant for pre-trial detention hearings).

159 Art. 166 of the CPC; Art. 378 (4) of the Administrative Offences Code.

160 Art. 166 of the CPC; Art. 26 (2) of the State-guaranteed Legal Aid Law, Regulation of the National Legal Aid Council No. 8 of 19 May 2009 Regarding the Approval of the Regulation Regarding the Procedure for Requesting and Appointing a Lawyer for Providing Urgent Legal Aid Services, entered into force on 6 July 2010.

The extent to which lawyers obtain prompt access to their clients varies. The criminal investigation bodies, prosecutors and lawyers interviewed for this report said that, following the introduction of the urgent legal aid scheme and duty lawyers' scheme respectively, prompt access to a lawyer has considerably improved, for two main reasons. First, lawyers plan their duty service days, and hence can be available at short notice. Secondly, the criminal investigation body has the list of the lawyers and can contact them directly. If the lawyer does not respond without a justifiable reason, the territorial office can exclude that lawyer from the list.

However, this scheme functions in cases where the criminal investigation body is diligent and has no interest in delaying access to a lawyer. When this 'interest' is present, the rules relating to appointment of a duty lawyer are generally not followed, with the time of arrest sometimes deliberately changed so that the arrest protocol appears to formally comply with the law.

3.2.2 The right to choose a lawyer

Defendants have the right to choose their lawyers, except in legal aid cases. With regard to who can act as a defence lawyer in a criminal procedure, the only restriction is he/she complies with the CPC requirements.[161] As noted above, there is no right to choose an individual lawyer for legal aid clients. The defendant can only choose among the lawyers that are included in the roster of private lawyers providing legal aid services on request (legal aid lawyers). Even if the defendant can request the appointment of a certain lawyer, the territorial office of the NLAC is not bound by that request.

The law provides that, when appointing a lawyer,

> ... the coordinator of the territorial office will take into account the legal aid applicant's request to appoint a certain lawyer, his/her level of engagement in other legal aid decisions, as well as other relevant circumstances.[162]

[161] Art. 67 (2) of the CPC states that a defender in a criminal procedure can be: (1) the lawyer; (2) other persons sanctioned by law to possess the competence of a defender; or (3) a lawyer from abroad when assisted by a lawyer from Moldova. Since there are no provisions regarding the competence of other persons to act as a defender, the suspect/defendant can only choose a lawyer who qualified to provide legal assistance in criminal cases, meaning only licensed lawyers and members of the Union of Lawyers. Since 2010, trainee lawyers can also provide legal assistance in courts, including the Courts of Appeals.

[162] Art. 27 (2) of the Legal Aid Law. The explanatory decision of the SCJ on the right to defence, 1998, also states on p. 5 that the suspect/defendant has a right to request a certain defender only when s/he intends to sign a contract with him/her. Perhaps the same will be provided in the new SCJ decision.

The right is even more restricted, and rightly so, for urgent legal aid cases, where the lawyers are provided according to the duty schedule compiled by territorial offices at the end of the month for the following month. If a legal aid lawyer is appointed and the defendant instead wishes to be represented by a privately retained lawyer, the legal aid lawyer must be substituted by the private one, who is paid by the client.[163]

3.2.3 Replacement of a lawyer

The chosen or appointed lawyer can be replaced during the criminal procedure by the lawyer's office or the relevant Territorial Office of the NLAC, at the request of the criminal investigation body or court, in the following circumstances: (1) if the chosen lawyer cannot be present in the case of arrest/apprehension, the presentation of the charge or the questioning the suspect/defendant; (2) if the chosen lawyer cannot participate in the procedure during the five day period from the time he/she was informed about it; (3) if the prosecutor or court determine that the lawyer providing state guaranteed legal aid services is not able to ensure an effective defence for the suspect/defendant.[164]

In the last two situations, the criminal investigation body or court can suggest to the suspect/defendant that he/she invite another lawyer to represent him/her. This is particularly necessary if the lawyer is not providing an effective defence, as often clients do not understand their rights and their expectations are therefore very low. At the same time, this possibility may also leave space for abuse by the criminal investigation body, particularly if it wishes to replace lawyers who are too active and zealous. Further empirical research is necessary in order to determine if this provision is misused in practice. The lawyers interviewed for this study did not refer to any case either where they were replaced or it was suggested to their client that he/she find another lawyer.

A legal aid lawyer can also be removed from the criminal procedure if the person that he/she defends has real reasons to doubt the competence or good will of the lawyer, and submits a request for his/her removal from the procedure.[165] The territorial offices of the NLAC can replace a lawyer appointed to provide qualified legal aid services in the following circumstances: (1) at the written and justifiable request of the

163 See p. 5 of the Plenary SCJ 1998 (on the right to defence).
164 Art. 70 (4)–(5) of the CPC.
165 Art. 72 (2) of the CPC.

applicant[166] for legal aid; (2) at the written and justifiable request of the lawyer; or (3) when there is a conflict of interest or other circumstances such that the lawyer cannot provide legal aid services for that case.[167]

3.2.4 The right to defend oneself and the waiver of the right to a lawyer

Any defendant has the right to renounce his/her right to be represented by a lawyer and instead choose to defend him/herself,[168] but this right is conditional upon the approval of the prosecutor (at the pre-trial stage) or court (at the trial stage). The prosecutor or court can accept the renunciation of the lawyer only where it is willingly requested by the defendant, on his/her own initiative, in the presence of a lawyer who provides state-guaranteed legal aid services. It is not accepted when motivated by a lack of financial means to pay for legal assistance or is dictated by other circumstances. The prosecutor and court also have the right not to accept the suspect/defendant's renunciation of a lawyer in cases where a defence lawyer is mandatory,[169] as well as other cases where the interests of justice so require.[170]

The determination of whether the interests of justice require the mandatory assistance of a lawyer falls within the prosecutor's or judge's discretion and depend on the following circumstances: (1) the complexity of the case, (2) the suspect's/defendant's capacity to defend him/herself; and (3) the gravity of the crime for which the person is suspected/charged and the relevant sanction.[171] At the preparatory hearing, the court announces the name of the lawyer and verifies if the defendant accepts this lawyer's legal assistance, renounces him/her to replace him/her with another lawyer, or wishes to defend him/herself.[172]

166 The applicant may be the suspect/defendant, as well as the criminal investigation body, court or a family member of the suspect/defendant; Arts. 19 and 25 of the Legal Aid Law, which refer to the persons who can benefit from legal aid and the procedure for applying for legal aid. The model legal aid application also has two entries: one for the applicant/person who requests legal aid, and the name of the beneficiary, who is the person who will receive the legal aid. The applicant and the beneficiary can be the same person where the suspect/defendant him/herself applies for legal aid.

167 Art. 27 (4) of the Legal Aid Law.

168 The right to renounce the lawyer and defend oneself is provided in Arts. 64 (2)(5) (concerning the rights of the suspect) and 66 (2)(5) of the CPC (concerning the rights of the defendant).

169 Art. 69 (1) (2–12) of the CPC; see above for the full text.

170 Art. 71 of the CPC.

171 Art. 71 of the CPC.

172 Art. 361 of the CPC.

In practice, defendants rarely represent themselves, the tradition being to require the presence of a lawyer in all criminal cases. The (largely outdated) SCJ explanatory decision on the right to defence[173] does not specifically refer to the right to defend oneself. The draft new decision is similar in that respect.[174]

3.2.5 The consequences of not respecting the right to a lawyer

The CPC provides for a general right to a lawyer in a criminal case, as well as the mandatory presence of a lawyer at specific procedural actions. For procedural actions where the presence of a lawyer is mandatory (not to be confused with mandatory representation by a lawyer under Art. 69 of the CPC as discussed above), the lack of a lawyer results in the procedural act being null and void.[175] Such a breach can be raised at any stage of the case and should be considered by the court, including *ex-officio*, at any stage if it is necessary for the truth about and fair resolution of the case.[176]

For the other procedural actions, if the defendant does not require the presence of his/her lawyer, the lack of the lawyer does not have any consequences with respect to the validity of the procedural action. In theory, the defence could challenge the validity of the procedural action based on the general right to be informed of the right to a lawyer, and hence the failure of the criminal investigation body to inform him/her about the right to a lawyer for that particular procedural action. At the court stage, this is not relevant since the lawyer must be present at all hearings and the consequences for not adhering to the right to a lawyer are therefore clearer than at the criminal procedure stage.

The most important procedural action where the presence of a lawyer is mandatory is the questioning of the defendant. The CPC expressly provides that the questioning of a defendant can be carried out only in the presence of a chosen lawyer, or a lawyer who provides state-guaranteed legal aid services. Hence, all statements must be taken only after the lawyer has arrived. Prior to that moment, the person/body that arrested the defendant can only ask general questions in order to identify the person.[177]

173 Plenary SCJ 1998.

174 Draft developed in 2010, but not yet finalised.

175 Art. 251 (2) of the CPC.

176 Art. 251 (3) of the CPC.

177 See, in particular, Art. 104 (1) of the CPC, which specifies that interrogation of the suspect, accused or defendant can only take place in the presence of a chosen lawyer, or a lawyer who provides state-guaranteed legal aid services. Statements taken without the presence of a lawyer, or

In practice, statements from suspects/accused are taken without a lawyer being present. One could distinguish several trends: (1) such statements are taken during the period in which the investigator is deciding whether to commence a criminal case. These statements are called 'explanations', which do not have the status of 'evidence' (the problems associated with questioning persons before the criminal case has been opened are discussed above); (2) after an arrest, statements are still taken from the defendant by the criminal investigator or by the criminal police officers until the lawyer arrives. In such cases the subsequent interview of ther defendant in the lawyer presence is largely based on the information collected prior to the lawyer's arrival. The statements obtained without the presence of a lawyer have no legal status and cannot be used in the case. For that reason, lawyers are subsequently asked to sign the respective interview protocols, the lawyer's signature practically validating the protocol.

Much therefore depends on the lawyer's attitude at this stage. Although it seems to be less widespread, the phenomenon of 'pocket lawyers' – lawyers who sign without having been present at the interview – still continues. In practice there remain many problems, particularly when the client does not trust the lawyer, and trusts the police, and therefore does not inform the lawyer about the informal 'discussions' he/she has had with the police, or where the police have exercised pressure (physical or psychological) on the defendant and the defendant is not willing to challenge the given statements.

Examples of procedural actions during the criminal investigation in the presence of the defendant, and for which the presence of a lawyer is not mandatory, include identification (either the defendant is identified or is asked to identify someone else) and participation of the defendant in an experiment.[178] In these cases, the defendant can ask for the presence of his/her lawyer, in which case the criminal investigation body must wait for the lawyer, and a breach of this right renders the act null and void.

with the use of force or other illegal means, are to be excluded from the case file or as evidence by the judge. Art. 94 of the CPC expressly provides that 'in the criminal proceedings, it cannot be admitted as evidence, and consequently, such are excluded from the case file, the evidence obtained through: use of force, threats or other coercive means, through violation of the rights and liberties of the person; breach of the right to defence of the suspect, accused, defendant, injured party, witness; with essential breaches of the present code by the criminal investigation body'. The Administrative Offences Code provides that evidence obtained through methods that involved significant breaches of the right to defence cannot be used as evidence (Art. 425 (6) (c)). These CPC rules are also applicable for administrative offence proceedings.

178 An experiment is a type of evidence collection means used for verifying or clarifying some data that is important for the case and can be reproduced in an experiment or other investigative measure. It is provided for by Art. 123 CPC.

The main difference in terms of consequences from actions where the presence of a lawyer is mandatory is the moment when the defence can challenge the legality of the respective action. If the lawyer was not present at the respective procedural action, he/she can challenge it when he/she has received the copy of the respective procedural act (during the criminal investigation, or at the end of the criminal investigation), as opposed to being able to raise it at any stage of the case.

There has been little research to date in Moldova as to how the right to legal assistance is implemented in practice. A victimisation survey of 2010 found that only 10 per cent of people called to or detained by the police say they were allowed to call a defence attorney. Failing to allow a defendant to call a defence attorney was also directly linked to mistreatment: while 18 per cent of those allowed to call a defender were mistreated, those not allowed to do so were twice as likely to be mistreated (36 per cent).[179] The survey questions were phrased in a non-legalistic way, in order to be clear and capture all contacts that the respondents had with the police.

This particular data does not relate only to those persons who were arrested, but rather to those who had *any* contact with the police, be it arrest, questioning as a witness or informal questioning ('explanations') by police prior to opening a criminal case, as well as other instances when people are called to the police. Hence, although the data must be interpreted with caution when it comes to the right to legal assistance in criminal cases only, it does indicate that the right to legal assistance is routinely breached in Moldova. Perhaps what the data tells us is not that the lawyer was not called at all, but rather that the lawyer was called only after a statement was made, or at least a conversation with the police had taken place. This is in line with the interview data, which shows that informal questioning outside the criminal procedure, and 'discussions' with the arrested people prior to the lawyer's arrival, still continue.

Another recent study also indicates problems in respect of the right to a lawyer at the arrest stage, based upon the available statistical data for 2009. According to the data, there were 3,467 persons arrested in 2009 (criminal and administrative offences procedure), and only 1,500 decisions appointing duty lawyers to provide urgent legal aid.[180] In 2010, according to the Prosecutor's General Office, there were

179 Redpath 2010, p. 36

180 See Gribincea et al., *Cercetare cu privire la instituția reținerii în Republica Moldova* (Study regarding arrests in the Republic of Moldova), Soros Foundation–Moldova, Chișinău: Cartier, 2011 (in Romanian), available at: http://www.soros.md/files/publications/documents/Cercetare%20retinere.pdf.

3,367 arrested persons,[181] with the territorial offices issuing 1,811 decisions to provide urgent legal aid.[182] One possible explanation for the low number of decisions would be that the remaining arrested suspects (57 per cent in 2009 and 46 per cent in 2010) had hired their own private lawyer. However, this explanation is slightly at odds with the estimates of the criminal justice actors interviewed for this report: that as many as 90 per cent of defendants receive legal aid rather than hire private lawyers. In any event, these statistics only relate to the assignment of a duty lawyer and not to the actual moment when the lawyer has intervened in the case.

3.3 Procedural rights

3.3.1 The right to release from custody pending trial

As Moldova has ratified the ECHR, the right to release from custody pending trial is incorporated in the Moldovan law. However, in practice, this right is not yet well respected.

One of the first cases brought under Article 5 of ECHR concerned the provision of the CPC that prohibited release of defendants charged with serious crimes. This was held to be in violation of the ECHR and the CPC was consequently amended shortly thereafter, although in terms that are still not fully compliant with the Convention provisions.[183]

Another systemic problem regarding pre-trial arrest in Moldova stems from the general lack of a justification for the arrest warrant.[184] The first judgments concerning the justification of arrest warrants were delivered in October 2005,[185] when the ECtHR noted for the first time that the domestic courts:

181 Prosecutor General's response regarding criminal justice statistics following a request for information by the Soros Foundation–Moldova in May 2011.

182 NLAC Annual Activity report for 2010, available at: http://www.cnajgs.md.

183 ECtHR 11 July 2006, *Boicenco v. Moldova*, No. 41088/05. Art. 191 para. (1), in the old version, provided that '(1) A provisional release under judicial control of a remanded person, or of a person in respect of whom a request for detention on remand has been made, may be granted by the investigating judge or by a court only in case of offences committed through negligence or intentional offences punishable with less than 10 years of imprisonment.' Art. 191 was amended to exclude the prohibition of provisional release under judicial control for offences committed with intention that were punishable by more than 10 years of imprisonment. However, it still excludes the defendants that have active criminal record for serious, very serious and exceptionally serious crimes.

184 ECtHR 4 October 2005, *Becciev v. Moldova*, No. 9190/03; ECtHR 4 October 2005, *Sarban v. Moldova*, No. 3456/05.

185 *Ibid.*

> ... did not make any record of the arguments submitted by the applicant or made a short note of them and did not deal with them. They limited themselves to repeating in their decisions in an abstract and stereotyped way the formal grounds for detention provided by law. These grounds were cited without any attempt to show how they applied to the applicant's case.[186]

The widespread practice of *poorly justified pre-trial arrest decisions* led to an explanatory note issued by the Plenary SCJ, which explained that an arrest warrant should be properly justified in light of the ECHR standard.[187] However, the practice of not justifying the pre-trial arrest decisions has continued, as have violations of Article 5 of the ECHR.[188] In a judgment of 6 November 2007, the ECtHR noted with concern:

> ... the recurring nature of the problems concerning the relevance and sufficiency of reasons for remand in the case of Moldova. It notes that it has found a violation of this kind for the first time in the cases of *Sarban* and *Becciev v. Moldova* ... and that regrettably, the problem continues to persist.[189]

Similar violations were found in a judgment in 2011.[190]

Although statistically there has been some progress in reducing the pre-trial arrest rate, for example from 36.2 per cent of pre-trial detainees out of the total number of detainees in 2006, to 21.1 per cent in 2011, this represents only modest progress. The

186 *Sarban v. Moldova*, para. 101.

187 Plenary SCJ 2005 (on preventive and home arrest).

188 ECtHR 13 March 2007, *Castravet v. Moldova*, No. 23393/05; ECtHR 27 March 2007, *Istratii and Others*, Nos. 8721/05, 8705/05 and 8742/05; ECtHR 13 November 2008, *Malai v. Moldova*, No. 7101/06; ECtHR 7 April 2009, *Straisteanu and Others v. Moldova*, No. 4834/06.

189 ECtHR 6 November 2007, *Musuc v. Moldova*, No. 42440/06, para. 43.

190 See ECtHR 8 February 20011, *Ignatenco v. Moldova*, No. 36988/07, para. 82, where the Court noted: 'The Court notes at the outset that the reasons relied upon by the domestic courts in their decisions to remand the applicant in custody and to prolong his detention were, for the most part, limited to paraphrasing the reasons for detention provided for by the Code of Criminal Procedure without explaining how they applied in the applicant's case (see para 29, 33–35, 38–40, 43, 47 and 49 above). The Court therefore does not consider that the present case can be distinguished from the above-cited cases of *Sarban* and *Becciev v. Moldova* in which the Court found a violation of Article 5 § 3 of the Convention on account of the lack of relevant and sufficient reasons in the domestic courts' decisions.' Moreover, the Court has noted 'with grave concern that reliance on its case law before the domestic courts was thought to amount to an attempt to undermine the normal conduct of domestic proceedings' (para. 84).

lawyers interviewed for this study have noted that the practice of not justifying the arrest warrant continues, and the main factor that determines pre-trial detention is the gravity of the (alleged) offence. They also suggested that corruption plays a role in whether a defendant might be released.

Apart from the poor level of justification of pre-trial arrest warrants, defence rights are also significantly curtailed at the pre-trial arrest hearings, due to the established practice regarding the evidence that is submitted to the lawyer. Although the lawyer has the right to see the materials presented by the criminal investigation body in court for the confirmation arrest or the necessity of pre-trial arrest,[191] the relevant provision outlining the pre-trial arrest hearing procedure is more vaguely worded regarding the obligation of the criminal investigation body to provide the relevant materials to the lawyer. Hence, the current provisions only state that:

> ... presenting the pre-trial arrest warrant request in court, the prosecutor ensures the participation at the hearing of the defendant, informs the lawyer and the legal representative of the defendant.[192]

This provision has been interpreted in practice such that prosecutors do not send the materials regarding the pre-trial arrest warrant request to the defence. Moreover, the practice seems to have taken two separate pathways in terms of what is presented to the investigative judge: some prosecutors present the pre-trial arrest warrant request and the entire case file; others present only the pre-trial arrest warrant request and the relevant materials that support the request. The CPC provides that the prosecutor should attach to the pre-trial arrest warrant request 'the materials that confirm the justification of the request'.

All the lawyers, criminal investigators and prosecutors interviewed for this study confirmed that the lawyer only gets to see the pre-trial arrest warrant request, and then only when arriving in court to represent the defendant. Only those lawyers who insist on receiving the confirming documentation might receive some additional material, but this is an exception. In one of police stations outside Chișinău, the criminal investigators interviewed for this report were very firm in asserting that the lawyers should not get any materials, as this runs contrary to the principle of the confidentiality of the criminal investigation. The lawyers interviewed for this report

191 Art, 68 (2)(3) of the CPC.

192 Art. 307 (2) of the CPC.

stated that all their requests for the materials upon which the prosecutor seeks the pre-trial arrest are futile, and many lawyers simply gave up making such a request. Some mentioned that the ECtHR cases against Moldova in that respect do not appear to have made a difference.

It seems that the current state of affairs is due to an incorrect interpretation of the principle of the confidentiality of the criminal investigation, the role of a defence lawyer and the defendant's rights. It is also due to the well-established and poor practices within the prosecution office and the general passiveness of lawyers. The CPC is currently being amended in order to expressly include the obligation of the criminal investigation body to provide the defence with all materials that support the pre-trial arrest warrant request. Hopefully, this should lead to changes in practice, although more needs to be done in order for such changes to become effective.

3.3.2 The right of a defendant to be tried in his/her presence

The participation of the defendant at the trial at both the first and appeal instances is mandatory, except: when the defendant absconds from court; when the defendant, being under arrest, refuses to be brought to court and his/her refusal is confirmed by his/her lawyer; examination of cases regarding minor crimes: or when the defendant wishes the case to be examined in his/her absence.[193] When the defendant is not present in court, participation of a lawyer and, depending on the case, of the defendant's legal representative[194] is mandatory. The court can proceed with the examination of the case in the absence of the defendant only when the prosecutor has presented credible evidence that the defendant has expressly and willingly given up at his/her right to be present in court and to defend him/herself, or that the defendant has absconded.

The defence can appeal the decision, and can also submit a cassation request, if the case was examined without the participation of the defendant and/or his/her lawyer, when his/her presence was mandatory; or was examined at the first or appeal instance without legally summoning the defendant; or, if summoned, it was impossible for him/her to attend and inform the court about this impossibility.[195]

193 Art. 321 of the CPC.

194 Legal representatives are the parents, adoptive parents, tutors, the defendant's or victim's wife/husband, as well as representatives of the institutions under whose responsibilities these persons are placed.

195 Art. 427 of the CPC.

There is no research on this issue. The lawyers and judges interviewed for this report did not note any particular problems regarding the right of the defendant to be tried in his/her presence.

3.3.3 The right to be presumed innocent

The presumption of innocence is clearly guaranteed under domestic law for all accused.[196] In practice, however, the presumption of innocence is not always respected. The first, most common, situation of violation is the case when public authorities make statements about the guilt of the person before it is established in a judicial decision. For example, in *Popovici v. Moldova*, the ECtHR found a violation of Article 6 (2) of the ECHR, because the statements of a public official were:

> ... clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority.[197]

The OSCE has also noted instances where the judges made improper remarks that were incompatible with the presumption of innocence, or were not listening carefully to the parties, giving the clear impression that the verdict had already been reached. The OSCE monitors have also noted instances where prosecutors have used the term 'criminal' while addressing the defendant. The practice of keeping defendants handcuffed or in metal cages was also regarded as a potential breach of the presumption of innocence.[198]

As raised by one lawyer interviewed for this report, the practice in Moldova relating to acquittal might also be an indication of an erroneous understanding by judges of the presumption of innocence. An acquittal leads to the full rehabilitation of the defendant. Article 390, para. 1 (3) of the CPC states that acquittal is justified when the incriminated actions do not contain all the elements of the crime, and

196 Art. 21 of the Constitution and Art. 8 of the CPC.

197 See ECtHR 27 November 2007, *Popovici v. Moldova*, Nos. 89/04 and 41194/04, para. 79. In this case, the Secretary of the Superior Security Council of Moldova, Mr Valeriu Gurbulea, gave an interview to a Russian-language newspaper, in which he declared, *inter alia*: 'The leaders of a very significant criminal gang, Micu, made very energetic attempts to get him released from detention, and only the personal involvement of the president cut short those attempts.'

198 OSCE Trial Monitoring Programme for Moldova 2009, pp. 60–62.

Articles 332 and 350 provide the possibility of terminating a criminal process in such circumstances. However, in such cases, the courts tend to adopt decisions about terminating the criminal process, rather than actually acquitting the person. Acquittal rates in Moldova are therefore quite low – for example, in 2008 it was 2.11 per cent, in 2009 it was 2.27 per cent, and in 2010 it was 2.49 per cent.[199]

Some commentators have noted that there is no effective remedy at the national level for breaches of the right to the presumption of innocence, apart from Article 385, paragraph (4) of CPC. This provides that, if certain violations of the rights of the indicted person are found to have occurred during the criminal investigation or examination of the case by a court, and the person guilty of these violations was identified, the court would examine the possibility of reducing the sentence of the convicted person as compensation for these violations.[200]

Further, the same commentators have raised the concern that the current bail process in Moldova may constitute a breach of the principle of presumption of innocence. In particular, Article 192 of the CPC requires that the accused person 'ensures the restoration of damage caused by the offence' as a precondition to being provisionally released on bail. This requirement indirectly means that the person is considered guilty of causing the respective damage and, consequently, of committing the charged the crime.[201] The CPC should be amended in this respect as well.

3.3.4 The right to silence

The right to silence is expressly provided for by the domestic law.[202] There is no legal provision that would allow a judge to draw any inferences from a defendant's silence. However, the application in practice of this right is problematic. For example, the practice of including in the case file the explanations collected by the primary

199 Prosecutor General Reports for 2009 and 2010.

200 Conclusion drawn by Rotaru, Dolea and Cretu, *Study on Comprehensive Analysis of the Legislative-Institutional Reasons of Sentencing in the Republic of Moldova by the ECHR*, Chișinău: OSCE Mission to Moldova, 2009, (in English and Romanian), p. 50.

201 *Ibid*, pp. 34–35.

202 Art. 21 of the CPC states that: '(1) No-one can be forced to give statements against him/herself or his/her closed relatives, husband, wife, fiancée, fiancé or to recognise his/her guilt. (2) The person that is proposed by the criminal investigation body to give statements against him/herself or closed relatives, husband, wife, fiancée, fiancé has the right to refuse to give these statements and cannot be held responsible for this'.

investigation bodies before the criminal case was opened may be interpreted as an infringement of this right, because the primary investigation bodies do not have the obligation (and in practice they do not do this) to inform the person they are talking to about his/her right to remain silent, or at least of the possibility that the information might subsequently be used against him/her in court.[203]

The lawyers interviewed for this study have also noted that the right to remain silent is not adequately respected in practice. For example, judges can decide to arrest a defendant based, among other reasons, on the fact that he/she did not make any statements, thus hindering the investigation. Similar violations were found in *Turcan and Turcan v. Moldova*, where the ECtHR stated that:

> ... the Court is particularly struck by the reasons for D.T.'s detention starting on 8 November 2005 ... , namely that he refused to disclose to the prosecution the names of witnesses who could prove his innocence at trial. It considers that this not only cannot constitute a ground for detaining a person, but it is in breach of the accused's right to remain silent as guaranteed by Article 6 [of] the Convention.[204]

Another suggested infringement arise where the judges critically/negatively assess the statements of the defendant in court, after he/she had exercised the right to silence during the pre-trial stage, and form the view that he/she had something to hide at that time.[205]

According to the current CPC, the defendant can lie without liability. The amendments to the CPC (submitted to the Parliament at the end of 2011) introduce criminal liability for lies by the defendant, hence providing the defendant with two options – either to tell the truth or keep silent.

3.3.5 The right to reasoned decisions

The CPC requires that judgments are legal, well grounded and reasoned (justified).[206] The judge should issue a reasoned decision when examining requests for the application

[203] See, in this respect, Dolea, *Drepturile persoanei in probatoriul penal. Conceptul promovarii elementului privat* (The rights of the person in the process of bringing evidence in criminal procedure. The concept of promoting the private element), Chișinău: Cartea Juridica, 2009, p. 16.

[204] See ECtHR 23 October 2007, *Turcan and Turcan v. Moldova*, No. 39835/05, para. 51.

[205] Interview with Vladislav Gribincea, lawyer, executive director of the Legal Resources Centre, Moldova, 1 March 2011; Valeriu Plesca, lawyer, 2 August 2011.

[206] Art. 384 (3) of the CPC.

of a pre-trial or home arrest, or their prolongation.[207] Although there is no express requirement regarding other decisions issued by the court,[208] the same rules should be applied to all decisions issued by the court – that they should all be reasoned.

Having reasoned court judgments is a problem in Moldova, particularly with decisions regarding the application of pre-trial detention warrants. As noted in section 3.3.1 above, the ECtHR has mentioned in several cases the recurring problem of Moldovan domestic courts limiting themselves to a simple paraphrasing of the reasons for detention provided for by the CPC, without explaining how they were applicable in the particular case.[209] The ECtHR has also found Moldova to be in breach of Article 6, paragraph 1 due to absence of sufficient reasons in the court decision convicting a defendant for a crime.[210]

The OSCE monitors have noted a widespread lack of justifiable reasoning for declaring court hearings closed to the public. Judges often only state that the hearing was being closed 'to protect the victim's privacy' or 'in the interests of justice'.[211] It is also not uncommon to have decisions on a case that are not reasoned. The judges point to the evidence examined in the court, but a detailed analysis of such evidence and the relevant circumstances is often lacking. According to lawyers interviewed for this study, judges often might not even give an answer to the parties' arguments, particularly those of the defence.

3.3.6 The right to appeal

The law provides sufficient mechanisms for exercising the right to appeal. Defendants can appeal the decisions of criminal investigation bodies with which they disagree to the investigative judge, after the complaint is heard by the prosecutor if the defendant

207 Arts. 307 (4) and 308 (4) of the CPC.

208 Moldovan courts adopt four types of decisions: *sentinte* (judgments – decisions of the first instance court), *decizii* (decisions – by appeal, cassation, cassation in annulment and re-hearing of the case by the appeal or cassation court), *hotarari* (decisions of the Plenary SCJ) and *incheieri* (all the other decisions).

209 See, for example, ECtHR 4 October 2005, *Sarban v. Moldova*, No. 3456/05 ECtHR 11 July 2006, *Boicenco v. Moldova*, No. 41088/05; ECtHR 23 October 2007, *Turcan and Turcan v. Moldova*, No. 39835/05, ECtHR 8 February 2011, *Ignatenco v. Moldova*, No. 36988/07.

210 See ECtHR, 8 April 2008, *Grădinar v. Moldova*, No. 7170/02, paras. 114–117 and ECtHR, 18 May 2010, *Vetrenko v. Moldova*, No. 36552/02, paras. 55–58 (in both cases the national court remained silent to a series of fundamental issues regarding the case, including the alibi of the defendant for the presumed time of the crime.

211 OSCE Trial Monitoring Programme for Moldova 2009, p. 57.

disagrees with the prosecutor's decision.[212] The decision regarding pre-trial or home arrest, or their prolongation, is subject to appeal to the hierarchically superior court, which comprises a panel of three judges.[213] Court judgements are subject to appeal and the decisions regarding specific issues can be either appealed separately or together with the judgment, depending on the nature of the decision. The CPC does not set out any specific reasons for an appeal of a decision of the first instance court, but does in respect of appeals from decisions of the appeal court (cassation).

In practice there are no impediments to exercising the right to appeal. However, the right to appeal is negatively affected where decisions or judgments are poorly reasoned.

The practice of examining cases on appeal has been raised in several applications to the ECtHR. The latter has found that the practice of only reading the witness statements as recorded at the pre-trial stage and convicting a person in such circumstances is in direct violation of the ECHR (see also Section 1.3 above).[214] In another case, the ECtHR found that

> ... having quashed the decision to acquit the applicant reached at first instance, the Supreme Court determined the criminal charges against the applicant, convicted him on almost all charges and sentenced him to life imprisonment, without hearing evidence from him in person and without producing evidence in his presence at a public hearing with a view to adversarial argument ... the Court does not consider that the issues to be determined by the Supreme Court when convicting and sentencing him – and, in doing so, overturning his acquittal by the Court of Appeal – could, as a matter of fair trial, have been properly examined without a direct assessment of the evidence given by the applicant in person and by certain witnesses. Indeed, this appears also to have been contrary to Articles 451 and 436 of the Code of Criminal Procedure.[215]

Regarding the right to appeal, criminal justice actors complain about the high rates of appeal against court judgments, which they see as a sign of lack of public trust in the system. This lack of trust is perpetuated by the superficial appeal proceedings at the Courts of Appeals, due to excessively high workloads.[216]

212 Art. 300 (2) of the CPC.

213 Art. 312 of the CPC.

214 See ECtHR 5 July 2011, *Dan v. Moldova*, No. 8999/07, paras. 32–34.

215 See ECtHR 27 November 2007, *Popovici v. Moldova*, Nos. 89/04 and 41194/04, paras. 72–73.

216 See Redpath and Hriptievschi 2009, pp. 52–45. Also see the OSCE Trial Monitoring Programme, for Moldova 2009, which mentioned that the Courts of Appeals and Supreme Court of Justice examine 25–30 cases per panel per day, examining several cases in a row and then breaking for deliberation on all these cases together, p. 35.

3.4 Rights relating to an effective defence

3.4.1 The right to investigate the case

There is no express right regarding the collection of evidence by the defence. The defendant and defence lawyer have the right to collect information and present it at the pre-trial stage and in court.[217] However, the information presented does not constitute evidence, unless the criminal investigation body at the pre-trial stage, or the court at the court stage, recognise a certain piece of information as evidence. The lawyer can talk to any party without any limitations, subject to the obligation not to influence a witness. There is no express limitation as to whom the lawyer may talk. However, since the lawyer cannot collect evidence him/herself, this right is *de facto* limited, as the witness or the expert to whom the lawyer talks are not obliged to produce evidence. Any statements obtained through this process are not admitted as evidence unless the witness is also questioned by the criminal investigation body.

There is no general right of the defendant or defence lawyer to participate at the investigation actions carried out by the criminal investigation body, although the defendant has the right to participate in the procedural actions that he/she has requested.[218] The defence lawyer has the right to participate at procedural actions if invited by the criminal investigation body, or where he/she or the defendant has requested the particular action. This right is not, however, respected in practice. The lawyers interviewed for this study said that they often ask the criminal investigation body to question a certain witness. The criminal investigation body usually refuses, but then contacts the respective witness and invites him/her for questioning. Often, defence witnesses provide incriminating evidence after being questioned by the police. For this reason, the lawyers interviewed for this report have admitted that they do not usually ask for the questioning of defence witnesses during the criminal investigation (pre-trial stage) as they risk losing the witness to the prosecution. When there is a danger of, for example, the witness leaving the country, lawyers usually require the criminal investigation body to hear the respective witness.

Regarding various documents, lawyers usually try to collect them both during the criminal investigation and trial stages but often have problems of access to the relevant documents. The Law on the Bar provides that the lawyer has the right to:

217 The relevant legislation is Arts. 64 (2)(13); 66 (2)(14), (15), (17); 68 (1) (4), (5), (7); 109; 327; 329; 350 (3) and (4) of the CPC; Art. 53 (1)(c) of the Law of the Bar.

218 Arts. 66 (2)(12) and 64 (2)(12) of the CPC.

> ... solicit information, references and copies of acts, necessary for providing legal assistance, from the courts, law enforcement bodies, public authorities, other organizations, *which are obliged to issue the requested acts, according to the legislation in force.*[219]

The phrase 'according to the legislation in force' was added in October 2011, as a result of a new law on data protection. The lawyer's right to access information had already been difficult in practice, as public and private authorities usually refuse to provide information to the lawyer on the basis that the required information is protected by data protection law. The new law on data protection, coupled with the respective amendment in the Law on the Bar, is believed by many lawyers to create additional barriers for lawyers to access information necessary to providing quality legal assistance. However, lawyers are able to obtain information through the criminal investigation body or the court. Yet, some lawyers interviewed for this study complained that, at the pre-trial stage in particular, lawyers' requests for information are often rejected by prosecutors with no justification.

Overall, the lawyers interviewed for this study consider that the limited role of the lawyer, both in law and practice, to collect evidence for their clients is the most serious impediment for lawyers to actively defend their clients, and is one of the reasons why the majority of lawyers do not do much at the investigation stage besides participating at the procedural actions initiated by the criminal investigation body.

As for mechanisms for exclusion of evidence, the defence can challenge evidence, as described below, but as such there is no clear mechanism that would guarantee the physical exclusion of data that is not admitted as evidence.[220]

At the pre-trial stage, the defence can submit complaints regarding the action or inaction of the criminal investigation body, which should be examined by the prosecutor (or the hierarchically higher prosecutor if the complaint concerns the prosecutor) within three days.[221] The prosecutor's decision can be appealed to the investigative judge, who can examine complaints regarding certain actions, as well as 'other actions that affect the constitutional rights and freedoms of the person'.[222] In practice, any complaint may be submitted to the investigative judge, including

219 Art. 53 (1)(d) of the Law on the Bar (emphasis added).

220 See Dolea 2009, pp. 10–11. The author further suggests entrusting the investigative judge with more powers with respect to the review and exclusion of evidence.

221 Arts. 299 and 299 (1) of the CPC.

222 Art. 313 (2)(3) of the CPC.

a complaint regarding the legality or pertinence of a certain piece of evidence. The investigative judge, if he/she considers the complaint well-founded, can adopt a decision obliging the prosecutor to annul the breaches of the rights and liberties of the person or, depending on the circumstances, declare the appealed act or procedural action null and void. This decision is final.[223]

At the court stage, the defence has the opportunity to refer to evidence that should not be considered by the judge (there is no express provision in the CPC regarding exclusion of evidence as such), by submitting either a reference to the indictment, or separate requests about specific evidence.

Some lawyers claim that, although the defence often raises arguments for excluding certain evidence from the case file,[224] in the majority of cases the courts either do not examine these requests, or simply dismiss them by stating that they will deal with the issue in the final judgment. Even though it infringes their obligation to exclude inadmissible evidence from the case file before presenting it to the court, prosecutors continue to include in their list of evidence the so-called 'explanations', which have usually been obtained in circumstances that violate the right not to incriminate oneself and the right to defence. Such explanations are usually taken from the suspects through the use of threats, violence or other means of coercion before the criminal process has been initiated.

Similarly, prosecutors often include in the case file illegally obtained information/materials secured by the operative investigation bodies – such material should only be accepted as evidence if it is obtained according to the law. The most usual breach is the use of illegally obtained video or audio recordings. As noted previously, although the judge may not rely on such evidence, and can even exclude it during the examination of the case, once included in the case file, it could influence the judge's understanding and perception of the facts and with regard to the defendant.

According to lawyers, the right to collect evidence is significantly curtailed for the legal aid lawyers, due to the limited number of actions that are covered by the territorial offices of the NLAC.

Lawyers do not use private detectives to investigate cases, except on very rare occasions. Rather, the predominant practice is that the lawyers do not actively collect and present evidence at the pre-trial stage, instead presenting documents and/or

223 Art. 313 of the CPC.

224 Relying on Art. 94 of the CPC.

witnesses only at the trial stage. At that stage the judge must approve the lawyer's request to present such evidence unless there are justifiable reasons for refusal.

3.4.2 The right to adequate time and facilities to prepare the defence

The general rule is that a person summoned to appear before a prosecutor or criminal investigation officer should be provided with a minimum of five days from the moment of the summons. This term does not apply when a suspect, defendant or other trial participant is summoned for an urgent procedural action during the criminal investigation or examination of the case in court.[225]

This rule is not, however, routinely followed, particularly at the criminal investigation stage, when lawyers are called by criminal investigation officers on a random and *ad hoc* basis. This has been an issue that the public defenders of the PDO have raised several times, including at a roundtable on 23 September 2010 with representatives of the Ministry of Interior and the Prosecutor General. The participants even suggested that criminal investigation bodies review this provision and, if five days was considered to be too long, it should be reduced to two to three days, but must be respected. This would be more acceptable than the current practice, when lawyers are called to appear immediately, or just a few hours before the procedural action itself.

The private lawyers interviewed for this study did not mention any problems related to having sufficient time and facilities for the preparation of the defence, despite the fact that there is no express provision for a remedy or sanction in the event that the requisite period of notification is not complied with at the criminal investigation stage. If the defendant and/or lawyer are not informed in advance about the planned procedural action and therefore do not attend, they can request that the action either be repeated or cancelled, depending on the exactly which procedural action it relates to.

If the defendant is either summoned or already detained and the lawyer does not arrive on time, the criminal investigation body may call another lawyer, reasoning that the suspect/defendant's lawyer was summoned and could not come in circumstances where the questioning/procedural action was urgent. Therefore, lawyers usually try to come when summoned, even if the legal notification period is not respected. At the

225 Art. 236 of the CPC.

court stage, if the defendant and/or lawyer were not correctly summoned, this can be a reason for an appeal, including by cassation.[226]

The practice of appointing lawyers at the Courts of Appeal and the Supreme Court of Justice with a short notice continues, violating the right to adequate time and facilities for the preparation of the defence. In a recent case, the ECtHR found a violation of Article 5, paragraph 4, due to the fact that the prosecution and the Court of Appeal did not inform the lawyer about the date of the hearing (referred to in Section 1.3).[227]

3.4.3 The right to equality of arms in examining witnesses

The right to equality of arms in examining witnesses applies only to court proceedings. As stated above, at the pre-trial stage, the lawyers do not have a right to examine witnesses on their own. They can talk to witnesses, but the latter are not obliged to give statements and the discussion does not constitute evidence relevant for the case, as long as the witness is not invited by the criminal investigation body and interviewed, with an interview protocol subsequently prepared. If a defence lawyer asks for a witness to be interviewed, the lawyer is informed within three days if the respective witness was or not interviewed, but the lawyer him/herself is not usually invited to the interview carried out by the criminal investigation body. For this reason, according to lawyers, many do not require witnesses to be interviewed at the pre-trial stage, principally out of fear of losing the witness to the prosecution.

There is one procedural action of particular concern from the equality of arms perspective; the confrontation or cross-interview of witnesses who have already been interviewed, including the defendant, if their statements contradict each other. The defence lawyer is usually informed if the defendant is invited for a cross-interview. However, in this case, the lawyer's participation is limited by the fact that he/she does not see the previous interview protocols (apart from the defendant's interview protocol) and, hence, he/she has to act on his/her own intuition in order to ask relevant questions and/or advise the client on appropriate strategy.

226 See, for example, Art. 427 (1)(5) CPC, which concerns the reasons for a cassation request: the case was examined at the first instance or on appeal without legally summoning one of the parties or, even where he/she had been legally summoned, it was impossible to appear and inform the court of the relevant circumstances.

227 *Levinta v. Moldova* (*No. 2*), cited above, paras. 46–51.

The adversarial nature of court proceedings is provided for by the CPC.[228] The court shall base its judgment only on evidence to which both parties have had equal access. The criminal investigation body (ultimately the prosecutor) presents to the judge the criminal case file, which includes all the evidence from the criminal investigation. At the initial appearance before the court, each party (prosecutor, defence) has the right and duty to present the list of evidence that needs to be examined in court. The judge rules on whether new evidence needs to be produced, including new witnesses, after listening to both parties.[229]

Moldovan legislation does not provide for the concepts of direct (examination-in-chief) and cross-examination. These are rather treated as technical means used by each lawyer according to his/her skills. Witnesses are examined in the following way: the witness is informed about the object of the case and is asked to relate the facts and circumstances he/she knows regarding the respective case. While he/she recounts the facts and circumstances, only questions of clarification can be asked. When the witness finished the story, the parties have the right to ask questions. The party that called the witness asks the questions first. Leading questions, or questions that do not refer to the evidence and which obviously aim at insulting or humiliating the witness, are not permitted.[230] The amendments to the CPC (submitted to the Parliament at the end of 2011) include a provision that would amend the questioning rules by allowing for cross-examination of the other side's witnesses.

3.4.4 The right to free interpretation and translation of documents

A person who does not know or speak the official state language has the right to understand all the relevant documents and case materials, and to speak before the criminal investigation body and the court through an interpreter. The criminal proceedings/process can also be held in a language accepted by the majority of the persons who participate at the trial. In this case, the procedural decisions are also drafted in the official state language, a mandatory requirement. The procedural actions undertaken by the criminal investigation body and the court are presented to the defendant translated into his/her native language, or in a language that he/she understands.[231]

228 Art. 24 of the CPC.
229 Art. 347 of the CPC.
230 Art. 109 of the CPC.
231 Art. 118 of the Constitution; Arts. 11 (5), (16), 64 (1)(2), 399 (3), and 559 (3) of the CPC.

The CPC expressly provides that the following procedural documents be translated: the judgement[232] and, in extradition cases, the foreign judgment and accompanying documents are translated into the official state language and the language that the defendant understands.[233] Commentators also note that the following procedural documents are usually translated: the charge sheet, the indictment and the court decision. However, there are no express provisions in the CPC regarding these specific documents.[234]

The Ministry of Justice is responsible for authorising interpreters and translators to provide such services. The authorised interpreters and translators sign contracts with the relevant bodies/persons. The Ministry of Justice is also responsible for overseeing the quality of the services provided by interpreters and translators, and receive complaints from anyone whose right to interpreter/translator was violated.[235]

In the event of a breach of the legal requirements regarding the presence of the translators and/or interpreters, if this is mandatory according to the law, the respective procedural act is deemed to be null and void. Such a breach cannot be corrected in any way, and can be pleaded at any stage of the process by the parties. It is also taken into account by the court, including *ex-officio* if the annulment of the procedural act is necessary for finding the truth and to properly resolve the case.[236] Moreover, data obtained via a breach of the right to an interpreter/translator is not admitted as evidence and is consequently excluded from the case file, with the effect that it cannot be put before the court and cannot be relied on when issuing the judgment or sentence.[237]

All judges, criminal investigation officers, prosecutors and lawyers interviewed for this study stated that the right to free interpretation is difficult to implement due to the lack of interpreters, particularly if it involves a language other than Russian. One lawyer said that, in practice, the relevant criminal investigation body or court would

232 Art. 399 (3) of the CPC: if the judgment or the summary (*dispozitivul*) is drafted in a language that the defendant does not know, he/she is given a written translation of the judgment in his/her native language, or in a language that he/she understands.

233 Art. 559 (3) of the CPC.

234 Dolea et al. 2005, p. 95.

235 Law No. 264 of 11 December 2008 regarding the authorisation of interpreters and translators utilised by the Superior Council of Magistrates, Ministry of Justice, prosecution bodies, criminal investigation bodies, courts, notaries, lawyers and court bailiffs.

236 Art. 252 (2) and (3) of the CPC.

237 Art. 94 (1)(3) of the CPC.

first establish the need for interpretation. They also ask people if they understand the language used during the procedural action and if they need a translator. Some investigators make the defendants sign protocols in which they declare that they do not need a translator, in order to ensure that the procedure cannot be subsequently challenged.

4. The professional culture of defence lawyers

The Union of Lawyers is a self-regulating body of lawyers, formed from the members of all Bars in the country. The Union of Lawyers is a special legal entity, with its own property and budget, and is regulated by the Law on the Bar. Acting as a lawyer is not considered as an entrepreneurial activity. The Union of Lawyers has a Disciplinary and Ethics Commission, which is responsible for examining complaints against lawyers. Both private and legal aid lawyers can be sanctioned only by this Commission. The Disciplinary and Ethics Commission is not regarded by many lawyers as an effective mechanism for ensuring adherence to the professional and ethical standards that apply to the profession.

The main criticisms of the Commission refer to its lack of transparency and reasoned decisions, and its lenience towards lawyers.[238] These concerns are supported to some extent by the available figures. For example, during the period May 2009–May 2010, the Commission examined 179 complaints, out of which only two were declared admissible; during the period May 2010–May 2011, the Commission examined 192 complaints, out of which only 10 were admissible. There is no data available for the period 2006–2008.[239]

Although, in practice, lawyers have tended to become increasingly specialised, there is no criminal defence section within the Union of Lawyers, or any other form of relevant organisation. In general, in Moldova, most lawyers – including criminal defence lawyers – tend to operate as sole practitioners. Even where they do work in associated firms, they would typically not share profits or work together on cases, but rather would only share the office space and costs.

238 Comments of the lawyers interviewed for this report.

239 Response of the Council of the Union of Lawyers of Moldova to the request for information by the Soros Foundation–Moldova in May 2011, regarding the number of lawyers, apprentices, disciplinary proceedings and their outcomes in the previous five years.

Lawyers, including those providing legal aid services, have been criticised for years for the low quality of their services. This was one of the main reasons for initiating the legal aid reform that culminated with the adoption of the Legal Aid Law on 26 July 2007. However, the low quality of legal representation goes well beyond legal aid and is a feature of the entire system. For example, it is not yet a well-established rule for lawyers to keep files for their clients. Some lawyers still accept to represent clients at the appeal stage without having had at least a meeting with the client prior to the court hearing. There is as yet no visible peer pressure to end the activities of 'pocket lawyers', who are not only damaging the defendant's rights, but also the reputation of the entire legal profession. There is still anecdotal evidence that legal aid lawyers continue to ask their clients for additional money or encourage them to sign a contract.

The current state of affairs is mainly due to the poor organisational structure of the Bar, a lack of initial and continuous training, improper admission criteria, a lack of a functional disciplinary mechanism and a lack of other functional quality assurance mechanisms within the profession. The new government of 2009 has declared the reform of the Bar to be among its priorities and, in the summer of 2010, it had already approved several amendments to the Law on the Bar. In the Ministry's view, the amendments were intended to consolidate the legal profession/the Bar, by creating a new organisational structure of the Bar (five Bars created, which together constitute the Union of Lawyers), new criteria for admission to the Bar, amended norms regarding disciplinary responsibility and continuing legal education.[240]

It remains to be seen whether these reforms will bring any qualitative results, or only minimally effect how the profession is organised. Since 2010, more discussions have been carried out within the profession regarding the need to develop standards, to improve the work of the Disciplinary and Ethics Commission and Licensing Commission, as well as to strengthen the Union Council's managerial capacities. One of the first steps in this direction was the development of the Bar strategy for 2011–2015, to be approved by the Lawyers' Congress in the first half of 2012.

A lawyer is obliged to provide state-guaranteed legal aid services as required by the territorial offices of the NLAC.[241] This obligation was introduced at the end of

240 Ministry's press release on the occasion of the adoption of the law in first reading by the Parliament, 19 March 2010, http://www.justice.gov.md/ro/news-ministr/10239/.

241 Art. 54 (1)(c) of the Law on the Bar.

2008,[242] as a result of the lawyers' boycott of the implementation of the Legal Aid Law,[243] manifested by refusing to apply to be included in the roster of lawyers providing legal aid services on request. Although this problem was subsequently resolved and the Law on the Bar was significantly amended and republished at the end of 2010, this obligation has remained, although its practical value is questionable.

The Law of the Bar[244] contains one article dealing with 'the quality of legal assistance', which states that the legal assistance provided by the lawyer must correspond to the best professional practices in legal matters, material and procedural norms, and involve professional and correct conduct. This requirement might further be used for developing quality assurance mechanisms within the profession.

Relying on this provision and the current needs within the profession a group of lawyers, supported by the Soros Foundation–Moldova, has developed the concept of peer review for Moldova, based on the Scottish and English models, to be applied to legal aid services in criminal cases. Since there are no written standards of lawyering, or methodological recommendations for handling different types of cases, the group has also drafted a guide for criminal defence lawyers based on the public defenders' professional standards.[245] The respective instruments have been presented to representatives of the Bar Council in December 2011. They have expressed interest in further discussing them, with a view towards implementation in Moldova. It remains to be seen if and how this will be progressed.

5. Political commitment to effective criminal defence

The 2003 CPC placed an emphasis on defendant's rights, providing enhanced safeguards compared to the previous legislation. The Criminal Code, on the contrary, which provided a new range of criminal sentences, was generally considered stricter from the

242 Law No. 306 of 25 December 2008.

243 Although the Bar was represented in the working group that drafted the Legal Aid Law, it publicly denounced the law and the reform as being bureaucratic and unjustifiably removing the appointment of legal aid lawyers from the criminal investigation bodies, courts and the Bar. The Bar's position has always been that it should be the body managing the legal aid system.

244 Amended by Law No. 102 of 28 May 2010.

245 The PDO in Chișinău is the first lawyers' office in Moldova to have developed professional standards of conduct. These are specific for public defenders that provide legal aid to poor defendants.

perspective of the range of crimes, severity of punishments and the impossibility to be released from (alleged) criminal responsibility at the pre-trial stage.[246]

In 2006, the then president declared that the criminal policy of the country was too punitive and had fallen behind best European practices.[247] As a result, the Criminal Code was subject to several amendments,[248] which were intended to make sentences more lenient, decriminalise certain crimes and adjust the legal framework of Moldova to comply with the ECHR, as well as identify the place and role of the Moldova's criminal policy within the broader context of European standards and initiatives. No assessment has yet been done regarding the impact of these amendments, although they appear to have resulted in a reduction of incarceration rates, which was also at the core of the amendments.[249]

Since the change of power in 2009, greater discussion about effective implementation of human rights in general is now on the political agenda, as is the more

246 For an analysis of the 2002 Criminal Code, see Marit, 'Impactul legislatiei penale generale asupra detentiei in vechea si noua legislatie penala a Republicii Moldova' (The impact of criminal general legislation on detention in the old and new criminal legislation of the Republic of Moldova), in Institute for Penal Reform, *Noua legislatie penala si procesual penala a Republicii Moldova. Realizari si controverse. Impactul asupra detentiei* (The new criminal and criminal procedure legislation of the Republic of Moldova: Achievements and controversies. The impact on detention), Chișinău 2007, pp. 42–84.

247 See the statement at http://www.irp.md/item.php?text_id=785.

248 Law No. 292 of 21 December 2007. The main amendments to the Criminal Code included the possibility to be released from criminal responsibility by the prosecutor at the pre-trial stage; changes to several sanctions and proportions as qualifying elements for harsher sanctions the degree of gravity by which the crimes are divided; the reduction of sanctions on average by two to three years; changes to the concept of a 'repeated crime': changes to the elements of a few crimes; improvement of provisions regarding the application of a more lenient sanctions, particularly with respect to minors (Art. 79 Criminal Code); and the addition of some new crimes and abolishment of others (although not as many as had been referred to in the stated goals and when compared to the number of added crimes).

249 For example, the information note to the amendments of the Criminal Code stated that, in 2007, it was 220 per 100,000 inhabitants, due mainly to the severe punishments – for example, an average imprisonment sanction of eight years, rather than due to criminality rates. It further stated that the transition of Moldova to 'European standards' would require a decrease to 100–150 sentenced persons per 100,000 inhabitants. Indeed, incarceration rates have been declining constantly since 2006, from 347.2 in 2006 to 219.5 in 2010. However, this does not take into account the number of non-sentenced detainees (those at the pre-trial stage) and the drop was also due, to a large extent, to amnesties proclaimed by the Parliament on a yearly basis.

efficient use of public money.[250] The discussions are mostly focused on securing the independence and accountability of the judiciary and the prosecution office, effective policing and human rights, and access for the general population to quality legal and other services connected to the justice system. These issues are also at the core of the Justice Sector Reform Strategy for 2011–2016, approved by the Parliament on 25 November 2011.

In the criminal justice area, it is proposed to substantially change the pre-trial stage of the criminal process, in order to ensure a proper balance between effective crime detection and human rights observance. In the legal aid field, it is planned to strengthen the capacity of the NLAC and improve the quality of the legal aid services. Although the budget for legal aid was supposed to increase in 2010 in order to include the public defenders, it did not. The main reason seems to be the austerity of the state budgets for 2010 and 2011, due to the global financial crisis and the local political instability (there have been three parliamentary elections over 20 months). It is expected that the legal aid budget for 2012 will cover the costs for at least seven additional public defenders.

6. Conclusions and recommendations

6.1 Major issues

The Moldovan legal system has gone through significant changes in the past decade, with the incorporation of human rights principles into the criminal justice system, and its Criminal Procedure Code does guarantee the basic rights of criminal defendants. Case law, and the practice of the criminal justice actors, has also developed, although much less than the progress made at the legislative level.

The main positive features regarding access to effective criminal defence are the legislative framework that guarantees the basic rights of the criminal defendant in compliance with the ECHR, and the creation a criminal legal aid system in order to provide legal services to all defendants who cannot afford to pay for a lawyer.

250 Human rights and adherence to international standards has previously been on the agenda before. However, during the communist regime, the discourse had been declaratory in many ways. In the criminal justice area, the use of the system to fight political opponents and control the entire society had dominated.

Defendants have a right to information on their rights, but this is a rather theoretical right, as criminal investigation bodies routinely do not properly inform defendants of their rights and do not explain what these rights mean. The written information about rights that is handed to every defendant is a merely a copy of the Criminal Procedure Code provisions, with little practical value for the defendant.

The role of the defence at the pre-trial stage is very limited. Although by law defence lawyers can request the criminal investigating body to collect information in favour of the defendant, such requests are not normally accepted by the criminal investigation body. Lawyers can talk to potential witnesses about the alleged crime or the defendant, but they are not obliged to speak to the lawyer and nothing that the lawyer collects counts as evidence unless the witness is interviewed by the criminal investigation body. However, the latter is not obliged to inform the lawyer about such interviews. This acts as a major deterrent to lawyers requesting witnesses to be interviewed at pre-trial stage, since they fear losing witnesses to the prosecution.

The defence has limited access to the case file, receiving full access only at the end of the criminal investigation before the case file is sent to court. The defence can see the protocols of those procedural actions in which the defendant participated, but even these are not routinely provided to the defence. Access to pre-trial arrest materials is a major problem. Lawyers are, in effect, required to improvise when representing their clients at pre-trial detention hearings since they rarely see any evidence other than the prosecutor's request for pre-trial detention. In addition, judges continue to issue poorly reasoned pre-trial detention warrants. Acquittal rates remain very low.

Defendants have the right to a lawyer immediately after arrest, and no later than three hours from the moment of arrest, and have the right to a confidential meeting with the lawyer prior to the first police interview. In practice these rights are routinely infringed. Criminal investigation bodies invite potential suspects and witnesses for 'discussions' with the criminal investigation body prior to opening the case file. The statements provided at this stage (so-called 'explanations') are not considered evidence; however, they are routinely included in the case file and relied upon during the case. Criminal investigation bodies often start interviewing the suspect before the lawyer arrives, and then subsequently ask the lawyer to sign the respective protocol. However, although there is no conclusive evidence, anecdotal evidence suggests that the phenomenon of 'pocket lawyers' has decreased.

Legal aid is provided to all defendants who do not have a private lawyer. The means test is not yet well developed and practically every defendant who requires a legal aid lawyer does have one (however, this does not mean every defendant gets effective legal

defence, see the previous paragraph regarding the 'informal' discussions prior to lawyer's arrival and the pocket lawyer phenomenon). Whilst, *prima facie*, this is a positive feature, in practice it means that resources for legal aid are thinly spread and remuneration is not sufficiently attractive to encourage competent and active defence lawyers. For example, only the first meeting with the client, or up to five meetings if the client is detained throughout the entire criminal case, is paid for and there is a cap of 200 MDL per day (12 Euro), except when legal aid is provided in two or more cases.

Although accountability of legal aid lawyers has increased since the adoption of the new Legal Aid Law, mainly due to the quality monitoring mechanism of the NLAC, the overall perception of the quality of legal aid lawyers is not very positive. In fact, the legal profession as a whole lacks suitably articulated quality standards and quality assurance mechanisms regarding legal services provided by lawyers, including legal aid lawyers.

Some court practices are particularly worrying from the perspective of the defendant's right to effective defence. For example, convictions are confirmed by appeals courts without hearing the witnesses directly in court, the courts basing their decisions on the witnesses' statements given at the pre-trial stage. This issue has been raised in several ECtHR judgments. Although the Criminal Procedure Code guarantees the right to silence, lawyers interviewed for the study complained of the practice of courts in drawing negative inferences where the defendant has relied on their right to silence, which is obviously contrary to the law. Courts are also normally reluctant to exclude illegally obtained evidence from the case file.

At a general level, the functioning of the criminal justice system is handicapped by the tradition that application of the law is confined to that which is written in the law, giving very little room for creative application of the law by criminal justice professionals. What is not written in the law becomes material for variable interpretation and abuse.

6.2 Recommendations

1. Enhance the role of the lawyer at the pre-trial stage, in particular: expressly providing the defence with full and timely access to all materials related to the pre-trial detention hearing; strengthening the obligation on criminal investigation bodies (police and prosecutor) to disclose to the defence all materials that are relevant to the case, including considering disclosure earlier than the end of the criminal investigation; providing for a procedure for collecting and presenting evidence by the defence that does not depend on the prosecutor's discretion;

2. Put into place sufficient practical tools to ensure that no illegally obtained evidence is used in a case, and enabling the defence to secure the effective exclusion of illegally obtained evidence. In particular, the provisions regarding the opening of a criminal case should be amended, and safeguards created that ensure that no statements taken outside of the formal criminal procedure can be included in the case file;

3. Guarantee the right that all court decisions will be properly reasoned;

4. Review the legal aid eligibility criteria for defendants, in particular to make a distinction between the right to legal aid irrespective of financial means and the requirement for mandatory legal representation, and introduce rules for checking financial eligibility and for the recovery of legal aid costs;

5. Develop standard forms for informing defendants of their rights, in simplified and accessible language. The EU Directive on the Right to Information should be used as guidance. It should also be made part of the professional requirements of the criminal investigation bodies to inform and clearly explain, procedural rights to defendants;

6. Improve the quality of legal aid by developing quality standards and quality assurance mechanisms for lawyers, ensuring an appropriate balance between the right to a competent defence and the independence of lawyers. Ensure that the remuneration scheme for lawyers is adequate for the required legal aid work, providing sufficient incentives for active defence work;

7. Routinely collect criminal justice statistics, including those related to the defendants' rights, and use this data for projections and evidence-based policy-making related to legal aid and effective defence.

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Interview with two prosecutors (Chișinău).

Interview with two criminal investigation officers (Chișinău).

Arkadiy Bushchenko
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CHAPTER 7 UKRAINE[1]

1. Introduction

1.1 General information

Ukraine is a unitary presidential-parliamentary democracy located in the eastern part of Europe, with a territory of 603,700 square kilometres. The distance from west to east is 1,316 kilometres, and 893 kilometres from north to south. As at 1 October 2010, the population was slightly less than 46 million people (about 31.5 million located in urban centres). Ukraine is divided into 25 regions, with the most populated being the eastern regions. There are several cities with a population of more than (or about) 1 million – Kiev (in the centre), Kharkiv and Donetsk (in the east), Lviv (in the west), Odessa (in the south), and Dnipropetrovsk and Zaporizhzhya (in the south-east). Out of more than 100 nationalities living on its territory, the main ethnic groups are Ukrainians and Russians. The official language is Ukrainian, which is used in official and business documents.

Ukraine has been an independent state since 1991, prior to which it was a part of the Soviet Union. The western part of Ukraine was annexed to Soviet Ukraine in 1940. The varying historical background has resulted in some differences in the cultural and political preferences between the west and east of Ukraine.

The Ukrainian legal system is of a continental type governed by a strict statutory hierarchy. The most important laws with respect to criminal procedure are the Criminal

[1] This country report has been reviewed by Mykola Khavroniuk, judge, Supreme Court of Justice of Ukraine.

Code of 2001 and the Code of Criminal Procedure of 1961. The basic structure of the criminal proceedings was established during the judicial justice reforms of 1864. The Statutes of Criminal Justice attempted to integrate both the then French and German criminal procedures. The criminal proceedings included a jury trial for some types of cases. The Statutes preserved a strong inquisitorial nature in relation to pre-trial proceedings, but created adversarial proceedings at the trial. The pre-trial proceedings were conducted by an investigator, who was a part of the court system.

During the Soviet period, the investigator became a part of the executive, but preserved the same powers as a judicial investigator under the relevant statutes, and the prosecutor's office gained extraordinary powers that can influence the judiciary and society. Jury trial was substituted by lay judges sitting in one panel with a professional judge. Soviet-type criminal proceedings, with their strong inquisitorial principles, were finally shaped in the 1960s into a criminal justice system that retains strong inquisitorial traditions; but these have been somewhat weakened by numerous changes since 1991. Only in 1993 was the right of the accused and suspects to have a defence counsel at the pre-trial investigation introduced in legislation; before that, they had a right to be represented by defence counsel only from the moment an investigation was completed.

Following independence in 1991, the Constitution was adopted in 1996 and the European Convention on Human Rights (ECHR) was acceded to in 1997. As a result, the Criminal Code has undergone numerous amendments. The most remarkable changes were adopted in June 2001, when the courts were vested with exclusive authority to make a decision on the arrest and detention of a defendant, as well as other issues relating to his/her fundamental rights.

The countless amendments to the Code significantly altered the system created in 1960, but failed to create a new system governed by modern principles of criminal procedure. The necessity for a new Code of Criminal Procedure (CCP) has been discussed since Ukraine acceded to the Council of Europe. One draft of a new Code was developed in 2007–2009 and drew a positive assessment from Council of Europe experts; however, only in June 2011 was a revised version of this draft approved by the country's president and, reportedly, sent to the Council of Europe and Venice Commission for expert review. The draft envisages some significant changes: courts are obliged to finally determine a charge and cannot send the case for additional investigation; the opening of an investigation is simplified; however, most

of investigative action interfering with personal rights require a court warrant; rules of evidence are introduced; rights of defence are strengthened and equality of arms during the trial are maintained more consistently; undercover investigative activities are regulated directly by the Code; and plea bargaining and other kinds of procedural agreements are introduced. It is understood that the new CCP will be adopted during 2012. If adopted, some conclusions of this report may require revision.

1.2 Sources of law

The Constitution of 1996 defines several sources of Ukrainian law: the Constitution, statutes and other regulations.[2] The Constitution also recognises ratified international agreements as a part of domestic law.[3] The Constitution represents the supreme law in Ukraine and may be directly applied by courts and the executive. Statutes are basic acts of law and are adopted by the Parliament (Verkhovna Rada). Regulations adopted by the executive – acts of the president and cabinet of ministers, acts of ministries or other state agencies – frequently determine the legal practice. However, in criminal proceedings, their influence is significantly less than in other branches of legal practice. All laws relevant to the rights and freedoms of people must be published;[4] moreover, acts of the executive (except of the president and cabinet of ministers) are subject to official registration by the Ministry of Justice and are not valid otherwise.[5]

The judgments of the Constitutional Court of Ukraine are binding, and that Court may repeal (but not create or amend) the law adopted by the Parliament or president of Ukraine.[6] Its judgments are also the only source of official interpretation of the Constitution and laws. Case law is not perceived as an official source of law. The higher courts and the Supreme Court of Ukraine issue Resolutions and a Summary of Practice, which may contain some guidelines for the lower courts. While not officially binding, the guidelines are widely used by the courts.

Despite an express denial of the *stare decisis* principle, 'mute' judicial tradition is also an important source of law. The courts, including higher courts, generally provide very thin reasoning in their rulings. Therefore, legal principles underlying

2 Constitution, Art. 8, para. 2.

3 Constitution, Art. 9, para. 1.

4 Constitution, Art. 57, paras. 2 and 3.

5 Regulations on State Registration of Regulations of Ministries and Other Executive Bodies Adopted by the Decree of the Cabinet of Ministers of 28 December 1992, No. 731.

6 Constitution, Art. 150.

decisions remain unexpressed in case law and are available only through unofficial communication from inside the judiciary. Moreover, supervision by higher courts of the inferior ones has a long-standing tradition (until July 2010 it was prescribed by law).[7] From the judges of appeal courts, so called 'curators' are unofficially assigned for each local court, and the latter frequently seek advice on cases under consideration.

Under the Constitution, the European Convention on Human Rights (ECHR) is a part of domestic law[8] and, in the case of a conflict, has priority over domestic statutes.[9] The special Law on Implementation of the Judgments and Applying of the Case Law of the European Court of Human Rights was adopted in 2006.[10] This law reiterates the obligation to implement judgments of the ECtHR, and provides for some mechanisms for payment of just satisfaction, for individual measures (including *restitutio in integrum*) and for general measures. Moreover, it recognises the case law of the ECtHR as a source of law for the domestic courts – the only exclusion from the general approach. The judgments of the ECtHR are, from time to time, also used by courts of general jurisdiction and the Constitutional Court of Ukraine. There are some areas in the legal system where the case law of the ECtHR – due to lack of national statutory law – has become a basis for domestic legal practice (for example, in regulation of peaceful assemblies, and settlement of defamation suits). However, this case law is not, in practice, of significant influence in the realm of criminal procedure. Even the highest courts are quite reluctant in the implementation of obligations under the ECHR and the case law of the ECtHR.[11]

1.3 The structure and processes of the criminal justice system

1.3.1 General remarks

The administration of justice in criminal cases, and in some categories of cases dealing with administrative offences, is exercised by courts of general jurisdiction. The local courts are included in a united system of courts of general jurisdiction that are established in districts (rayons), towns and city districts. Appeal courts of general

7 In July 2010, CCP, Art. 24 'Higher courts' supervision over judicial activity' was repealed.

8 Constitution, Art. 9, para. 1.

9 Law on International Treaties of Ukraine, Art. 19, para. 2.

10 Law of 26 February 2006, No. 3477– IV.

11 See, for example, the follow up on the ECtHR's judgment in *Yaremenko v. Ukraine* and *Shabelnik v. Ukraine*, at: http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp.

jurisdiction operate in each regional centre. Since July 2010, the High Court on Criminal and Civil Cases (High Court) is a court of cassation for all criminal cases.[12]

The Supreme Court, in issues of material criminal law, and the High Court, in procedural issues, have jurisdiction to undertake reviews based on judgments of international bodies. Both the local and appeal courts are staffed with professional judges. Primarily the local courts also have jurisdiction to decide over the issues arising during the pre-trial investigation (for example, bail hearings and requests for a search warrant).

The CCP declares that adversarial proceedings and the equality of arms are basic principles of criminal procedure. However, at the pre-trial stage, the prosecuting authorities have an overwhelming advantage over the defence. Frequently, this cannot be remedied at the trial stage of the proceedings.

In practice, the vast majority of criminal cases result in a conviction. Acquittals are perceived as a failure of the criminal justice system, and anything other than a conviction by the court may lead to many negative implications for the prosecutors and investigators involved in the case.[13] As a result, the judges are under constant pressure from different sides to secure a conviction. Some judges believe that the court has some prosecution functions (for example, obtaining evidence), and the following changes are therefore needed: abolish additional investigation, implement jury trial, and introduce an agreement between the prosecution and defence. Both judges and investigators believe that instituting a criminal investigation system independent from the police is necessary to improve the criminal justice.

In 2009 and 2010, the proportion of persons acquitted by a trial court constituted only 0.2 per cent of all persons tried; and higher courts quashed about 50 per cent of trial courts' acquittals. By contrast, convictions were quashed by higher courts in only 36 out of 142,000 convictions in 2009, and 27 out of 164,000 in 2010.[14] Such a ratio of convictions and acquittals creates the background of criminal justice system by which to assess the implementation of particular rights and safeguards.

12 Before July 2010, the Supreme Court of Ukraine was a court of cassation.

13 Release of a suspect after arrest (detention) if the suspicion was not proved is considered as a violation of law; see Ruling of the Ministry of Interior and State Department of Ukraine on the Matter of Serving Punishment of 23 April 2001 No. 300/73; as to the statistics on such violations, see Materials for Public Hearing in the Committee of the Supreme Council of Ukraine for Legislative Provision of Law Enforcement Activity on Observance of Human Rights in Internal Affairs Bodies Activity, Kiev, 2010.

14 Rudnik 2009; Rudnik and Apanasenko 2010.

Crimes are divided by the Criminal Code (CC) into four categories, depending on the punishment prescribed: (1) particularly grave (more than 10-years imprisonment or life imprisonment); (2) grave (more than 10 years' imprisonment); (3) of medium gravity (not more than five years' imprisonment); and (4) of little gravity (not more than two years' imprisonment). Administrative offences are not crimes under domestic law and are outlined by the Code on Administrative Offences (CAO), although many administrative offences may be classified as 'criminal' under Article 6 of the ECHR.[15] The procedure to determine an administrative charge is governed by the CAO.

The person against whom criminal proceedings are directed is, depending on the stage of the proceedings, referred to as a 'suspect', 'accused', 'defendant', 'convict', or 'acquitted'. A suspect is a person detained or subjected to other preventive measures upon a suspicion of the commission of crime.[16] An 'accused' is a person formally charged with a crime by an investigator.[17] After bringing the case to a court for trial, the accused becomes a defendant. After trial – depending on the result – the defendant becomes a convict or an acquitted.[18]

1.3.2 Police arrest and detention

Police arrest of a person suspected of having committed a crime is not considered as the commencement of of criminal proceedings. However, it has many implications for the practical implementation of defence rights, which are rather strictly formulated in the law. Under the Constitution, no arrest can be undertaken without a court warrant,[19] except in the situation of urgent necessity as exhaustively listed in the Constitution[20] (for example, in the case of the urgent need to prevent or suppress crime). In the case of arrest without a warrant, the validity of the arrest shall be verified by a court within 72 hours. However, these quite rigorous restrictions in the Constitution have little influence on legal practice. The Constitutional Court has expanded the possibility to utilise an arrest without a warrant for administrative offences, despite the fact that

15 *Gurepka v. Ukraine*, No. 61406/00, 6 September 2005.
16 CCP, Art. 43–1.
17 CC, Arts. 43 and 131.
18 In this report the term 'defendant' is used as a generalisation, with other terms used as necessary in the context.
19 Constitution, Art. 29, para. 2.
20 Constitution, Art. 29, para. 3.

such offences are not considered by national law as crimes *stricto sensu*. Many other powers to arrest without a warrant co-exist with the provisions of the Constitution.

There is no statutory definition of the moment of arrest, which leads in practice to widespread unacknowledged detention. Very often, arrest for an administrative offence is used for the purpose of a criminal investigation. Persons arrested under the CAO have practically no defence rights,[21] so the effect of such arrest is practically the same as for an 'informal' arrest. In *Nechiporuk and Yonkalo v. Ukraine*, the ECtHR

> ... emphasised that by having formally placed the applicant in administrative detention but in fact treating him as a criminal suspect, the police deprived him of access to a lawyer, which would have been obligatory under the Ukrainian legislation had he been charged with the offence of murder committed by a group of persons and/or for profit, an offence in respect of which he was in fact being questioned.[22]

In *Balitskiy v. Ukraine*, the ECtHR indicated that, under Article 46 of the ECHR, such practice is 'recurrent in the case law against Ukraine', and stressed that 'specific reforms in Ukraine's legislation and administrative practice should be urgently implemented'.[23]

In practice, an informal period of arrest precedes formal arrest of a suspect in almost every criminal case. The informal period may last from several hours to several days. Only in a fifth of cases (24.4 per cent) is a report drawn up immediately upon arrest; in other cases, the period between the actual detention and the drawing of the report lasts from six to more than 24 hours. In 41.3 per cent of cases, the report was drawn up more than 24 hours after the moment of detention.[24]

The widespread use of unacknowledged or administrative detention for the purpose of criminal proceedings nullifies in many cases the quite high safeguards of informing a person about the nature and cause of the accusation against him/her. In practice, the obligation to timely and properly inform is circumvented by law enforcements agencies postponing the granting of the status of suspect or defendant to a person who is really under suspicion. Even in the case of actual detention, some period of 'informal' unregistered detention exists (from several hours to several days).

21 CAO, Art. 268.

22 *Nechiporuk and Yonkalo v. Ukraine*, No. 42310/04, para. 264, 21 April 2011.

23 *Balitskiy v. Ukraine*, No. 12793/03, paras. 51 and 54, 3 November 2011.

24 Kobzin 2007, p. 54.

Only after the case is notified by the police to the investigator does the latter compile a special protocol on arrest. It is rare for the police to record the arrest of a suspect. The formal arrest of a person on suspicion of having committed a crime automatically grants him/her the status of a suspect.[25] At this time, the suspect is informed about the crime of which he/she is suspected. The police may arrest a person suspected of the commission of a crime punishable by imprisonment – which covers most crimes – only *in flagrante delicto*.[26] However, suspects are, in practice, arrested under these provisions even several months after the alleged crime occurred. The law does not clearly require a 'reasonable suspicion' in order for an arrest to be carried out.

The law requires the drawing up of a report in every case of an arrest.[27] A copy of the report, together with a list of his/her rights and duties, must be immediately handed over to the detainee and directed to a prosecutor.[28] The suspect has a set of procedural rights, including the right to defend him/herself through defence counsel.[29] *Within 72 hours, the detained suspect should either be released or brought before a judge for bail/jail hearing*.

1.3.3 Stages of the proceedings

Commonly, every criminal case involves the following stages: (1) pre-trial investigation, (2) trial, (3) appeal review and (4) cassation review. In exceptional cases, extraordinary proceedings are possible: extraordinary review, and review on newly discovered circumstances.

Trial or appeal courts have the power to return a case to a prosecutor for additional investigation, in order to correct mistakes committed at the previous investigation, to find sufficient evidence of guilt, or to correct the legal classification of the events imputed.

1.3.3.1 Pre-trial investigation

Criminal proceedings formally begin from the moment when the investigator adopts a formal written decision about opening a criminal case. Under the law, before this

25 CCP, Art. 43–1.
26 CCP, Art. 106.
27 CCP, Art. 106, para. 4.
28 CCP, Art. 106.
29 CCP, Arts. 106 and 21

moment no investigative actions, apart from an examination of scene of crime, may be conducted.[30] However, a semi-formal 'preliminary examination of materials' is usually carried out, with the aim of determining the existence of an 'arguable claim'.[31] The preliminary examination must be finished within three days or, in exceptional cases, 10 days. This preliminary stage frequently involves an inquiry conducted by police officers who have the power to question individuals (but only upon latter's consent), and to conduct undercover operations and other investigative measures. During this stage, the police, using unregistered detention and other form of coercion, often obtain a so-called 'explanation', which creates a basis for further formal investigations and frequently contains a confession to the commission a crime.

After the formal opening of a criminal case, the full range of investigative measures may be exercised. The pre-trial investigation is conducted by police investigators. Under the law, the investigator is an independent authority within the police but, as a matter of fact he/she is subordinate to the police chief. Police inquiry officers are obliged to assist the investigator in the investigation. In complex cases, 'task units', composed of several investigators and inquiry officers, are created. A prosecutor has the power to supervise the investigation and inquiry activities by the police. A limited number of cases is investigated by the prosecutor's offices itself.

Upon obtaining sufficient evidence against a specific individual, an investigator takes a decision to charge the individual[32] – that is, to inform him/her about the cause and nature of the accusation against him/her. If any preventive measure is to be imposed on the suspect, he/she shall be formally charged within 10 days from the application of the measure, otherwise the measure must be cancelled. The interrogation of the accused shall be conducted immediately, and in any case not later one day after bringing the charge. The presence of a defence counsel at the time of charging and during the interrogation is mandatory except when the defendant waives this right and such waiver is accepted.[33]

As a rule, a pre-trial investigation in criminal cases where the (alleged) perpetrator of the crime is determined must be completed within two months.[34] This term may be extended by a district prosecutor to up to three months, and by a higher prosecutor

30 CCP, Art. 190, para. 2.
31 CCP, Art. 97.
32 CCP, Art. 131.
33 CCP, Arts. 140 and 143.
34 CCP, Art. 120.

to up to 18 months. The pre-trial investigation is ended when the investigator has collected evidence sufficient to present the indictment to court. The investigator shall then inform the accused about the completion of the investigation and provide him/her with access to the case file.[35] If no additional investigative actions are required, the investigator compiles an indictment and directs the case file to the prosecutor, who shall decide whether to lodge the indictment at the court, to dismiss the case, or to order additional investigations.[36]

1.3.3.2 The trial

All criminal cases are tried by a local court of general jurisdiction.[37] The judge assigned to the case conducts a preliminary examination (the participation of the defence is not mandatory and, in practice, is rare) to decide on the formal admissibility of the case for trial.[38] The judge may also appoint a defence lawyer if a lawyer's participation is mandatory,[39] and change the preventive measure applying to the defendant. However, as a rule, the existing former preventive measure is upheld, using standard wording. This has created issues that have been raised by the ECtHR in numerous judgments.[40] However, despite instructions from the Supreme Court,[41] the practice remains unchanged. Issues decided by the judge at this time may not be appealed.[42]

As a rule, criminal cases are tried by a single judge. However, a defendant charged with a grave offence may make a request to be tried by a panel of three judges. Charges that may entail life imprisonment must also be tried by a panel of three judges.

All parties to the case have formally equal rights to present evidence, to rebut the evidence of the adverse party, and to present arguments on every issue of the case. However, the court is not obliged to allow the party to present evidence, and may refuse to call witnesses or allow the production of other evidence. Due to the absence of rules of evidence, the court uses its discretion on very vague grounds. Only experts

35 CCP, Art. 218.
36 CCP, Arts. 229 and 233.
37 CCP, Art. 33.
38 CCP, Arts. 237 and 240.
39 CCP, Art. 253.
40 See, for example, *Kharchenko v. Ukraine*, No. 40107/02, paragraphs 73–76, 10 February 2011.
41 Resolution of the Plenum of the Supreme Court of Ukraine No. 6 of 30 May 2008 on Practice of Application of Criminal Procedural Legislation at the Time of Preliminary Examination of Criminal Cases in First Instance Courts, para. 13
42 CCP, Art. 245, para. 3.

assigned by the court or by the prosecution may produce expert opinions; conclusions of experts instructed by the defence are rarely considered as admissible evidence, despite clear legal provisions allowing the defence to submit such conclusions.[43]

During the trial, the prosecutor may change the charge;[44] the defence cannot seek a revision of a charge or the dismissal of the case until the closing arguments. This legal provision produces a situation where, if the charge is obviously incorrect, the defendant continues to be tried. Moreover, the wrongful classification of a crime influences the decision on preventive measures. The court must directly examine evidence in a case.[45] In practice, judges frequently use the pre-trial statements of witnesses and are reluctant to inspect the trial evidence.

Upon completion of the trial, the court decides on the merits of the charge. There is no separate sentencing stage of the proceedings. The determination of guilt and the sentence are decided by the court simultaneously. The CCP provides for the option to return the case for additional investigation, due to the incompleteness or incorrectness of the pre-trial investigation.[46] Frequently, such a judgment is adopted instead of acquittal when there is insufficient evidence to prove the charge.[47]

1.3.3.3 Appeal and cassation

The double jeopardy rule is not applied in Ukraine, and the defence and prosecution have equal rights to appeal against any court ruling. The parties may appeal on matters of law or fact, as well as a mismatch between the sentence and the gravity of the crime and/or the personality of the convict. The appeal hearing is carried out by a panel of three judges of an appeal court. The scope of an appeal is limited by the content of the appeal complaint from parties to the case.[48] Moreover, the right to appeal is restricted by the position of the parties at trial, and if parties had not contested the facts of the case and other circumstances at the trial, they may not challenge these in their appeal.[49]

An appeal court is empowered to uphold, modify or quash a judgment of a trial court. Upon quashing a judgment, the appeal court has the power to remit the case for

43 CCP, Art. 48.
44 CCP, Art. 277.
45 CCP, Art. 257.
46 CCP, Arts. 246 and 281.
47 Marchuk and Rudnik 2005.
48 CCP, Art. 365, para. 1.
49 CCP, Arts. 299, paragras. 3, and 365, para. 1.

a re-trial, or for additional pre-trial investigation.[50] The trial court's judgment may be modified if the amendments are not detrimental to the convict.[51] If the appeal court comes to conclusions concerning facts or applicable law that are detrimental for the convict, it must quash the trial court's judgment and adopt a new judgment.[52] The appeal court may also dismiss the charge;[53] however, surprisingly, it has no power to acquit the defendant.

An appeal court has the power to conduct an evidentiary hearing, the scope of which is determined by the parties in their appeal complaints. However, it rarely uses this power. As a rule, an appeal review consists of an exchange of arguments by the parties concerning the trial court's judgment.

Any party to a case has the right to lodge a cassation complaint at High Court. The hearing is limited to issues of law; for example, has the criminal law been applied correctly; have there been significant violations of the proper procedure; and does the sentence correspond to the circumstances of the crime and the personality of the convict.

1.3.3.4 Extraordinary proceedings

Extraordinary proceedings may be opened by an interested party in two circumstances:

(a) if there have been discrepancies in applying the criminal law by the High Court, except the application of rules on sentencing and exemption from punishment. Differences in the application of procedural rules also do not allow for an application for extraordinary review;
(b) if an international judicial body has established a violation of an international obligation by a court during a determination of the case.

The possibility to apply for review of the case in view of newly discovered evidence depends on the discretion of the prosecuting authorities; the interested party may apply to the prosecutor who, if he/she sees a ground for review, may apply to the appeal or cassation court for a review of the case.

50 CCP, Art. 374.
51 CCP, Art. 373.
52 CCP, Art. 378.
53 CCP, Art. 366, para. 1 (1).

1.3.3.5 Summary proceedings

The court may find it unnecessary to examine evidence regarding those circumstances that are not contested by the parties, and the defendant may therefore agree to bypass an evidentiary hearing.[54] While an acknowledgement of guilt is not necessary for such a procedure, judges always seek such an admission from the defendant and, in such a case, the court ends the evidentiary hearing. Moreover, if a defendant admits his/her guilt, subject to the absence of aggravating circumstances and with presence of mitigating circumstances, the punishment theoretically shall not exceed two-thirds of the harshest penalty prescribed by law for that particular crime.[55]

However, the consent of the defendant to this process is often obtained through direct or indirect influence, particularly in the absence of a defence counsel, such as a threat to ask for the maximum sentence in case of denial, and unofficial promises to 'gain' a lesser sentence for the defendant upon consent. Thus, the expedited procedure raises the issue of a guarantee against involuntary waiver for right to be tried, and a guarantee against ungrounded charges.

1.3.4 Statistics on the criminal justice system

The statistics below refer only to crimes *stricto sensu* described in the CCP. It does not include so-called 'administrative offences' under the CAO. Crime is measured by 'registered crimes', and Ministry of Interior statistics includes an analysis on the types of crime, types of perpetrators, regional distribution and other parameters. Official statistics indicate that there was a decreasing number of registered crimes in 2006–2008; however, an increasing trend appeared in 2009–2010, and reached 500,000 crimes in 2010 (among them 20,635 violent crimes, 318,216 crimes against property, and 56,931 drug-related crimes). This is not, however, necessarily evidence of a deterioration of the situation, since the increasing number of crimes is the result of some changes in the CCP (concerning, for example, quantity indicators of stolen property leading to criminal prosecution).[56] In 2010 the number of juvenile perpetrators (under 18) was 17,342 (5.3 per cent of all crimes).

54 CCP, Art. 299, para. 3.

55 CC, Art. 69–1.

56 Rudnik 2009; Rudnik and Apanasenko 2010.

The Ministry of Internal Affairs has no public statistics on the following indicators of a person's deprivation of liberty within the meaning of Article 5 of the ECHR: the number of persons delivered to police stations for different reasons, including persons arrested as criminal suspects or in the course of proceedings in respect of administrative offences.

In 2010 (in comparison with 2009), according to information from the Supreme Court of Ukraine, 46,000 (45,100) submissions to detain on remand were considered, of which 40,400 (39,100) or 88 (86.7) per cent were allowed; 4,400 (4,300) appeals by the accused and/or their lawyers against the judges' decision to apply this preventive measure were considered, of which 693 (674), or 1.7 (1.7) per cent were allowed. In addition, the courts considered 11,900 (12,600) submissions on the extension of the period of detention and allowed 11,300 (11,500) of these. In addition, 35,500 persons were sentenced to imprisonment.

The growth of the population of Centres for Pre-trial Detention's (SIZO)[57] has continued over the past three years at a considerable rate. While on 1 January 2008, 32,110 persons were held in SIZOs (one year before it was 32,619), during 2009, the number increased by 3,882 (11.4 per cent) and, for the first half of 2010, by a further 1,996 (5.2 per cent). The total increase since the beginning of 2008 is 24.6 per cent.

The number of persons in correction facilities (colonies) in the period 2008–2010 was between 108,000 and 110,000; in juvenile facilities it decreased from 1.902 on 1 January 2010 to 1,462 by the middle of 2010, and during the same period, the number of persons imprisoned for life is increased from 1,463 to 1,643.

It is possible to identify certain regional peculiarities in the changes in the number of SIZO detainees. Considerable overcrowding of SIZO institutions occurs in Kiev (which saw an increase of 1,065 persons), in the Donetsk region (1,651 in the three SIZOs), in Kharkiv (738) and in Symferopil (713).

2. The legal aid system

The basics of legal aid are established by Article 59 of the Constitution of Ukraine, which states that:

> ... [e]verybody has the right for legal assistance. In cases described by law the assistance is provided free of charge.

[57] The Centre for Pre-trial Detention.

In the criminal justice system, the right to legal aid is provided by the CCP. However, the system of providing legal aid to indigent people remains unchanged from Soviet times, when it was based on the compulsory participation of a lawyer. The decision to grant legal aid is taken by an investigator or judge. No separate group of 'legal aid' lawyers exists. A defence counsel is appointed by an investigator or judge through a request to a lawyers' association, if participation of a defence counsel in mandatory (see 3.2 below), and the head of the lawyers' association must comply with the request. The problem is that not all lawyers are in an association, and in some regions no lawyers' association exists (see 4.1 below).

Remuneration by the state is regulated by an Instruction of the Ministry of Justice. Remuneration for lawyers assigned by a judge or investigator is obviously in contrast with market price for private work (until 1 January 2009, about 2 Euro per full day; nowadays, about 2 Euro per hour). Remuneration is paid on the basis of a timetable compiled by the investigator or judge. The amount of, and mechanism for, payment for a lawyer's legal aid work in criminal cases at the expense of the state is determined by the government.[58] Under the CCP,[59] such compensation may be for the account of the convict only upon his/her consent. The expenditures for legal aid in criminal cases decreased from 287,488 Euro in 2004 to 164,618 Euro in 2010. The proportion of the total expenses of the State Budget of Ukraine decreased from 0.0027 to 0.0008 per cent. The real expenditure on remuneration of lawyers is even less – 11,600 Euro in 2008, and 82,500 Euro in 2010. For 2011, annual expenditure on criminal legal aid is budgeted in the amount of 0.0033 Euro per resident of Ukraine.[60]

In a survey, only 15.1 per cent of inmates responded that they were represented by lawyers. A review of case files indicated that only 13 per cent of the defendants were legally represented.[61] During the research, persons serving a sentence were interviewed as to whether they had any possibility of using free legal assistance in the course of the investigation. It was found that the prosecuting authorities provided a lawyer *proprio motu* in 24 per cent of cases; upon the first request of respondents in 4.3 per cent of cases; after repeated requests and remonstrations in 5.4 per cent of cases; and refused outright to provide a lawyer in 26.9 per cent of cases. On the other hand, 3.7 per cent

58 Resolution of Ministry Cabinet of Ukraine of 14 May 1999, No. 821, Procedure of Remuneration of Lawyers' Work in Rendering Legal Aid for Citizens in Criminal Cases at State Expense (Amended 11 June 2008, No. 530), para. 3.

59 CCP, Art. 93.

60 This information has been checked many times and is correct.

61 Kobzin 2007, p. 32.

of respondents did not require a lawyer; however, a lawyer was still assigned to them. Some 21.8 per cent of respondents voluntarily waived the right to a lawyer, while 13.9 per cent were represented by a paid lawyer.[62] If a person is subsequently found guilty, the remuneration must be recovered from him/her, except in certain limited circumstances.

The legal aid system has proven to be completely ineffective in practice. During the past several years, about two million UAH (approximately 175,000 Euro) has been allocated in the state budget for legal aid in criminal cases. However, not more than one-quarter of these funds has actually been spent, even taking into account the very low rate of remuneration. It cannot be said that free legal aid is not provided by lawyers. Moreover, the requirement of mandatory legal assistance is observed quite strictly. However, it appears that lawyers providing legal aid are driven by incentives other than remuneration from the state budget, for example, by the desire to maintain good relations with investigators and judges and to have some 'privileges' during paid representations, or in some cases by true philanthropic considerations.

There is no clear and transparent mechanism for the assignment of a lawyer under the legal aid scheme. Frequently, legal aid is provided by lawyers upon a personal request from a judge or investigator, in exchange for some privileges from them in other cases. Therefore, the assignment of a lawyer frequently arises from the recommendation by an investigator or court of a particular lawyer, which contributes to a system of 'pocket lawyers'.

There are no special arrangements, including restrictions, for lawyers/firms in providing legal aid. Moreover, pursuant to the Rules of Lawyer's Ethics, a lawyer is obliged independently from his/her specialisation to keep abreast of recent developments in order to be ready to provide proper legal representation in criminal cases under the free legal aid scheme.[63] Thus, in theory, every lawyer is capable of being a defence counsel in a criminal case upon a request by the person or organ conducting the proceedings.

Legal assistance free of charge in criminal cases is one of the aspects of the criminal justice system that needs immediate improvement. In June 2006, the Decree on the Formation of the Legal Aid System in Ukraine was adopted by the president to guarantee high standards of free legal aid delivery and provide effective access to counsel for all indigent defendants and claimants who are eligible. The Decree establishes

62 *Ibid.*, p. 55.

63 The Rules on Lawyer's Ethics, Art. 10, para. 3.

general principles for the organisation, delivery and funding of the legal aid system in Ukraine in both the criminal and non-criminal fields. It determines the scope of legal aid, defines criteria of eligibility for legal aid, provides for voluntary participation of legal professionals in the legal aid scheme funded by the state, recommends adequate funding for the legal aid system and lays down the basic principles of legal aid management.

Since 2006, under the Decree, public defender offices funded by non-governmental (NGO) donors have been established in three different regions of the country, as a model to provide prompt access to lawyers following detention. On 2 June 2011, the Ukrainian Parliament passed the Free Legal Aid Law. In spite of some its shortcomings, its adoption is a significant step forward in the regulation of the legal aid system. First of all, it confirms that public authorities recognise the necessity to make changes in the area, and provides a possibility to increase financing through budgetary funds. Adoption of the law also makes it possible to involve international assistance programmes for the introduction of the system across the country, as well as to establish an effective management system. The efforts of the Ministry of Justice and Ukrainian NGOs will be focused on implementing the experience of the pilot projects, and finding answers to the questions that will be important for the establishment of free legal aid centres in other regions.

The law envisages the establishment of the first Legal Aid Centres as from January 2013. It is the first attempt to codify eligibility criteria for legal aid. The positive feature of the Law is that legal aid is available not only for those detained on suspicion of committing a crime, but also for persons under administrative detention or administrative arrest. The law established several institutional agencies: Legal Aid Centres at the regional offices of the Ministry of Justice, as well as two Registries of lawyers to assist with the work of the Centres and to render legal aid on the basis of a single contract (*ex-officio* lawyers).

Legal aid will be funded from state and municipal budgets, as well as from other sources. Detailed procedures on the selection of lawyers, the operation of the Centres, and co-operation between the Ministry of Interior and Legal Aid Centres will be developed within bylaws. The primary challenge for the implementation of the Law is to find the appropriate balance among the interests of the different stakeholders of the legal aid system, as well as to separate two types of the activity under the law – the administration of the legal aid system and the delivery of legal aid services.

3. Legal rights and their implementation

3.1 The right to information

Generally, the court, prosecutor and/or investigator must explain the rights of a suspect or defendant at any his/her request.[64] The suspect (accused) must, immediately upon his/her detention or the bringing of a charge, be informed in writing about the grounds for, and nature of the suspicion against him.[65] The cause and nature of the accusation shall be indicated in the arrest report or formal charge, and a copy thereof must be handed over to the suspect or defendant. At the same time, the suspect (accused) must be informed about his/her rights.[66] The law lists the specific rights that shall be explained to the suspect (accused),[67] including the right to be represented by a lawyer and to have a meeting with lawyer before the first interrogation. The investigator or court is obliged to assist the suspect (defendant) in his attempt to contact a lawyer.[68]

The information on the cause and nature of the accusation may be quite general before the person is formally charged. However, as a rule, the suspect is provided with the factual circumstances of the crime and their legal characterisation under criminal law (sometimes, however, the legal classification of an offence is described in a very unclear and technical way).[69] On the other hand, the formal charge is set out in the special order of the investigator that, as a rule, is quite an extensive document. The investigator is, in the order, obliged to indicate the crime imputed to a person, the time, place and other circumstances of the crime, and the provision(s) of the criminal law describing the crime.[70]

64 CCP, Art. 53.

65 CCP, Art. 53 creates a general duty of the investigator or court to 'explain' the rights of any participant of the proceedings. CCP, Arts. 43–1 and 106 provide that, in the arrest report or order regarding other restrictive measures, it must be indicated that the suspect was explained his/her rights. As the suspect acquires the formal status from the very moment of arrest or other restriction, the rights must be 'explained' at once. CCP, Arts. 43 and 140 prescribe similar duties in respect of defendant.

66 CCP, Art. 106; surprisingly, the law does not contain a similar clause as regards the defendant.

67 CCP, Arts. 43 and 43–1.

68 CCP, Art. 47 (1).

69 See, for example, *Nechiporuk and Yonkalo v. Ukraine*, No. 42310/04, 21 April 2011.

70 CCP, Art. 132.

In addition, the investigator is obliged to explain the relevant rights prior to each investigative step.[71] As a rule, the rights tend just to be quoted to a suspect or defendant. Even though the text, with extracts from the relevant provisions of the CCP, is present in the relevant protocol, in fact the protocol is not handed over to the defendant and the obligation to verify that a defendant understands their rights is not clearly expressed in the law; nor is the obligation to explain the consequences of a waiver of rights, including the right to remain silent and to be represented by a lawyer. In practice, no such explanations are provided to defendants; moreover, investigators often provide quite frivolous interpretations of the rights either deliberately or as a result of a poor understanding of the scope of the relevant rights.

There is no standard form of a letter of rights, and every local agency uses its own template. Some investigating authorities have adopted the practice that, at the time of interrogation, a 'protocol of explanation of procedural rights', together with voluminous quotations from the Constitution, the CCP, and even the Convention, is signed by a defendant. In fact, it is quite difficult for the defendant to understand the large amounts of text printed in small letters. As a rule, a list of rights is not handed over to the accused, but is kept in the case file.

Research indicates that 99 per cent of reviewed criminal case files contained reports about the explanation of rights.[72] However, the majority (72.7 per cent) of interviewed inmates said that they were not informed about any rights. Another 20.3 per cent indicated that they were offered the opportunity only to quickly review a piece of paper containing something about their rights; however, no rights were explained to them. Only seven per cent of respondents believed that they were informed of their rights.[73] This data, in general, is supported by information from the Public Defender Offices (PDOs).[74]

There is no duty to inform a defendant of any developments in the case, for example, new evidence or minor details of the factual circumstances. The duty to inform the defendant of any change in the nature and cause of the accusation arises only in respect of significant developments in a case – that is, when new aspects of a charge, a new charge is developed, a new legal characterisation is attached to the factual circumstances, new factual circumstances are found, but only if this results in a change of the legal classification or reassessment of the classification. In such a case,

71 CCP, Art. 85.

72 *Ibid*, p. 59.

73 Kobzin 2007, p. 49.

74 'Defence against Criminal Accusation: How to Make It Accessible for Anyone', report of PDOs activity in 2010, Kiev, International Renaissance Foundation, 2011, p. 78.

the amended decree containing the formal charges must be compiled and presented to the defendant in writing.[75]

The final charge is outlined in the indictment presented to the defendant after completion of the pre-trial investigation. The bill of indictment must contain *inter alia* the following: a detailed description of the crime(s) impugned with reference to supporting evidence, and a classification of the crime(s) under the Criminal Code.[76] If there are developments at the trial that are important to the legal classification of the crime, the prosecutor is obliged to bring a new (amended) charge against a defendant. In complex cases, particularly involving numerous and complicated changes, the court has the power to order an additional investigation.

Access to evidence or materials in a case file is problematic during the pre-trial investigation. The suspect (defendant) has no legal right to inspect any documents in the case file; however, surprisingly, his/her defence lawyer has the right to inspect materials (evidence) that substantiate the arrest, detention or other preventive measure imposed on his/her client and/or are a basis for a charge.[77] The scope of evidence accessible to the defence lawyer is an issue of constant dispute between lawyers and investigating authorities. Some defence lawyers use various court proceedings to gain access to the case file: the bail or jail hearing, the court hearing on a decision to open the investigation, or some other interlocutory proceedings are frequently used for this purpose. However, the lack of access to the case file could frequently raise problems at these interlocutory hearings, particularly at the detention hearing, and could lead to violation of Article 5, paragraph 4 of the ECHR.

In a special resolution, the Supreme Court of Ukraine has underlined that the law does not provide for an opportunity for the defence to inspect the case file in court prior to the bail or jail hearing, and the judge must inspect the evidence in camera, in order to secure the 'secrecy' of the investigation.[78] Moreover, it is difficult to read the materials supporting the preliminary detention, as an investigator usually carries out investigatory actions and prepares the case file for the judge just prior to the hearing. During the pre-trial investigation, the suspect (defendant) has a right to inspect only in order to arrange an expert examination or review the results of such

75 CCP, Art. 141.

76 CCP, Art. 223.

77 CCP, Art. 48 (2)–(3).

78 Resolution of the Plenum of the Supreme Court of Ukraine on Application by Court of Detention on Remand and of Prolonging Terms of Detention on Stages of Inquiry and Pre-trial Investigation, No. 4 (2003), paragraph 6.

an examination. The defence lawyer also may gain access to evidence through being present during those investigative actions opened by his/her motion.[79]

After the completion of the investigation, a defendant must have full access to the materials in the case.[80] The right of access to the case file at this stage is absolute. Any time limits will depend on length of the investigation. Immediately after the investigation is completed, the case file must be accessible to the defendant, although practical circumstances may influence the promptness of such access. If the defendant is detained, the law provides additional safeguards for timely access to the case file: the detained defendant must have access to the case file not less than a month prior to the expiry of the fixed term of detention; otherwise his/her detention cannot be prolonged and he/she must be released after the expiry of this term.

As a rule, the obligation to provide access to the case file is strictly complied with. Failure to do so may result in the return of the case to the prosecutor by a court. However, only evidence gathered in the course of the 'formal' investigation is accessible to the defendant. No rule of 'discovery' exists in the legal system. In principle, the case file is a complete compilation of all the investigative steps and their results. The investigator has no power to withhold material from the case file. However, the case file includes only material obtained after the case was formally opened, and not the results of undercover activities by the police. Evidence collected in the course of 'informal' interviews by the police, as well as other results of police activities not included in the 'formal' investigation, and may therefore be completely unknown to the defendant. However, if the prosecution intends to use these materials in court, they are included in the case file. Therefore, in principle, it is quite easy for the police to withdraw exculpatory evidence obtained during activities that are not formally classified as part of the formal investigation.

In practice, it is possible to re-inspect the case file, compiled at the pre-trial investigation, during the trial and other judicial proceedings. However, if the defendant is detained on remand, such re-inspection may require some additional practical arrangements, and he/she would most likely not be able to re-inspect the case file if a judge has confirmation that it was inspected after completion of the investigation. Any new evidence produced by a party, or obtained by the court *proprio motu*, is examined at the hearing. There is no rule about preliminary notification of the intention to produce new evidence.

79 CCP, Art. 48.

80 CCP, Art. 218.

3.2 The right to defend oneself

A suspect/defendant has the right to conduct his/her own defence. There is no express legal obligation on the authorities to inform the suspect of this right; rather it may be concluded from the set of rights granted to the defendant in the proceedings. However, the implementation of a person's own defence may be hindered in practice. Surprisingly, the procedural rights of a defendant's lawyer are wider than the rights of the defendant him/herself. For example, the defence lawyer has the right to be present during investigative actions requested by him/her or his/her client, and may collect evidence and request expert opinions. It is not clearly expressed in the law that the defendant has the same rights.

The participation of a defence lawyer in the proceedings does not preclude the personal participation of the defendant. Although the right of the suspect to defend him/herself covers all phases of the criminal proceedings (including the appeal and cassation stages), the self-representation of the detained defendant at the appeal and cassation hearing depends on clear motion from him/her.

In cases exhaustively listed in the CCP the assistance of a defence lawyer is mandatory, notwithstanding the wishes of the defendant. Defence counsel must be assigned if a defendant:[81] (1) is a minor; (2) is impeded from effective defence him/herself due to his/her limited physical or psychological capacity (for example, mute or blind); (3) does not have a good command of the language of the proceedings; (4) is accused of a crime punishable by life imprisonment; (5) may be placed for psychiatric treatment at a closed institution; or (6) may be subjected to involuntary educational treatment. By contrast, the complexity of a case, the welfare of the defendant and any other considerations are not taken into account.

The police and investigative authorities frequently use manipulative strategies, particularly taking advantage of claims regarding the gravity of a charge, usually with respect to the investigation of a murder. The investigator initially classifies the crime imputed as a 'simple' murder, or inflicting grave bodily harm resulting in death, interrogates a suspect, and then reclassifies the crime as aggravated murder. The effect of this is to circumvent the requirement of mandatory legal representation in the case of charges of aggravated murder. In its judgment in *Balitskiy* case, the ECtHR indicated that this problem is 'recurrent in the case law against Ukraine', noting that

81 CCP, Art. 45.

the 'issues should be addressed by the domestic authorities to avoid further repetitive complaints of this type' (paragraph 53) and also that:

> ... having regard to the structural nature of the problem disclosed in the present case, the Court stresses that specific reforms in Ukraine's legislation and administrative practice should be urgently implemented in order to bring such legislation and practice into line with the Court's conclusions in the present judgment to ensure their compliance with the requirements of Article 6.[82]

Surprisingly, when a defendant 'wants to be represented by a lawyer but cannot afford it', legal assistance is mandatory,[83] irrespective of any circumstances related to personality of the defendant or the nature of the charge. In practice if, in the first type of case, the requirement of legal representation is observed strictly (subject to manipulation of the status of suspect/defendant – see 1.3.2), in the second type of case, legal representation is provided quite rarely, and only where the defendant is very insistent.

When provided, legal assistance remains mandatory during the pre-trial proceedings and the trial. The law does not prescribe mandatory legal assistance in appeal and cassation proceedings, except where the prosecutor or victim raise before those courts questions that may result in a ruling that is detrimental to the defendant.[84] Otherwise, legal assistance is not mandatory and, as a rule, assigned lawyers do not represent the defendant in the higher courts.[85] In the appeal court, the participation of a defence counsel is obligatory only for cases of mandatory participation of counsel in the trial court, and then only if the matter at issue in the appeal may result in a worsening of the position of the convict. In the cassation court, convicts have no right to be represented by an appointed lawyer, and there is no provision in the law regarding legal representation of a convicted person.

82 *Balitskiy v. Ukraine*, No. 12793/03, paras. 50 and 54, 3 November 2011.

83 CCP, Art. 47 (4) (2).

84 CCP, Art. 47 (4).

85 In *Bandaletov v. Ukraine* (No. 23180/06), the applicant was convicted of murder even though he argued that certain exculpatory circumstances should result in a less grave classification of the crime. He was represented during the trial, but was left alone at the cassation hearings, and the government in its observations stated that he had no right to legal representation, as he was convicted to life imprisonment and did not risk receiving a graver sentence as a result of the cassation proceedings.

The law does not distinguish between 'aided' defendants and those who are represented by a lawyer of their own choice. In practice, the application of the above rules depends to a great extent on the presence of a lawyer, and how zealous he/she is in securing the rights of the client. Undoubtedly, a well-paid lawyer will be more alert to possible violations of procedural rights and more active in the defence.

A suspect or defendant has the right to choose a lawyer only if he/she is able to pay for legal assistance. As to the privately chosen lawyer, there are some discrepancies between the law and practice. The Constitutional Court of Ukraine, in its *Soldatov* judgments,[86] held that the right to free choice a defence counsel under Article 59 of the Constitution is not limited to members of Bar, but also includes any 'other legal professional' practicing law within the system established by legislation. However, in its summary of case law,[87] the Supreme Court of Ukraine recognised that the courts that did not admit other legal professionals as defence counsel in criminal cases had acted correctly. The Court referred to the absence of law regulating the activities of such 'other legal professionals'. In practice, different courts act in different ways, as no legal rules exist in this respect. The issue of the right to choose a non-Bar lawyer is currently under consideration by the ECtHR in *Zagorodniy v. Ukraine*.[88]

The replacement of a defence counsel may be done only at the initiative of a defendant or with his/her consent. When representation is mandatory,[89] the refusal by a particular lawyer is accepted only when the officer or the court conducting the proceedings in the case accept that the reasons for such refusal are serious. The Supreme Court of Ukraine has expressed the opinion that, when considering whether to accept the refusal of a defence counsel to act for a defendant, a court should ascertain whether the refusal was forced (for example, in connection with the non-appearance of the counsel at the court hearing) and, if so, whether to provide the defendant with a possibility to have a (new) defence counsel.[90] However, if the lawyer is a witness in a case, as well as in the case of other conflicts listed in the relevant law, that particular

86 Decision of the Constitutional Court of Ukraine of 30 September 2009, No. 23 – rp/2009 on the Case about the Free Choice of a Defence Counsel.

87 Resolution of the Plenum of the Supreme Court of Ukraine, No. 8 of 24 October 2003 on Application of Legislation Providing the Right for Defence in Criminal Proceedings, paragraph 5.

88 *Zagorodniy v. Ukraine*, No. 27004/06.

89 CCP, Art. 45.

90 Resolution of the Plenum of the Supreme Court of Ukraine, No. 8 of 24 October 2003 on Application of Legislation Providing the Right for Defence in Criminal Proceedings, paragraph 8.

lawyer may be removed by the investigator or court,[91] which shall, in this case, inform the defendant about his/her right to be represented by another lawyer.[92]

The law contains a provision that, in principle, may be used against a defence counsel who is zealously defending his client:

> A defence counsel owes not to hinder for determining of truth in the case ... by means of protracting the investigation or the trial.[93]

In some cases, investigators try to remove a particular lawyer acting on behalf of a defendant through the use of this provision. Such a case was considered by the ECtHR in *Yaremenko*, where:

> ... the applicant's lawyer was dismissed from the case by the investigator after having advised his client to remain silent and not to testify against himself.

In its reply to the complaints, the prosecutor,

> ... noted that the lawyer had breached professional ethics by advising his client to claim his innocence and to retract part of his previous confession.[94]

Under the law, access to a lawyer shall be secured as soon as a person is acknowledged as a suspect or accused and, in any case, before the initial interrogation. However, the practice of unregistered detention (see Section 1.3.2 above) nullifies this supposedly strict safeguard in many cases. No system or mechanism exists for the monitoring of the quality of legal assistance, including that under the free legal aid scheme.

A suspect/defendant has an absolute right to confidential consultations with the lawyer who is appointed as /his/her defence counsel.[95] Generally, this privilege is observed quite strictly. Moreover, since January 2010, correspondence between detained defendants and their lawyers has been privileged from any monitoring by administrators at detention facilities.[96] However, the procedure for handling

91 CCP, Art. 61, 61–1.
92 CCP, Art. 46, para. 4.
93 CCP, Art. 48, para. 6.
94 See, for example, *Yaremenko v. Ukraine*, No. 32092/02, para. 78, 12 July 2008.
95 CCP, Art. 41.
96 Law on Detention on Remand, Art. 13, para. 9.

correspondence in detention facilities is unclear, and it is difficult to verify the practical implementation of this requirement, although the main problem concerns time restrictions rather than actual confidentiality itself. Problems with confidential consultations may also arise at the trial because, as a rule, detained defendants are held in a cage in the courtroom, and thus are remote from their lawyer and cannot receive advice during the hearing. Some judges perceive communication between the lawyer and his/her client as a breach of order in the courtroom, or even contempt of court.

The Constitutional Court of Ukraine, in its judgment on the right to legal assistance,[97] interpreted Article 59 of the Constitution as guaranteeing the right of any person – irrespective of his/her legal status – to be accompanied and assisted by a legal representative in his/her communications with state bodies, local authorities, public associations, legal entities or physical persons. Amendments to the CCP were adopted in 2010 with the supposed aim of implementing the judgment.[98] However, contrary to the Constitutional Court's judgment, the law introduced restrictions on legal assistance in the form of requiring the investigator's 'permission'. Indeed, the law makes efficient legal aid virtually impossible. For example, under the law the witness's defence attorney:

> ... has the right to ... provide consultations for the witness with investigator present, if the material evidence in the case can be used for criminal prosecution of the witness or members of his/her family and close relatives.

Thus, the fundamental principle of the legal assistance – confidentiality – is flagrantly violated.

3.3 Procedural rights

3.3.1 The right to release from custody pending trial

Pursuant to the CCP, any preventive measure (excluding preliminary detention) at the stage of the pre-trial investigation is determined not by a judge, but by an investigator, inquiry officer or prosecutor.[99] Only a judge, upon the request of an investigator supported by the prosecutor, may detain a defendant pending trial. The motion is

97 Decision of the Constitutional Court of Ukraine of 30 September 2009, No. 23 – rp/2009.

98 CCP, Arts. 44 (6), 69–1 (1) (4–1).

99 CCP, Art. 165–2, para. 1.

considered by a single judge in the presence of the prosecutor, the investigating officer, and the defendant and his/her defence counsel.[100] However, the law allows the hearing to be conducted without defence counsel if he/she fails to appear (even in a case of not having been informed about the hearing). The hearing may be postponed by up to 10 days upon the request of a prosecutor to allow additional information relevant to the issue to be collected, and up to 15 days upon the request of the defendant.

The court may apply various alternative measures instead of detention pending trial: (1) recognisance not to leave the jurisdiction; (2) personal surety; (3) surety by a civil organisation or working collective; (4) bail; or (5) supervision by military authorities (for a military servant).[101] In making his/her decision, the judge must establish:

(a) whether the suspicion of the commission of the crime by the defendant is grounded;[102]
(b) whether there is risk that the defendant will abscond from the investigation, court or execution of procedural decisions, intervene with ascertaining the truth in the case, or continue criminal activity;[103]
(c) the defendant's age, health condition, family and financial status, occupation, place of residence, previous criminal history, social ties, dispositions (drug or alcohol addiction), lifestyle or previous conduct during criminal proceedings.[104]

However, in practice, considerations regarding the gravity of the charge prevail in the reasoning of the courts. In fact, a charge entailing more than three-years imprisonment may be sufficient to order that the defendant be kept in custody without substantiating any particular risks or considering alternative measures. As the ECtHR indicated in the *Kharchenko* judgment:

100 CCP, Art. 165–2.
101 CCP, Art. 149.
102 Resolution of the Plenum of the Supreme Court of Ukraine on Application by Court of Detention on Remand and of Prolonging Terms of Detention on Stages of Inquiry and Pre-trial Investigation, No. 4 (2003), paragraph 3.
103 *Ibid*, para. 10; CCP, Art. 148.
104 *Ibid*, para. 10, CCP, Art. 150.

> ... it faced an issue of the domestic courts' failure to provide an adequate response to the applicants' arguments as to the necessity of their release. Despite the existence of the domestic judicial authorities competent to examine such cases and to order release, it appears that without a clear procedure for review of the lawfulness of the detention the above authorities often remain a theoretical rather than practical remedy for the purposes of Article 5 § 4.[105]

The judge may order the detention of a defendant for up to two months. If the pre-trial investigation is not completed in this period, the investigator may request the judge to extend the detention up to four, nine or 18 months, which is the maximum period of detention during the pre-trial investigation. About 25 per cent of all criminal suspects are arrested by the police and further detained, mainly in cases relating to grave offences. Of those arrested by the police, approximately 80–90 per cent[106] are brought before a judge with a motion to detain the suspect pending trial, and in 87–88 per cent of cases, the motions are upheld. Bail is almost never granted; in the whole country, only 109 defendants in 2010 (150 in 2009) were released on bail.[107] Although the law[108] foresees using any kind of a property as bail, only monetary amounts are used in practice. There are no regulations on the practical aspects of the bail application; moreover, in most courts, there is no public information about bank accounts for the deposit of bail moneys, thus further suggesting that bail is an exceptional preventive measure in the national criminal justice system.

The decision of the judge may be appealed. The defendant may also be released at the preliminary hearing by the trial court, and at any time during trial. Decisions of the trial court are not appealable. The law does not provide for a maximum period of detention at the trial stage or during subsequent judicial proceedings.

3.3.2 The right of a defendant to be tried in his/her presence

As a rule, the right of a defendant to be present during the trial is strictly observed. However, in an appeal and cassation court, this right is subject to conditions, in particular to the clear request of the defendant. A defendant may be tried *in absentia*

105 *Kharchenko v. Ukraine*, No. 40107/02, para. 100, 10 February 2011.

106 Materials for Public Hearing before the Committee of the Supreme Council of Ukraine for Legislative Provision of Law Enforcement Activity on Observance of Human Rights in Internal Affairs Bodies Activity'), Kiev: 2010, and statistics of the Supreme Court of Ukraine.

107 Rudnik and Apanasenko 2010.

108 CCP, Art. 154–1.

where: (1) he/she is abroad; or (2) he/she asks the court for a trial *in absentia* and cannot be punished by imprisonment.[109] No special provisions guarantee the rights of an absent defendant.

3.3.3 The right to be presumed innocent

The Constitution of Ukraine affirms for any person a presumption of innocence unless and until his/her guilt is legally proven and determined by a court judgment.[110] In compliance with this principle, the CCP provides[111] that the judge remitting the case for trial may not predetermine the defendant's guilt. In Ukraine, the approach in selecting the preliminary measures differs from that in, for example, the UK or the US, where a judge selects the appropriate preventive measure, which for almost all crimes may include bail.

In Ukrainian criminal practice, the gravity of the (alleged) crime continues to be the primary ground upon which to base the determination of the appropriate preventive measure. As a result, alleged grave offences generally 'guarantee' that the defendant will be placed in preliminary detention. Moreover, the judge's decision is preceded by that of the investigatory authorities with regard to the temporary detention of the suspect. Accordingly, in practice, if preliminary detention is imposed on a defendant, there is a high level of probability that he/she will ultimately be punished with a sentence involving imprisonment. Thus, the decision to take a defendant into custody often predetermines the guilt of the defendant. According to the available statistics,[112] this applies in the case of approximately 20 per cent of all defendants.

3.3.4 The right to silence

The right to silence is guaranteed by the Constitution of Ukraine, which provides as follows:[113]

109 CCP, Art. 262.

110 Constitution, Art. 62.

111 CCP, Art. 245.

112 http://www.scourt.gov.ua/clients/vs.nsf/0/09F805995C5F5CA6C2257752002A196D?OpenDocument& CollapseView&RestrictToCategory=09F805995C5F5CA6C2257752002A196D&Count=500&.

113 Constitution, Art. 63.

> The person does not bear liability for refusal to give testimonies or explanations against himself, family members or close relatives ...

The CCP[114] also confirms that the accused and suspect have the right to refuse to testify and answer questions. These provisions do not, in reality, provide defendants with a real possibility to exercise this right at the initial stage of proceedings in the absence of legal assistance. Criminal prosecutions generally begin with informal questioning of the person by the police. Typically, at this moment, the person does not have the status of either a suspect or witness; either he/she was voluntarily escorted to the station by police officers, or was physically apprehended and conveyed to the station.

NGOs working in the area of human rights' protection report that duress, in the form of cruel physical abuse, is a routine practice of police wishing to extort a confession. An assessment by the Kharkiv Institute of Social Research concluded that some 790,000 persons became victims of abuse by force of internal affairs bodies in 2010.[115] According to available statistics from the PDOs, more than 90 per cent of persons made a confession during the initial police questioning.[116] Given the proportion of cases disposed of by way of an expedited procedure (see 1.3.5.1), confessions by defendants due to abuse and physical force during an inquiry and investigation represents a serious issue.

Investigators from time to time explain the right to silence in frivolous or incorrect manner; for example, 'You may refuse to testify about your personal actions, but not about actions of your accomplices'. Threatening a suspect or accused with criminal liability for refusing to testify is often used to confuse that person. Moreover, the 'right to silence' can be easily violated in respect of a person who has no procedural status, or of a suspected person during his/her questioning as a witness, due to the obligation under Ukrainian law to testify or face criminal liability for refusal to give testimony.[117] The European Court has found a violation of Article 6, paragraph 1, of the ECHR in several cases against Ukraine, for example where:

> ... the applicant, having been warned about criminal liability for refusal to testify and at the same time having been informed about his right not to testify against himself, could have

114 CCP, Arts. 43 and 43–1.
115 Zakharov 2011, p. 16.
116 Yavorska 2011, p. 78.
117 CCP, Art. 385.

been confused, as he alleged, about his liability for refusal to testify, especially in the absence of legal advice during that interview.[118]

Police frequently construe an attempt by an accused to exercise his/her right 'to remain silent' as a desire to impede the investigation and an implicit admission of guilt by the accused. The police attitude was flagrantly expressed in a letter from the Khmelnytskyy City Police Department addressed to the PDO in Khmelnytskyy and the City Prosecutor. The writer expressed displeasure about the fact that, upon meeting with a lawyer, suspects refused to testify, relying on Article 63 of the Constitution: this 'hinders determining the truth in the case', and 'restricts the possibility of directing a criminal case to court due to incompleteness of the pre-trial investigation'. The author began with the statement that 'using Article 63 of the Constitution of Ukraine ... negatively affects the course of investigating of criminal cases', and that 'defence counsel is obliged not to hinder the determination of the truth in the case'.[119]

The statements of the suspect or defendant may be (and frequently are) used as evidence at the trial. The statements of the defendant in the courtroom have no legal hierarchy over his/her statement made at any pre-trial stage of the proceedings. If a defendant denies his/her guilt at trial, such pre-trial statements may still constitute the basis for a conviction.

According to the CCP,[120] statements by the suspect or accused should be verified, and conviction may be based on a confession only when it supported by a totality of evidence in the case. As mentioned above, the resort to abuse or force is a routine practice of law enforcement officers designed to 'encourage' the detainee to make a confession, which then becomes the basis of the accusation. The improper and ineffective examination of complaints, usually in the form of a prosecutor's decision about the absence of the signs of a crime on the part of police, have created the situation where a confession is 'the queen of evidence', and all another evidence is 'adjusted' to fit it. According to the statistics of model PDOs, more than 90 per cent of those detained in police stations in the absence of a defence counsel make a confession regarding the commission of one of more crimes.[121]

118 *Shabelnik v. Ukraine*, No. 16404/03, para. 59, 19 February 2009.

119 Letter of the Chief of Investigation Division of Khmelnitskyi City Police Department of 28 February 2008 (see Appendix 1).

120 CCP, Arts. 73 and 74.

121 Yavorska, 2011, p. 80.

3.3.5 The right to a reasoned decision

The CCP[122] specifies what the reasoning of a judgment should contain. This includes the evidence grounding the court's findings relating to each of the defendants; the motives for changing the charges; and the grounds for finding that (a part of) the charges are ill-founded. In practice, the principle of a reasoned judgment is not always observed. This is particularly so when the evidence of the defence against the prosecution is strong, and accordingly it is objectively impossible to ground the defendant's guilt – in such a case, the court might not assess all of the defence evidence examined during the trial but may not mention it in the judgment. In such a way, the judgment superficially appears to be reasoned, although this is shown not to be the case if one were to thoroughly examine the case file records, including the court transcript.

One aspect of the reasonableness of court's decision is the lawfulness of how the evidence relied upon was obtained. The Constitution of Ukraine provides that a charge may not be based on evidence that has been obtained illegally.[123] The CCP does not directly regulate the expunging of evidence from a case, unlike, for example, the rules about suppression of evidence in the US Federal Rule of Criminal Procedure.[124] The constitutional provision is almost useless in those cases where the defence applies to the court with a motion to exclude illegally or unfairly obtained evidence, due to the absence in the CCP of any mechanisms for exercising it. The court usually rejects such a motion on the ground that it is not directly provided for in the CCP, only granting the right of the defence to make a motion relating to the summoning of new witnesses and experts, requesting new evidence, or attaching new evidence to the case file.[125] Only in very rare cases is such a motion granted by an investigating officer (at the pre-trial stage) or by the court. However, the CCP provides[126] that the reasoning of a 'guilty' judgment must contain the reasons why the court rejected other evidence. In fact, this is the only mechanism for the realisation of the constitutional provision concerning the illegality of obtaining of prosecution's evidence.[127]

122 CCP, Art. 334.

123 Constitution, Art. 62, para. 3.

124 US Title 28A Judiciary and Judicial Procedure (Appendix) Federal Rules of Criminal Procedure, Rule 12 (b) (3).

125 CCP, Art. 296.

126 CCP, Art. 334.

127 *Nechiporuk and Yonkalo v. Ukraine*, No. 42310/04, 21 April 2011.

3.3.6 The right to appeal

The right to appeal is provided for both by the Constitution of Ukraine[128] and the Law of Ukraine on Judicial System and Status of Judges. Appellate proceedings in criminal cases are regulated in a special chapter of the CCP and, in principle every convicted person can exercise this right by submitting an appeal to the appellate court.

The practical realisation of the right typically gives rise to a general examination of the case in the appellate court. Often, when defence evidence is not referred to in a trial court judgment (see 3.3.4), the appellate court will further compound the problem by itself not mentioning such evidence. Moreover, although the possibility to conduct an investigation during the appellate court's examination of the case is provided for by law,[129] in practice this happens very rarely.

An acquittal judgment is not provided for in the CCP. Instead, if it finds a convict not to be guilty, an appellate court may only dismiss the case. In such cases, the appellate court commonly sends the case back to the trial court for re-trial, or to the prosecutor for further investigation.

3.4 Rights relating to effective defence

3.4.1 The right to investigate the case

Upon a motion by the defence, the defence counsel has the right to be present at all investigative actions involving the defendant, as well as other actions with the permission of the investigator, and may use technical devices (audio or video recorders, cameras, during investigative actions) with the permission of the latter.[130]

At the pre-court stages, the prosecution itself decides what evidence is to be presented before the trial court. Other parties to the proceedings can propose evidence, particularly witnesses to be questioned at the pre-court stage, subject to the discretion of the prosecution, as well as in court, subject to the discretion of the court (a judge), taking into consideration the opinion of the prosecutor (who typically would oppose such evidence if it is clearly benefits the defence) and other participants in the proceedings. In fact, all materials in the case file collected during the investigation

128 Constitution, Art. 129.
129 CCP, Art. 358.
130 CCP, Art. 48 (2), (4), (5).

constitutes evidence of the prosecution, although there may also be some materials of the defence that will be in the case file by the end of the investigation.

While evidence may be adduced by a suspect, a defendant and his lawyer,[131] the absence of clearly developed rules of evidence gives a significant advantage to the prosecution in presenting evidence, because the court usually refuses the evidence of the defence on the grounds of its unreliable nature, or its non-admissibility 'as obtained in non-procedural way'. The inequality of arms between the parties in adducing evidence to the court is made worse by the fact that no exclusionary rules exist. Although the Constitution of Ukraine prohibits the prosecution from using unlawfully obtained evidence, the only norms in the CCP concerning the matter of dealing with such evidence is in the provision dealing with the reasoning in a judgment, as follows:[132]

(a) the court must point to the reasons for evidence to be rejected;
(b) the court must give reasons for why specific procedural or operational search actions are a violation of law.

Typically, all evidence of the prosecution is confirmed by the court. Thus the defendant faces the accusations until the end of the trial, even in the case of unlawfully obtained evidence.

According to the CCP, at the time of the preliminary examination, if the judge believes that there are sufficient grounds to try the case, he/she will issue such a decision, without predetermining any issue in relation to guilt.[133] The Supreme Court of Ukraine has added that the judge may not examine the reliability of evidence at this stage.[134] Such a position makes it practically impossible to address a motion to suppress evidence (to exclude illegally obtained evidence from the case), and the case is assigned to trial, even in a case of an obviously groundless accusation.

3.4.1.1 The right to seek evidence, investigate the facts and interview prospective witnesses

Defence counsel has a right to gather information about facts that can be used as evidence in a case. This right encompasses the right to:[135]

131 CCP, Art. 66, para. 2.
132 CCP, Art. 334.
133 CCP, Art. 245.
134 Resolution of the Plenum of the Supreme Court of Ukraine, No. 6 of 30 May 2008 on Practice of Application of Criminal Procedural Legislation at the Time of Preliminary Examination of Criminal Cases in First Instance Courts, para. 13.
135 CCP, Art. 48(2)–(13).

(a) request and obtain documents (or copies) from persons or legal entities;
(b) familiarise him/herself with the necessary documents, apart from those that are confidential according to the law;
(c) obtain written expert opinions; and
(d) interview persons.

It remains a problem in practice, however, for a lawyer to obtain documents or copies from official bodies. If the information is clearly to the benefit of the defence, officials typically use numerous methods to avoid providing the information; for example, by asserting the 'confidentiality' of the information, by claiming that the agency does not have the information, by not answering the specific request, or by giving answers to questions that were not actually raised. Each of these methods indicates the extent of 'unofficial corruption' that restricts the rights of the defence.

By interviewing persons, a defence counsel will seek to learn facts about the case and determine possible witnesses for the defence; however, a lawyer only obtains written 'explanations' from a person, and that document almost certainly will not be added to a case file as evidence. Since 1993, defence lawyers have been granted:

> ... the right to collect information about facts, which could be used as evidence in a case, in particular ... to obtain written conclusions by professionals on any issues requiring special expertise.[136]

However, in practice, this document is perceived by the courts as having much less probative value than a forensic examination report conducted pursuant to an order of an investigator or court. In any case, such a conclusion cannot serve as a basis for the court's findings and, at best, may lead to an order for additional expert opinion by the court. Moreover, there are cases when the alternative expert opinions were not admitted by a court, as they were regarded as evidence 'obtained in a non-procedural form'.

In a recent judgment,[137] the Constitutional Court tried to develop an approach to the admissibility of information obtained by way of secret phone tapping. The Court held that:

136 CCP, Art. 48(2) and (13).

137 Judgment of the Constitutional Court of Ukraine of 20 October 2011 (No. 1–31/2011) on Official Interpretation of Article 62, para. 3 of the Constitution (http://www.ccu.gov.ua/doccatalog/document?id=160046).

> ... the charge cannot be based on evidence obtained in the course of undercover activities (1) by authorized person however in violation constitutional provisions or provisions of the law, or (2) obtained by unauthorized person in the course purposeful activities by means prescribed by the Law on undercover activities.[138]

However, the danger exists that rigorous interpretation of the judgment may result in refusal to admit as evidence pictures and records made by private persons. This judgment gave rise to considerable debate among legal professionals, and is the first time that one of the highest courts in Ukraine clearly expressed its view on the issue of admissibility of evidence.

In practice, investigators usually refuse to grant defence counsel access to materials that form the basis of the detention of a suspect, or the charge(s) against him/her, on the grounds of the 'secrecy of the investigation'. This has no definition in law and, therefore, it appears that the discretion of investigators in this regard has no clear legal limits.

3.4.1.2 The right to obtain expert evidence

Within the currently structured legal system, the possibility to obtain an independent expert opinion is extremely limited. At the end of 1992, the basic legislation on healthcare was adopted.[139] Article 6 stipulated the citizen's right to obtain an independent medical examination. Article 73 specifically addressed this alternative medical examination:

> ... upon request of a citizen, an alternative medical (medical social, medical military, medical forensic, forensic psychiatric) examination or post mortem examination shall be conducted ... Citizens shall themselves select an examination institution or expert.

As a result, in the period 1992–2000, a number of private medical, forensic and other experts and non-state expert bureaus were established. However, in June 2000, by an amendment of Section 4 of the Law on Entrepreneurship and Non-state Organisations, the possibility to be engaged in expert activities as an independent expert or expert organisations was abolished.[140] In 2004, the Law of Ukraine on Forensic Expertise specified that expert examinations decisive to a criminal investigation could

138 The numbering has been added by the author.

139 Newsletter 'Vidomosti Verkhovnoyi Rady Ukrayiny', 1993, No. 4, Article 19.

140 Newsletter 'Oficialnyi visnyk Ukrayiny' of 21 July 2000, No. 27, p. 1, Article 1109.

only be carried out by 'specialised state institutions'.[141] The Law contains a list of agencies, under which these specialised institutions can operate: forensic examination institutions under the Ministry of Justice; institutions on forensic examination, forensic medicine and forensic psychiatry under the Ministry of Healthcare; expert services under the Ministry of the Interior, the Ministry of Defence, the Security Service and the State Border Service.

This led to a monopoly of 'specialised state institutions'. Defence lawyers lost the possibility to seek an independent expert opinion. The state monopoly also seriously undermined the guarantees of the independence of experts in 'specialised institutions'. The management at these specialised institutions has an enormous influence on experts. The law does not provide experts with adequate safeguards to protect them from unlawful pressure. An expert may be easily fired notwithstanding any safeguards in the general labour legislation. Within the state monopoly of 'specialised institutions', the dismissal of professionally sound experts whose work could contradict management 'instructions' would virtually destroy any possibility for him/her to continue to practice as a forensic expert.

Such a system of 'specialised' expert institutions has lead to a decline in the quality of expert conclusions, a loss of skills and scientific impartiality among experts, and has resulted in the manipulation of expert knowledge in order to fulfil objectives that may not necessarily be related to the task of establishing the truth in a case.

3.4.2 The right to adequate time and facilities to prepare the defence

The defendant and his/her lawyer must be provided with adequate time to inspect the case file. However, the time for inspection may be limited by an order of a judge, in cases of intentional delay by the defence.[142]

In principle, the defence may ask a trial court to postpone the hearing due to the necessity to collect evidence or otherwise prepare the defence. In practice, no significant problem in this respect has been observed.

Some problems with respect to ensuring adequate time for preparation of the defence were raised in recent proceedings concerning former government officials, when the defence was provided with only two to three days to inspect a case file

141 Law on Forensic Examination, Art. 7 (3).

142 CCP, Art. 218, paras. 6 and 7.

of 5,000 pages. More often than not there is a lack of adequate facilities. It may be difficult to receive copies of necessary documents, even though, under the law,[143] the defence lawyer has an absolute right to use technical equipment during inspection of the case file. However, many judges and investigators consider this right as being subject to their discretion.

Some prisoners complained that they were kept handcuffed during inspection of the case file. Also, the presence of a clerk of the court or the investigator – who is there to stop the possible destruction of documents – hinders the confidentiality of communications between the lawyer and the defendant.

3.4.3 The right to equality of arms in examining witnesses

3.4.3.1 The right to secure the attendance of witnesses

The CCP provides for the right of parties to ask a court to summons new witnesses.[144] Obviously, this is at a lower level than is provided in Article 3 (d) of the ECHR – to examine or have examined witnesses against him/her, and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her. Moreover, any decision on this matter is dependent not only on the court's discretion, but also on the opinion of the other parties. Typically, the prosecution would object to any such motion by the defence.

The CCP does not contain detailed and clear rules of evidence,[145] particularly concerning the definition of 'relevant' evidence, thus giving rise to uncertainties in judicial practice. This leads to enormous difficulty for the defence in securing the attendance of witnesses compared to the prosecution, since the courts routinely reject defence motions to call witnesses on the grounds of their non-relevancy to the case. Even if such a motion is granted by the court, there is a practical problem with their appearance to court. The failure of witnesses and victims to appear in court is typical for trials in Ukraine. According to statistics from the Ministry of the Interior, for the first nine months of 2010, witnesses were subjected more than 131,000 times to

143 CCP, Art. 48.

144 CCP, Art. 296.

145 By contrast, see US Title 28A Judiciary and Judicial Procedure (Appendix); Federal Rules of Evidence.

forcible summonses to appear by the court or investigators because of their failure to appear in the proceedings.[146]

In the case on non-appearance of a witness on the motion of the defence, a court would issue an order to arrest and bring the witness to the court. Usually, all the witnesses whose names are included in accusatory act are raised by the prosecution, and it is routine practice of the police to submit to the court a report describing the impossibility of bringing a person to court without a court order. If a court directs an order to a prosecutor's office about the inability of the police to bring a witness to court, there is usually a standard reply to the effect that everything possible to attach witnesses has been done. Thus, in the case of non-appearance in court of one of its witnesses, the defence has no practical means to insist that this be rectified by the police.

3.4.3.2 The right to examine witnesses

The testimony of witnesses, either for the defence or for prosecution, must normally be produced orally at the trial.[147] The use of witnesses' pre-trial statements is possible only in the following situations:

(a) where there are considerable contradictions between the pre-trial and trial statements of the witness;
(b) in the absence in court of the witness, whose attendance is impossible due to sound reasons;
(c) where the witness is subject to a protection measure, and court has excused him/her from appearing in court, subject to the witness's written confirmation of his/her pre-trial testimony.[148]

Judges treat the term 'impossibility to appear in court' very broadly, and generally do not require the police to submit evidence as to the impossibility of finding a witness. In cases where the police have conducted a 'test purchase' of forbidden items, for example, drugs, the 'buyers' in such confidential operations are questioned either in a closed hearing or not at all, on the grounds of maintaining their protection. This

146 Materials for Public Hearing in the Committee of the Supreme Council of Ukraine for Legislative Provision of Law Enforcement Activity on Observance of Human Rights in Internal Affairs Bodies Activity, Kiev, 2010.
147 CCP, Art. 257.
148 CCP, Art. 306.

tactic is widely used by the prosecution to hide any improper actions of the police, and often constitutes a violation of the principle of a fair trial.

In the situation where a witness cannot recall the circumstances of a crime, the court commonly has read out the preliminary testimony of that witness 'to refresh' his/her memory, and this in effect often substitutes for the witness's oral testimony, thus making effective cross-examination impossible. As a result, the reading of written records (protocols) containing the testimony of witnesses, instead of having him/her examined in the court room, is a common practice.

While provided for by law,[149] effective examination of witnesses is, in practice, difficult to implement. A presiding judge must not allow the examination of irrelevant evidence, and this power is sometimes arbitrarily used by courts. In practice, this very often makes it impossible to attack a witness's credibility, because the court commonly rejects questions about the witness' personality, family relations, criminal history, former co-operation with police and so on as being 'irrelevant'. As a result, it is impossible to rebut or undermine the credibility of witness testimony. The power of the court, during the questioning of a defendant or witness, to ask questions in order to clarify and/or supplement answers is often overused

As mentioned in Section 3.3.8.1 above, there is no statutory or judicial definition clarifying the 'relevance' of evidence, or any interpretation of that term by the Supreme Court of Ukraine. Any question asked outside the scope of the accusation can be considered as irrelevant to the case, and rejected by the court.

3.4.4 The right to free interpretation and translation of documents

A defendant has a right to participate in the proceeding in a language that he/she understands and there exists an obligation to provide him/her with an interpreter.[150] In addition, the bill of indictment must be provided in the defendant's native language.[151] In principle, this right is complied with by law enforcement agencies and the courts. There may be a situation where the person has been a resident of Ukraine for a long time, but yet still claims that he/she cannot understand Ukrainian. In such a case, a question of fact may arise, but courts and law enforcement agencies usually try to secure an interpreter so as to avoid reproach from higher courts.

149 CCP, Art. 303.
150 CCP, Arts. 19 and 128.
151 CCP, Art. 223.

A problem may also arise in the context of effective communication between a lawyer and his/her client, because the expenses of an interpreter are not compensated to cover this issue.

The law does not require that every document in the case file be translated. However, legal representation for a person who cannot speak and read in Ukrainian is mandatory and may be considered as a compensatory mechanism. The translation of case documents that must be handed over to a defendant (for example, the decision to open a case, the charges, the indictment) is accomplished according to the CCP.[152] However, the translation of *all* papers in a case file is not provided for by law.

Engaging a certified interpreter is a problem in practice, and ordinary persons with a practical knowledge of the particular foreign language are usually used as interpreters or translators during the pre-trial investigation and in court. There is no special scheme for engaging interpreters and translators to participate in criminal proceedings.

There is no statistical data available about the compensation or reimbursement of expenses of witnesses, experts (excluding those of official institutions) and interpreters, and there is no mechanism for such payments within the public prosecutor's system.

It should be noted that, according to the opinion of judges, the rights of defendants in the course of criminal proceedings are observed in full accordance with the law, but that there are some differences that may arise due to the alcohol or drug dependency of a defendant and, in the view of investigators, his/her material status. Some investigators believe that the defendant's rights are significantly violated during the pre-court proceedings, particularly with respect to having adequate opportunity to prepare the defence before the initial interrogation of a suspect. Both the judges and prosecution consider that the defendant's rights are generally better observed when a defence counsel is present.

4. Professional culture of defence lawyers

4.1 Professional organisation

In Ukraine, two types of lawyers co-exist, a situation that creates unfair competition among them and confusion and lack of guarantees for the users of legal services.

[152] CCP, Art. 19.

A judgment of the Constitutional Court of Ukraine[153] has confirmed the co-existence of two different legal professions, both engaging in the same type of legal activities: legal advice, representation in court and in criminal proceedings. The first section of the profession – advocates – is regulated by the Law on the Bar and by the Rules on Professional Ethics. To become an advocate, a person must pass the Bar exam, take an oath and thereafter become subject to disciplinary liability. Advocates are obliged under procedural law to provide legal aid. In parallel, there are specialists in the field of law who are not licensed, and are therefore not subject to any special professional rules and disciplinary liability. They have no obligations under the legal aid scheme. This dual situation is damaging for the administration of justice and for the protection of citizen's rights, including within the legal aid system.

There is no organised professional Bar Association in Ukraine. In the absence of an organised Bar, the discipline of advocates is currently undertaken by a Regional Qualifying Disciplinary Commission for Advocacy, with the possibility of an appeal to the relevant High Commission for Advocacy. In every region (oblast), there is a qualifying disciplinary commission. A person who passes a special examination before the commission receives a certificate as an attorney-at-law. There is no comprehensive registry of attorneys-at-law for Ukraine, but only separate lists in each region. The total number of certified lawyers in Ukraine is estimated to be 20,000–30,000. Some lawyers have a specialisation, for example, civil law or business law (in business courts), but many practice in several fields of law without a specialisation. There are no associations of criminal defence lawyers.

Under the CCP, a defendant may have as his/her 'defender' in a criminal case not only a licensed attorney-at-law, but also 'specialists in a field of law' (jurists without the licence of attorney-at-law), and even close relatives of the accused (after completion of the pre-trial investigation).[154] According to the CCP, all three categories of 'defenders' are considered as formally equal and have the same rights in criminal proceedings but, of course, close relatives cannot provide the same degree of assistance as lawyers, and are considered as 'public defenders'.

153 Decision of the Constitutional Court of Ukraine of 30 September 2009, No. 23 – rp/2009 on the Case about Free Choice of a Defender.

154 CCP, Art. 44.

4.2 Professional ethics

4.2.1 Organisation of the disciplinary procedures

Disciplinary proceedings concerning a lawyer are conducted by the disciplinary chamber of a qualifying disciplinary commission for advocacy, upon a complaint from an interested person. The disciplinary sanctions that may be imposed on a lawyer are: a caution; suspension of the licence not more for one year; permanent withdrawal of the license.

The lawyer has an absolute right to participate in the hearing and defend him/herself. The chamber has the power to conduct an evidentiary hearing. The decision of the chamber may be appealed to the High Qualifying Commission for Advocacy. No information regarding the disciplinary activities of qualifying commissions is publicly available.

4.2.2 Rules of professional ethics

The obligations of defence lawyers towards their clients are quite general and are set out in three Acts:

(a) the Law of Ukraine on the Bar of 1992;
(b) the Rules on Lawyer's Ethics of 1999; and
(c) the Code of Criminal Procedure of 1961.

The Rules on Lawyer's Ethics are of a rather general nature, with many references to 'the dignity of the profession', and similar vague concepts relating to the honour of the profession of a lawyer, such as reliability and conscientiousness. There is also a heavy emphasis placed on lawyers' independence from their clients. Furthermore, there are no specific rules for acting as a defence lawyer in criminal cases.

Since the post-communist changes in criminal procedure constitute new challenges for defence lawyers, the creation of specific professional rules for acting as a defence lawyer, and the formulation of explicit criteria for realising an effective defence, is recommended. The CCP contains several provisions that describe the obligations of the defence lawyer in relation to his/her client. The role of criminal defence lawyers in criminal proceedings is to ensure the rights and lawful interests

of a defendant, and to provide him/her with legal aid in the course of the criminal proceedings.[155] The most important provision in this respect is the rule stating that the defence lawyer is obliged to use all means open to the defence, as set out in the law, to clarify the facts rebutting the suspicion or charge, to mitigate or exclude the criminal responsibility of a defendant, and to give to him/her all necessary legal assistance.[156]

4.3 The perception of defence lawyers and their relationship with other legal professions

4.3.1 General comments

Criminal defence work is considered as a normal part of a lawyer's activity, although some lawyers working in business cases, or engaged in the field of international law, believe themselves to be an elite segment of the legal profession. Judges and lawyers must pass their examinations to act in their professional capacity, but prosecutors are not required to pass an examination. Compared with countries where prosecutors and private attorneys-at-law are considered as part of a general notion of 'trial lawyers', in Ukraine these two categories of legal professionals are considered quite differently. Public prosecutors appear to have more 'weight' than lawyers because they are a state authority which, in addition to the associated 'official' power, gives rise to many personal privileges: medical assistance in special institutions, special terms for a pension and so on. Investigators, and even field officers, commonly have the same legal education as attorneys-at-law – law school; therefore, they are jurists, in contrast to, for example, detectives in the US.

Relations between criminal defence lawyers and other criminal justice professionals depend on many factors, including the way in which a particular lawyer performs his/her duties. If the lawyer acts in an zealous manner, he/she usually does not have good relations with the police and prosecutors; but relations of so-called 'pocket lawyers' with officials can be very friendly (see Section 2). There is an obvious resistance by the police in the initial stage of proceedings towards the presence of a defence lawyer, before the first formal interrogation of a suspect by an investigator,

155 CCP, Art. 44, para. 1.
156 CCP, Art. 48, para. 1.

and field police officers take many actions intended to prevent contact between the apprehended person and a lawyer, before they begin to question him/her.

Defence lawyers officially contact prosecutors in very few cases at the pre-trial stage, namely during the interrogation of the defendant by the chief of the prosecutor's office, and when the investigator's motion for preliminary detention is intended to be submitted to the court. It usually only happens in cases where the grounds for such a motion are not sufficiently convincing, and the prosecutor has to interrogate the defendant personally. In such cases, the prosecutor typically takes into account the arguments of the defence. Sometimes, usually in cases concerning the most serious crimes such as murder, the (district) prosecutor personally participates in investigatory actions, including the reproduction of the situation and circumstances of the event with the defendant in the presence of his/her defence counsel. In such a situation, the prosecutor (and the investigator) will want the defence lawyer to be silent and not to hinder the conduct of the investigative action.

Due to their institutional and methodological commonality, the activities of the pilot PDOs differs considerably from law firms and private lawyers practicing in criminal defence, and is based on their underlying principles:

(a) the main priorities are the clients' interests and quality of defence;
(b) the largest possible involvement of a lawyer to a case (ideally, immediately upon arrest) on the basis of availability of a lawyer at all times;
(c) teamwork;
(d) the continuous training of lawyers;
(e) effective management and inspection; and
(f) co-operation with the police, courts, prosecutors' offices.

Whilst the PDOs have been active, various specific means for the provision of quality criminal defence services have been developed and implemented: pilot Standards of Professional Conduct, criteria for quality, and a methodology for measuring the quality of criminal defence. The year 2009 saw the first monitoring of the quality of the PDOs' activities, including peer review, and the examination of administrative procedures. The PDOs now co-operate with the Academy of Advocacy of Ukraine to prepare practical recommendations for criminal defence in specific categories of cases (for example, crimes against property, minor offences, drug-related offences) for the use of all lawyers in Ukraine.

4.3.2 Quality (assurance) of free and retained legal assistance

Lawyers *stricto sensu* (Bar lawyers) are presumed to be sufficiently qualified legal practitioners, including for the defence in criminal cases. There are no special qualification requirements for criminal lawyers. Moreover, there are no quality assurance mechanisms either for free legal aid or for legal assistance in general. In some senses, the quality of legal assistance is considered by the disciplinary chamber of a qualifying disciplinary commission for advocacy, upon a complaint regarding a specific lawyer. However, in the absence of minimum quality performance standards, and thus any criteria for assessment of compliance with them, even in such infrequent occasions is this possible only by means of rather philosophic terms such as 'competence' and 'conscientiousness', as used in the Rules on Lawyer's Ethics.

With a view to establishing standards of practice for lawyers engaged in criminal defence work in PDOs, the Minimum Requirements Concerning the Quality of Professional Conduct of PDO Lawyers was drafted by experts of the Offices in 2009. In 2010, on the basis of these requirements, the first external evaluation (peer review) of the model PDOs was conducted.

In the opinion of investigators, the quality of work in legal aid cases is low, and consists mostly of the lodging of routine motions and adding evidence concerning the personality of the defendant, but not in rebutting the charges in an attempt to achieve a lesser punishment for a defendant. Retained defence lawyers are more active in proceedings than appointed ones. Some judges consider the quality of the defence, both as regards the preparation for proceedings and acting during proceedings, as being adequate.

4.3.3 Perceptions of the role of the defence lawyer

Investigators commonly perceive the role of a defence counsel as assisting criminals to avoid criminal liability while some judges, on the other hand, consider that they help to observe the interests of justice.

In interviewing survey of convicted persons, 60.6 per cent of respondents assessed the assistance of their lawyers as being of poor quality. In most cases, this related to lawyers appointed by agencies under the legal aid scheme.[157] Some respondents

[157] Kobzin 2007, p. 40.

pointed out that 'legal aid' lawyers were indifferent to their problems (15.8 per cent), inadequately effective (8.1 per cent) and some even stated that the free legal aid lawyer acted *against* their interests (6.1 per cent).[158] In the opinion of judges, the main defects in defence lawyers' work are insufficient attention to their clients or indifference to their clients' problems, plus the fact that they only sometimes ask investigators or the court for permission to meet their clients in the detention facilities.

There is today considerable mistrust of free legal aid, both on the part of the average citizen and on the part of the authorities. Some 28 per cent of interviewed investigation officers would definitely refuse a free lawyer's services, and another 31 per cent would be more likely to refuse than use such services, even in the event of their detention. The same opinion is shared by 30.6 per cent of those inhabitants interviewed in the second largest city in Ukraine, Kharkiv. Both groups of respondents offered similar reasons for their views – the lack of diligence of a free lawyer or legal expert (55.7 per cent of respondents among the general population and 65 per cent of investigation officers); and the view that such assistance would not be of sufficient quality (24.5 per cent of the population and 20 per cent of investigation officers). Almost 20 per cent of respondents considered that free legal aid may be more likely to be harmful rather than useful.[159]

5. Political commitment to effective criminal defence

The 1990s saw growing criminality, as well as the growth of a free press, which became very 'enthusiastic' about crime. Although there were some serious publications on the subject, often the matter of criminality was held hostage by the 'yellow press', which produced a distorted picture of reality, an image that is still widely held in the broader community. Since then, organised crime has also come to be perceived as a danger to national security. At the same time, the problem of drugs has been raised, resulting in the formation of special divisions to fight against drug crimes, as well as vast state programs against drugs.

In the opinion of both judges and prosecutors, corruption is a real issue within the police, prosecutor system and courts, in line with numerous statements made at the highest levels in Ukraine. In recent years, the subject of fighting against corruption

158 *Ibid*., p. 41.
159 *Ibid*.

in the state machinery has often has been raised. This was noticeable during 2010–2011, when assertions regarding corruption were raised in notorious cases against prominent members of the previous Ukrainian government. However, because of the selective nature of criminal prosecution, and the incomprehensible charges and convictions, these processes are perceived more as political persecution than as systematic action against corruption. Moreover, a series of bills directed towards the prevention of corruption were blocked by the ruling party, and the transparency of the regime remains a problem to this day. At the same time, numerous observers believe that the corruption of the authorities is becoming more widespread.

In principle, the view prevails in the broader society that any problems in economics and policy can be solved by means of criminal prosecutions. From time to time, the issue of restoring the death penalty, as well as other initiatives directed towards increasing criminal liability for specific crimes, have a greater chance of success than bills directed towards mitigating punishment. Business and official offences often result in punishment no less severe than for violent crimes. However, a bill on mitigating punishment for economic crimes is currently being considered in Parliament. This bill envisages the substitution of imprisonment by monetary sanctions in many cases.

From the viewpoint of the general public, the equality of every person before the law and the court naturally remains important. Yet, according to widespread opinion, money allows the real criminals to avoid criminal liability, while an indigent person can be given many years of imprisonment for an insignificant crime.

The level of punishment for crimes remains very severe, with most of sections of the Criminal Code specifying incarceration as a punishment. The range between the minimum and maximum sanctions for a crime sometimes reaches seven to eight years, and a judge has practically unlimited discretion in imposing a punishment within these limits. The Code also allows the imposition of a punishment less than minimum limit.

At the national level, state officials and representatives are widely associated with corruption and criminality. There is an opinion that no-one has achieved wealth in Ukraine by honest means, and that power is used solely for business interests. While no specific ethnic group nationally is associated with criminality in public opinion, regionally some groups may be perceived as the main sources of crime. However, in everyday practice, the police discriminate against Roma, people from the Caucasus and other people of non-Slavonic appearance.

It is quite difficult to assess the real range of crimes for several reasons. Traditionally, the effectiveness of the law enforcement system is accessed by reference to the ratio of solved to committed crimes, which according to official statistics is 92–93 per cent for murders, and 98–99 per cent or more for crimes in the area of illegal drug operations.[160] Doubts persist about the correctness of these figures. The traditional approach is to plan in advance the indicators as to the number of solved crimes and, although this is officially denied by law enforcement authorities, it remains one of the main reasons for misconduct by those bodies. One of the results is that the number of crimes can decrease simply by means of manipulating the calculations. In recent years, several Ministers of Interior Affairs have talked about addressing the falsification of the registration of criminal complaints, and any changed approach might also influence the criminality indicators. The official indicators of crimes are more reliable in the area of severe violent crimes, where manipulation is less likely.

6. Conclusions and recommendations

6.1 Major issues

Over the past two decades, the Ukrainian criminal justice system has undergone numerous changes. Principles of equality of arms and of adversarial proceedings have been introduced, and significant amendments to legislation were designed to enhance defence rights. The power to intervene in fundamental human rights during the course of criminal prosecutions was placed mostly under judicial control, improving the safeguards against arbitrariness. Nonetheless, actual practice, taken together with the absence of a system of legal aid, show that the aim of securing effective criminal defence is still quite far away.

Under the law, access to a lawyer must be ensured as soon as a person is acknowledged as either a suspect or an accused and, in any case, before the initial interrogation. However, there is no statutory definition of the moment of arrest, which leads to a widespread practice of unacknowledged arrest. For the purposes of criminal investigation, an arrest for an administrative offence, when a person has no defence rights under the law, is also frequently used by police; the effect of such arrest

[160] Statistics of the Ministry of Interior Affairs at: http://mvs.gov.ua/mvs/control/ma@in/control/main/uk/publish/article/374130.

is practically the same as with an unacknowledged arrest. During this period, a person, while being in fact a suspect, remains beyond the reach of basic safeguards applicable to the suspect under the law (including notification of those rights). As a result, the police, using various forms of coercion, obtain a so-called 'explanation', which frequently contains a confession of the commission of a crime and often creates a basis for further formal investigations. As a consequence, the practice of unacknowledged or administrative arrests nullifies these supposedly strict safeguards.

Given the frequent use of extrajudicial written statements at trial and the difficulties associated with having witnesses called for cross-examination in court, the confession plays a crucial role in the conviction of defendants. Moreover, the court has no procedure for verifying the 'voluntariness' or otherwise of a confession, and frequently relies on the decision of the prosecution authorities in this regard. The stark reality is that, with a confession obtained by the police, a finding of guilt is usually predetermined, and any efforts by the defence to rebut this are practically futile.

In the situation where a witness cannot recall the circumstances of a crime, the court commonly has read out the preliminary testimony of that witness 'to refresh' his/her memory. In effect, this often substitutes for the witness's oral testimony, thus making effective cross-examination impossible. As a result, the reading of written records (protocols) containing the testimony of witnesses, instead of having him/her examined in the court room, is an all too common practice.

Pre-trial detention is overused and frequently unreasonably long, and courts' decisions on pre-trial detention or its prolongation frequently rely on the gravity of the charges against a defendant and use stereotyped formulae, without addressing the specific facts of the case. Moreover, the defendant has no legal right to initiate court proceedings to review the grounds for detention during the pre-trial investigation, and only has the opportunity to rebut the prosecutor's submission during the automatic review of the detention. Moreover, the position of the defence is weakened at such a review due to lack of access to the case file before the completion of the pre-trial investigation.

There also remains a lack of clear and detailed rules of evidence, which results in the inequality of arms between the prosecution and the defence in criminal proceedings. Under both the law and judicial practice, the court is obliged to consider all of the evidence adduced by the prosecutor in pre-trial investigation case file, due to the lack of a procedure for the exclusion of unlawfully or unfairly obtained evidence. At the same time, the admissibility of evidence presented by the defence is subject to an unrestricted discretion of the judge, after taking account of the opinion of the

prosecutor. This problem is exacerbated by the unavailability of an alternative expert's opinion on behalf of the defence.

6.2 Recommendations

1. To create an effectively administered system of free legal aid, including a police station legal advice scheme, with secure and adequate budget funding; in creating a legal aid system, to develop an appropriate system of quality control, securing and maintaining at the same time the principle of independence of the lawyer; to provide a feasible procedure for assessing the eligibility of persons applying for legal aid, so as to secure prompt access to a lawyer; to provide sufficient funding for investigation of the case by the defence.

2. To eliminate the practice of unacknowledged arrest and any manipulation by legal procedures; the securing of practical and effective defence rights for any person 'charged' in accordance with Article 6 of the ECHR (including the introduction of a 'letter of rights' and the obligation to verify that the person adequately understands his/her rights); to identify the commencement of the arrest as the moment when the person, by force or by obeying a police order, is required to remain with a police officer or in a place identified by a police officer; to extend those guarantees attached to a criminal suspect also to persons arrested for an administrative offence.

3. To introduce clear rules of evidence in criminal proceedings, including rules suppressing any evidence obtained by coercion and/or as a result of a flagrant violation of human rights, as well as detailed procedures for the exclusion of evidence before completion of the trial, for verifying the voluntariness of any alleged confession, with the court to have broad powers to examine any evidence and related issue; to limit the discretion of the judge with regard to the admission of evidence, through the introduction of clear and predictable rules.

4. To secure in the law the right of the defence to direct examination and cross-examination of witnesses in the courtroom, and the inadmissibility of extrajudicial statements subject to exceptions only in very rare cases and to counterbalance such admission by additional safeguards for effective defence.

5. In case of any expedited proceedings based on a plea of the defendant, to provide strict guarantees against involuntary pleas providing, for example, mandatory representation of the defendant in such cases, strict judicial procedures for verification of its voluntariness, and verification of the probable cause for the charge against the defendant.

6. To eliminate the practice of sending a case for additional pre-trial investigation and to exclude any power of the court to collect evidence *proprio motu* on behalf of the prosecutor; to secure the disclosure of the evidence by the prosecutor during the pre-trial investigation in time and scope sufficient for preparation of the defence, including for important steps, for example, such as bail hearings or any plea.

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APPENDIX

Mrs. N. A. Vagyna, Chairman, Lawyer's Union 'Defence Agency'
Mr. V. V. Shevchuk
Prosecutor of Khmelnitskyi City (for information)

28 February 2008

In the course of giving of legal aid in criminal cases by some lawyers from the office, there are repeated cases where a person (suspect, accused), for which a lawyer of the office is appointed, after a meeting prior to the first interrogation, refuses to testify, relying on Article 63 of the Constitution of Ukraine, although previously at the time of receiving an explanation by officers of an inquiring body, and during questioning as a witness, he/she was giving consistent testimonies about the commission of the crime by him/her.

Such occurrences in the future would hinder a determination of the truth in the case, and thus in the actions of the person conducting the investigation (inquiry) in the criminal case, there are the reasons to consider that the investigation was conducted in a perfunctory and incomplete manner ... , that in future restricts the possibility to direct the criminal case to the court due to the incompleteness of the pre-trial investigation, and also leads to forced delays in the criminal case, contrary to the requirements of the law and departmental rules regulating the activity of the pre-trial investigation and investigation of criminal cases by pre-trial investigation agencies ...

The grounds arise to consider that the lawyer's office 'Defence Agency', for unknown motives, reasons and inducements, knowingly undertake 'tactics of the realisation of the defence' by using Article 63 of the Constitution of Ukraine, which negatively affects the course of investigating criminal cases, determining the truth in the case, and also apportioning criminal responsibility on guilty persons, which in future will lead to the violation of the principles of police activity – the prevention of crime – as well as a violation of the provisions of existing legislation, thus delaying the investigation of criminal cases. Afterall, how is it possible to prevent the commission of a new offence if the person realises that he/she has not had imposed a punishment for one already committed, and the absence of the punishment just encourages the commission of new crimes.

Pursuant to the requirements of the criminal procedural legislation of Ukraine concerning the duties and rights of a defence counsel, namely according to Article 48,

paragraph 5 of the Criminal Procedure Code of Ukraine, a defence counsel is obligated not to hinder a determination of the truth in the case by means of committing the actions that are aimed at inducing a witness or victim to refuse to testify, or to give knowingly untruthful testimonies ... [or] to delay the investigation or trial of the case ...

M. V. Kaschuk
Chief
Investigation Division of Khmelnitskyi City Police Department

PART III

ANALYSIS AND CONCLUSIONS

Ed Cape
Zaza Namoradze

CHAPTER 8 COMPLIANCE WITH EUROPEAN STANDARDS

1. Introduction

In this chapter we analyse the data from the five countries in the study by reference to the European standards regarding access to effective criminal defence that we examined in Chapter 2. As explained in Chapter 1, Section 3, our approach to assessing access to effective criminal defence involves not only an examination of relevant laws concerning procedural rights, but also the regulations, institutions and procedures that give effect (or not) to those legal provisions. An examination confined to the law will inevitably be partial, and often misleading. All laws and legal rights, of course, require interpretation but the experience of those laws and rights by suspects and defendants is mediated by a number of factors. First, relevant laws may be supplemented by detailed regulations at the national, and sometimes local, level and these are crucial in turning high-level rights – which may exist to serve broadly political purposes or to demonstrate compliance with international norms – into rights that may be understood and applied in particular factual contexts. Second, procedural rights, as the term implies, arise in the context of criminal procedures, for which a range of institutions, and individuals working for them, are responsible. Such institutions may have a range of policies and procedures concerned, directly or indirectly, with procedural rights, and such policies and procedures may, at times, conflict with one another. Furthermore, the individuals working for such institutions may observe, or ignore, formal policies and procedures, depending on a range of factors including their own values, conflicting demands made of them, and the transparency and accountability of the decisions they take. Given the centrality of legal assistance to our approach to access to effective criminal defence, the third part of our assessment

concerns lawyers and the legal profession. Thus we examine the evidence regarding the professional culture and competence of lawyers acting for suspects and accused persons, whether there is a sufficient number of lawyers willing and able to undertake criminal defence work, especially in legal aid cases, and whether systems are in place that enable them to deliver their services when and where they are needed, especially for those suspected and accused persons who are unable to afford lawyers' fees.

The approach of the ECtHR to procedural rights involves an assessment, in the factual context of a particular case, of whether the right to fair trial was complied with overall.[1] As a result, the court may determine that the right to fair trial has been complied with, even though specific procedural rights have been breached, if such breaches have been compensated for by other features of the particular case. In order to establish standards which can be applied to an assessment of access to effective criminal defence, we treat procedural rights as discrete rights and make an assessment accordingly. However, in doing so, it is important to remember that procedural rights do not exist in isolation. Whilst it is true that breach of a specific right may not render a trial unfair overall, it is also the case that apparent compliance with a procedural right may not satisfy the requirements of effective criminal defence if other factors render such compliance ineffective. For example, as is the case in a number of jurisdictions in this study and in other jurisdictions, a right to legal assistance that applies where a person has been arrested is an ineffective procedural safeguard if the police have powers to detain a person without (formally) arresting them, if arrest is defined in such a way as to exclude other forms of detention by the police, or if the police are permitted to detain and interrogate a *de facto* suspect as a witness.

Our assessment of the procedural rights relevant to access to effective criminal defence follows the same structure as the consideration of those rights in Chapter 2. Whilst, where appropriate, we summarise ECHR and EU law on any particular right, it may be necessary to refer to Chapter 2 in order to understand the full complexity of the relevant standards. Before commencing the analysis, we first provide a broad outline of the jurisdictions concerned.

[1] See Chapter 2, Section 8.

2. The national contexts

The five countries in the study are geographically diverse, have significantly different histories, and whilst four of them have relatively small populations, the fifth, Ukraine, has more than double the population of the other four put together.[2] They are also ethnically diverse, and some of them also have significant ethnic minority populations. What they share is a period spanning much of the twentieth century during which they were part of the Soviet bloc, and during which their criminal justice systems reflected the Soviet model.[3] Since the collapse of the Soviet bloc in the late 1980s, all of the countries have made significant adjustments to their criminal justice systems, although the reforms have been more substantial in some jurisdictions compared to others. Bulgaria, Georgia, Lithuania and Moldova introduced new criminal procedure codes during the first decade of this century, and Ukraine has amended its codes, with a new criminal procedure code expected during the course of 2012.[4] Whilst the majority have sought to introduce adversarial principles, at least at the trial stage, Georgia has explicitly adopted an adversarial system complete with jury trial in more serious cases. All have had to grapple with the challenges inherent in changing their system from one where the primary allegiance of the police, prosecutors, judges and even lawyers, was to the state, to one that reflects, at least in principle, the characteristics of a liberal democracy which demands an independent judiciary and a less powerful role for prosecutors.

To an extent, these developments have been influenced by accession to the ECHR, with all of the countries ratifying the convention during the 1990s. In most, if not all, of them the convention has been incorporated into domestic law, but there has been varying degrees of resistance to reflecting the convention in laws, court judgments and practices, and all five countries have been the subject of adverse judgments by the ECtHR. In 2011 the Parliamentary Assembly of the Council of Europe criticised Bulgaria, Moldova and Ukraine, along with six other countries, for 'major systemic deficiencies' causing repeated violations of the ECHR, and also identified Georgia as

2 Bulgaria 7.4 million, Georgia 4.4 million, Lithuania 3.2 million, Moldova 3.5 million and Ukraine just under 43 million.

3 For a brief account of the Soviet approach to criminal procedure see Chapter 1, Section 2.

4 The new Criminal Procedure Code passed its first reading on 9 February 2012, although there have been calls for it to be fundamentally revised, particularly to reduce the maximum period of initial police detention from 72 to 24 hours. See http://khpg.org/en/index.php?id=1331108266.

having outstanding problems.[5] In the case of Bulgaria and Lithuania, developments have also been influenced by accession to the European Union, Lithuania in 2004 and Bulgaria in 2007. The criteria for membership, as defined by the European Council in Copenhagen in 1993, included a requirement that accession states demonstrate 'that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities', and judicial independence was regarded as a key aspect of respect for the rule of law.[6] Since accession, Bulgaria and Lithuania have, of course, been bound by EU legislation in the field of criminal justice and will be bound by legislation under the procedural rights 'roadmap'.[7]

The reforms of the criminal justice institutions and processes have, to a greater or lesser extent, been controversial in all of the countries in the study, and continue to be so. Developments have not followed a linear path, and in a number of the countries the initial priority given to adopting fairer, more transparent, criminal procedures has been replaced by a real, or perceived, need to reduce crime levels and satisfy public demands concerning the fear of crime. However, public perceptions of the criminal justice systems and institutions in the five jurisdictions are generally poor. In all of the countries the public appears to have significant and, it appears, warranted fears about aspects of the criminal justice system. Public perception of corruption amongst the police in Ukraine is matched by similar perception of corruption of the judiciary in Moldova, and corruption of the system more generally in Bulgaria. In Lithuania research conducted in 2009 showed that whilst only a quarter of respondents thought that the treatment of criminal suspects was acceptable, about half had a low opinion of both the police and the courts, with a significant degree of lack of trust. In Georgia, government attempts to deal with corruption and organised crime by changes to the criminal justice system appear to have met with a large degree of success, but there are significant concerns about the influence of both the government and prosecutors putting the independence of the judiciary at risk.

A common feature of all the countries in the study is a lack of statistical information about aspects of the criminal justice system, and lack of rigorous, independent research into the way in which criminal justice processes work in

5 Implementation of Judgments of the European Court of Human Rights, Parliamentary Assembly Resolution 1787 (2011).

6 See OSI 2001, p. 9.

7 See Chapter 1, Section 4.3.

practice. In some countries the lack of information is quite stark. In Ukraine, for example, there are no publicly available statistics on the number of people detained by the police. In Bulgaria statistical data is limited, and where official statistics do identify a cause for concern, such as the over-representation of Roma people in the criminal justice system, there is a lack of research into how and why this is. In Moldova there is a lack of reliable statistics on the operation of the criminal justice system and, in particular, the number of crimes appears to have been consistently under-recorded by the police. The position regarding statistical information in Lithuania appears to be somewhat better, although even here there is a lack of research evidence on the operation of the criminal justice system. The general picture regarding statistics and research is not dissimilar to that found in many, although not all, of the countries in the original *Effective Criminal Defence in Europe* study,[8] but in the context of the enormous changes that the criminal justice systems in the countries in this study have undergone, and continue to experience, the lack of statistical information and research evidence is a cause for profound concern.

3. The limits of the analysis

As explained in Chapter 1, our primary focus is the rights that are essential to effective criminal defence, rather than those that are relevant to fair trial *per se*, or indeed other rights guaranteed by the ECHR. As a result, we do not seek to assess aspects of the criminal justice system and processes in the countries in the study which, whilst they may have a significant impact on suspects and defendants, are not central to effective criminal defence. Thus, for example, we do not examine the length of time for which suspects can be held in police detention, nor the maximum (or average) time that an accused person can be kept in pre-trial detention. Similarly, we largely ignore evidential rules (although we do give some consideration to evidential mechanisms in the context of the enforceability of procedural rules), and we do not consider sentencing. Equally, although the chapters on the respective countries do provide some account of criminal justice policies, institutions and processes, this is largely for the purpose of providing some context for understanding the rights that we do examine, and they do not figure in the analysis in this chapter. Finally, in collecting

[8] Cape et al. 2010, pp. 550 and 558.

data for the study we have largely accepted domestic definitions of what amounts to 'criminal proceedings'.[9] A number of the jurisdictions in the study have separate laws and procedures for dealing with 'administrative' or 'regulatory' offences. Such systems have some, even most, of the characteristics of criminal proceedings, yet those who are suspected or accused of administrative or regulatory offences often have fewer procedural rights than those suspected or accused of criminal offences. Furthermore, there is often an interrelationship between the two systems – an investigation of an administrative offence may end up with a person being made the subject of criminal proceedings.

The intention is not to convey the impression that these issues are unimportant, nor that they are not worthy of study or do not raise significant concerns. Given the time and resources available for this study we have concentrated on its primary purpose – to examine access to effective criminal defence.

4. The right to information

There are three dimensions to the right to information: the right to be informed about procedural rights; the right to information about an arrest and the nature and cause of the accusation/charge; and the right to information regarding material evidence.[10]

4.1 Information about rights

Rights are of little value to a person who does not know of them. As noted in Chapter 2, Section 4.1, the ECHR does not explicitly require a suspect or accused person to be informed of their procedural rights, but ECtHR case law requires judicial authorities to take positive steps to ensure compliance with ECHR Article 6, and in a number of cases it has been held that the authorities should provide suspects with information on the right to legal assistance and to legal aid. Providing such information in writing is not sufficient, and steps should be taken to ensure that the suspect is fully aware of their rights and that they understand the implications of their conduct under questioning. The proposed EU Directive on the Right to Information[11] is more explicit, providing

9 See Chapter 2, Section 3.

10 See Chapter 2, Section 4.

11 See Chapter 2, Section 4.3. See also Chapter 1, footnote 79.

that a person who is suspected or accused of committing an offence must be provided with information about their rights: of access to a lawyer, if necessary free of charge; to be informed of the charge; to interpretation and translation; and to be brought promptly before a court if arrested. The information must be provided promptly, and in simple and accessible language and, where a person is arrested, they must be given the information in writing and given a copy which they may keep.

In all of the countries in the study, there are legal provisions requiring a suspect or accused person to be given information about (at least some of) their procedural rights, and for such information to be provided in writing (and in some countries also orally, for example, Moldova and Ukraine). With regard to the rights that must be included in the notice, both the ECtHR and the proposed EU Directive on the Right to Information provide for a relatively limited list, but common to both is information about the right to legal assistance and legal aid. It appears that in all of the countries in the study, the law requires that the notice of rights must include the right to legal assistance, but not all require a suspect or accused person to be informed of their right to legal aid. In Bulgaria, for example, a person who is charged must be so informed, but not at the earlier stage of arrest. The ECtHR has held that information about the right to silence must be given when the right arises, and that the right arises when a person is 'charged' (that is, when the situation of the person has been substantially affected).[12] Although not included in the notice of rights to be given under the proposed EU Directive on the Right to Information, it was included in the final version of the Directive.[13] In all countries in the study, the law requires that notification of rights must include reference to the right to silence.

To that extent, the legal provisions appear to be in broad compliance with ECHR requirements. However, when examined in more detail, and also by reference to the more exacting requirements of the proposed EU Directive on the Right to Information, the picture is less positive. Generally, in all five countries the law provides that the information must be given when a person becomes a suspect, is arrested or is formally accused, and thus it appears that in all of them a suspected person would have to be given the information no later than the commencement of any interrogation. However, there is evidence that in Lithuania the police frequently do not comply with the obligation, and in Ukraine the practical effect of the legal requirement is limited by the fact that most formal arrests are preceded by a period of informal arrest, as a

12 See Chapter 2, Section 6.1.2.

13 See Chapter 1, footnote 79.

result of which persons who are *de facto* arrested are not routinely informed of their procedural rights. Other mechanisms for avoiding rights (and, therefore, notification of rights), in particular treating *de facto* suspects as witnesses, are used to a certain extent in all of the jurisdictions.[14]

Whilst both the ECtHR jurisprudence and the proposed EU Directive on the Right to Information place emphasis on the importance of steps being taken to ensure that the information is understood, in practice formal verification procedures – of the notification of rights, waiver of rights, and of whether suspects understand their rights – do not appear to be effective. Whilst formal records in Lithuania and Ukraine show that notification of rights has been given, 50 per cent or more of suspects say that they were not so informed.[15] The picture is not dissimilar in the other countries in the study. None of the countries uses a standard 'letter of rights', and in Bulgaria, Moldova and Ukraine it is reported that the rights are provided in a formal and technical language that does not aid understanding. Furthermore, none of the countries require that the relevant official verifies that the suspect or accused person understands the notice of rights.

4.2 Information about arrest, the nature and cause of the accusation, and charge

The ECHR Article 5 (2) provides for a fairly straightforward right of a person arrested to be promptly informed, in a language that they understand, of the reasons for their arrest. However, this is a difficult area to regulate effectively. All jurisdictions permit summary arrest, in the absence of a warrant or other authority, in certain circumstances such as where a suspect is caught *in flagrante delicto*, and such arrests are normally carried out in the absence of supervision or away from public view. The law in each of the countries, either in the form of the criminal procedure code or because the ECHR has direct effect, appears to comply with the ECHR requirement. However, in the majority of countries, the obligation to provide the information is breached in practice. In Ukraine, whilst it appears that the obligation is complied with where a person is formally arrested, as noted in Section 4.1 above, formal arrest is normally preceded by informal arrest, when the required information is unlikely to

[14] See Chapter 9, Section 2.

[15] And in Lithuania, a survey conducted in 2008 showed that fewer than half of officers always inform suspects of their rights. See Chapter 5, Section 3.1.1.

be given. In Bulgaria there is evidence that the obligation is frequently breached, and in Georgia the information is not normally given 'on the spot', but at some later time.

The obligation to provide a person with information about the charge, or the nature and cause of an accusation, is derived from ECHR Article 5 (2) and Article 6 (3)(a). The information must be provided promptly and in a language that the person understands, and must go beyond merely a recitation of the legal authority for the charge or accusation. The extent of the information that must be provided is fact specific, but the rationale is that the person should understand the allegation with a view to challenging their detention or to preparing their defence. Neither the ECHR nor the proposed EU Directive on the Right to Information makes reference to the form in which the information must be given, although there is ECtHR case law to the effect that in principle it must be provided in writing. The proposed EU Directive explicitly provides that an arrested person, or his/her lawyer, must be granted access to those documents in the case file that are relevant to the lawfulness of their arrest or detention.[16]

As with information about arrest, the law in the five countries formally complies with the obligations, and the major problems occur with practical implementation of the requirements. There is concern in Bulgaria that the information provided is minimal, and in Lithuania, Moldova and Ukraine that the information is expressed in formal language and/or that the recipients of the information often do not understand it. The overall impression is that the police, or other investigative authorities, do the minimum necessary to comply with their legal obligations, and that the requirement that the information be provided in a form that the suspected of accused person can understand is ignored. As a result, and given that such a small proportion of suspected or accused persons have access to a lawyer at this stage (see Section 5.2 below), most suspected or accused persons are denied the information necessary to enable them to challenge their detention or prepare their defence and, therefore, to enable them to effectively defend themselves or participate in the process.

4.3 Information regarding material evidence

Since, in practice, if not in law, the police and prosecution have a near monopoly of powers and resources to investigate an alleged offence and to gather evidence (see

[16] See Chapter 2, Section 4.2.

Section 7.1 below), access by an accused person to the material gathered by the police or prosecutor is critical to their ability to defend themselves, personally or with the assistance of a lawyer, and to adequately prepare for pre-trial detention hearings and for trial. Two major issues regarding defence access to material evidence are: (1) the stage at which access must be given, and (2) the extent of access that must be provided.

With regard to the former, the ECHR does not explicitly identify when access must be given.[17] The ECHR Article 6 (3)(b) provides that a person charged must be given adequate time and facilities to prepare their defence, and it can be argued that this must include access to relevant material in sufficient time to enable them to do so. The proposed EU Directive on the Right to Information provides that access to the case file must be granted once the investigation of the offence is concluded, and in any case in sufficient time for preparation of the defence. However, since pre-trial detention hearings are often conducted during the course of investigations, the EU provision may not be sufficient to ensure that a suspect or accused person has access to the materials relevant to the issues to be determined in the hearing in sufficient time to prepare for the hearing. ECtHR case law on ECHR Article 5 (4) indicates in respect of pre-trial detention hearings that the principle of equality of arms requires that the person in respect of whom the application is made is given access to those documents in the investigation file that are essential to enable him/her to effectively challenge the application (which is also reflected in the proposed EU Directive on the Right to Information). By reference to Article 6 (3)(b), this must mean that access is given in sufficient time to enable them to prepare for the pre-trial detention hearing.

All of the countries operate a 'case file' system that is common in jurisdictions with an inquisitorial tradition, and in all of them the law broadly provides that an accused person has a right of access to the case file at the end of the investigation. This, in principle, conforms to both ECHR and EU standards, and the evidence suggests that the right is generally complied with in practice. In some of the countries, such as Bulgaria and Moldova, the law also gives a suspected person a right of access to material that results from a procedural action in which they have participated even before the investigation has been completed, although in Moldova lawyers complain that it is often not supplied promptly and effective access is impeded by practical difficulties such as a lack of copying facilities. However, in common with the experience in other jurisdictions,[18] timely access to prosecution materials prior to pre-trial detention

17 See generally Chapter 2, Section 4.3.

18 See Cape et al. 2010, p. 557.

hearings is often not granted. In Ukraine, the Supreme Court has determined, in apparent defiance of the requirements of ECHR Article 5 (4), that the law does not give the accused the right to inspect the case file prior to a pre-trial detention hearing, and that the judge must inspect the evidence *in camera*. Bulgaria was the subject of a number of adverse judgments of the ECtHR in the late 1990s in respect of lack of access to the case file prior to the hearing, but despite legal reforms defence lawyers still complain that it is not uncommon for the prosecution to withhold certain evidential documents at this stage. In Moldova, although the law provides that both the accused and their lawyer have a right 'to get acquainted' with the prosecution materials supplied to the court to justify an application for pre-trial detention, in practice the materials are not supplied to the defence prior to the hearing.

With regard to the extent of access by the defence to evidential materials gathered by the police and prosecution at the pre-trial stage, whilst the proposed EU Directive on the Right to Information simply states that the accused must be granted access to the case file, ECtHR jurisprudence requires the prosecution authorities to disclose all material evidence for and against the accused. The right of access is not absolute, and can be restricted for a legitimate purpose provided that it is strictly necessary and can be counter-balanced by other mechanisms.[19] The law in the five countries does provide that after the investigation has ended the accused has a right of access to everything that is in the case file. However, the ECtHR requirement is not confined to what is in the file but, subject to the exceptions noted, all evidence for and against the accused, and this is where there are problems of compliance in a number of the countries in the study. Whilst in theory the case file should contain all material evidence gathered in the investigation, in practice the prosecution can determine whether any particular piece of evidence is placed in the file. In Moldova, this appears to be accepted practice since whilst an accused has no right of access to evidence that is not in the case file, the prosecutor is required to notify the accused of any such evidence.[20] In Ukraine, the case file only includes evidence that was obtained after an investigation was formally opened. Whilst evidence obtained prior to this, not being in the case file, cannot be used as evidence at trial, the concern is that this may result in exculpatory evidence being excluded from the file. The case file, as the

19 See Chapter 2, Section 4.3.

20 Although it is virtually impossible to verify that full disclosure is provided, and it appears that whilst defence lawyers can ask to see such evidence, in practice disclosure is rarely, if ever, granted. See Chapter 6, Section 3.1.

repository of all material evidence gathered in an investigation, and providing the basis for the evidence put before a court, is a fundamental characteristic of the inquisitorial approach to the criminal process. Yet it appears, at least in these two countries, that the police and/or prosecutor are able to act in a partisan, adversarial way in defiance of the principle of the equality of arms, and to the detriment of the right to fair trial. This is exacerbated by the fact that in those two countries, and in Bulgaria and Lithuania, there is no system of discovery which would enable the accused to uncover such evidence. There is a clear tension here between inquisitorial and adversarial principles, and in the face of evidence that prosecutors act, and are permitted (or even required) to act, as adversaries seeking conviction of the accused, serious consideration must be given to establishing procedures for discovery of evidence in the hands of the prosecution. The 2010 Criminal Procedure Code in Georgia, which gives the defence the right to seek evidence in the hands of the prosecution, has already taken a first step in this direction.[21]

5. The right to defence and legal aid

As noted in Chapter 2, Section 5, the right of defence is comprised of two separate but related rights: the right of a suspected or accused person to defend themselves, and the right to legal assistance. Both aspects of the right are guaranteed by ECHR Article 6 (3)(c), and the right to legal assistance is also covered by the proposed EU Directive on Access to a Lawyer. In principle, the right of a person to defend themselves is guaranteed in each of the five countries in the study, being expressly provided for in the constitution or the criminal procedure code. However, the right is multifaceted, being an essential element of the right to fair trial, and being inextricably linked to other rights such as the privilege against self-incrimination and the right to participate. It is also not an absolute right, both in the sense that the ECtHR accepts that personal participation may be limited in certain circumstances (for example, in relation to the examination of certain vulnerable witnesses), and to the extent that a suspect or accused person may be subjected to compulsory representation by a lawyer in certain circumstances. In most of the jurisdictions mandatory assistance is closely linked to legal aid, and so is considered further below.

Apart from mandatory assistance, in this analysis we will concentrate on the second aspect of the right of defence, that is, the right of a person to the assistance of a

[21] See Chapter 4, Section 3.4.1.

lawyer. In examining the right to legal assistance, we will look at the point at which the right arises and, in particular, at whether a suspect has a right to have lawyer present during interrogation. These issues have been the subject of significant developments in ECtHR jurisprudence in recent years, are specifically dealt with in the proposed EU Directive on Access to a Lawyer, and have generated a great deal of controversy.[22] In examining the right to legal assistance, we will also look at safeguards concerning lawyer/client communications. We will then examine the practical arrangements for accessing legal assistance because, particularly at the investigative stage, they are critical in determining whether the right of access to a lawyer is 'theoretical and illusory' or 'practical and effective'.[23] Finally, in this section we will consider the data regarding the role, independence and standards of lawyers providing legal assistance to those suspected or accused of crime.

5.1 Mandatory legal assistance

Mandatory defence raises important questions of principle related to notions of individual rights and self-determination, and to practical questions of waiver and choice, and the extent to which a lawyer can effectively represent an unwilling client.[24] However, although we do consider waiver and choice, we concentrate here on identifying the mandatory defence provisions in the five countries in order to better understand legal aid provisions, since they are often closely linked. Although mandatory defence may not be a necessary element of the inquisitorial approach to criminal procedure, it is a common feature of criminal justice systems with an inquisitorial tradition,[25] and all of the jurisdictions in the study have provisions in their criminal procedure codes concerning mandatory defence.

Mandatory defence provisions are commonly triggered by certain characteristics of the suspect or accused. The mandatory defence provisions of all of the countries apply where the suspected or accused person is a juvenile, is suffering from a mental

22 See Chapter 2, Sections 5.3 and 5.4.

23 *Artico v. Italy* (1981) 3 EHRR 1, *Airey v. Ireland* (1979) 2 EHRR 305; ECtHR, 9 October 2008, *Moiseyev v. Russia*, No. 62936/00, para. 209; and ECtHR 24 September 2009, *Pishchalnikov v. Russia*, No. 7025/04, para. 66, and see Chapter 1, Section 4.2.

24 See Chapter 2, Section 5.1.

25 But not those with an adversarial tradition. England and Wales, for example, has no tradition of mandatory defence, although more recently provisions have been introduced for mandatory appointment of a lawyer in certain limited circumstances. See Cape et al. 2010, p. 126.

or physical disability impeding effective participation, or where they do not have an adequate command of the language. Interestingly, in Bulgaria, Lithuania and Ukraine the compulsory defence provisions also apply where the accused is indigent, although it appears that in the Ukraine at least this is not effective in practice. In the majority of the countries, they also apply where the accused is not present at their trial.

Mandatory defence may also be linked to the seriousness of the alleged offence and/or the complexity of the proceedings. For example, in Georgia, Ukraine, Moldova and Lithuania mandatory defence provisions apply if the alleged offence carries a maximum sentence of life imprisonment, and in Bulgaria, where it carries a maximum sentence of 10 years' imprisonment. Evidence from Ukraine, including adverse ECtHR judgments, indicates that the police sometimes avoid the mandatory defence requirements by initially downgrading the alleged offence to one that does not attract mandatory defence, only to upgrade it later in the process. In some jurisdictions, mandatory defence may arise by reference to the stage or nature of the proceedings, for example, jury trial in Georgia and cassation appeal in Bulgaria. Lithuania and Moldova are notable in that the mandatory defence provisions apply to a person who has been arrested.

In those countries where procedural mechanisms such as expedited hearings and guilty plea procedures have been introduced, they are often subject to a condition that the accused is legally advised or represented. Thus in Georgia, an accused person must be legally represented where a plea agreement is contemplated, and similarly in Lithuania the expedited procedure may only be adopted if the accused is represented. When used for this purpose care is necessary, for example, as to the information that is supplied or to the time and resources that are given to the accused, to ensure that the provisions for legal assistance are not simply used to provide a due process gloss to a process that may undermine fair trial rights. Such procedures are often associated with systemic incentives to comply with the process (for example, sentence discount in Moldova), or even coercion (Ukraine), and in this context *effective* legal assistance is essential in ensuring that the procedural device does not defeat fair trial rights.

5.2 When the right to legal assistance applies

In the five countries in the study, as in most if not all jurisdictions in Europe, the principle that an accused person has a right to legal assistance at trial is not controversial (although the role that they may play at, and in preparation for, the trial may be). The more difficult issues concern the point at which the right to legal

assistance arises, the role that the defence lawyer may play at the investigative stage, the practical arrangements for giving effect to the right to legal assistance, and how the right is given effect for those who are unable to pay for legal assistance from their own resources. With regard to the first of these issues, the *Salduz* doctrine of the ECtHR provides, subject to limited exceptions, that the right to legal assistance arises no later than the first interrogation of a suspect by the police. The proposed EU Directive on Access to a Lawyer provides in general terms that the right applies from the time a person is made aware by the competent authorities that they are suspected or accused of having committed a criminal offence, and specifically from the outset of the deprivation of liberty and before the start of any questioning by the police or other law enforcement authorities.[26]

The constitutions and/or criminal procedure codes of all five countries provide for a right to legal assistance for those suspected or accused of crime no later than before the first interrogation by police, and in most if not all of them, at some prior stage such as when it is acknowledged or the person is first notified that they are suspected or accused, or when they are arrested. On the face of it, therefore, it would appear that all of them comply with the ECtHR standards, and most comply with the more exacting EU standards. The fact is, however, that in all of the countries in the study only a very small proportion of those arrested or detained by the police on suspicion of having committed a criminal offence, or those interrogated by the police, have access to legal assistance. Whilst, in part, this is attributable to shortcomings associated with the practical arrangements for access and/or legal aid (which are dealt with below), in most of the countries it also results from systemic problems associated with policing practice that appears to be designed to avoid suspects exercising procedural rights generally, and the right to legal assistance in particular.

In Moldova, for example, the right to legal assistance arises when a person is informed about a suspicion or charge and, following arrest or detention, the person has a right to consult a lawyer prior to the first interrogation. However, the right to legal assistance is avoided by the police pursuing a matter without formally opening an investigation. In this way, they can take statements without restriction. Such statements are not necessarily included in the case file (although even if they are not, they could be used for intelligence purposes), although lawyers interviewed for the study stated that they normally are. In Bulgaria, a person interviewed as a witness has a right to consult a lawyer, but does not have a right to have the lawyer present when

[26] See Chapter 2, Section 5.3.

they are interviewed. Even where a person has been arrested, there is evidence in some jurisdictions that the police put pressure on suspects not to request legal assistance. The latter, if it is established, is clearly in breach of ECHR rights although in practice the problem is one of proof. Treating *de facto* suspects as witnesses has been condemned by the ECtHR, and it potentially contravenes the proposed EU Directive on the Right of Access to a Lawyer.[27] In Ukraine, avoidance of the right to legal assistance, and thus breach of European standards, is even more endemic. Whilst the criminal procedure code provides that legal assistance must be secured as soon as a person is acknowledged as a suspect or accused person, and in any case before interrogation, this is routinely avoided by the police using informal or administrative detention to detain suspects, for periods ranging from a number of hours to several days, a practice that has been repeatedly condemned by the ECtHR.[28]

Even more controversial than the right to legal assistance during the investigative phase has been the right to have a lawyer present during interrogation. As noted in Chapter 2, Section 5.4, the right to have a lawyer present during interrogations has been put beyond doubt by the ECtHR in recent years, although it continues to be flouted in a number of European jurisdictions.[29] It appears that all five countries formally recognise the right to the presence of a lawyer and in some, such as Moldova, the presence of a lawyer in interrogations is mandatory. However, in most of the countries it is rare for a lawyer to be present during police interrogations and even where legal assistance is mandatory, there is evidence that some lawyers collude with the police by signing a protocol to confirm that they were present event though this was not the case. Other reasons why lawyers are frequently not present include the ploys used to avoid the right to legal assistance (see Section 4.1 above), and the inadequacy of the legal aid and practical arrangements for delivering legal assistance at the investigative stage (see Sections 5.3 and 5.4 below).

Another aspect of the right to legal assistance is the confidentiality of lawyer/client communications. Although not explicitly set out in the ECHR, the ECtHR has confirmed its importance, and has described lawyer/client confidentiality as 'one

27 See ECtHR 14 October 2010, *Brusco v. France*, No. 1466/07, and see generally Chapter 2, Section 5.3. Similar ploys to those in Bulgaria and Moldova have been found in studies of other European jurisdictions. See Cape et al. 2010, p. 584 (Hungary, Italy and Poland), and Cape et al. 2007, p. 113 (Greece).

28 See Chapter 7, Section 1.3.2.

29 For example, in the Netherlands.

of the basic requirements of a fair trial'.[30] The proposed EU Directive on Access to a Lawyer specifically provides that member states must ensure the confidentiality of lawyer/client meetings and communications (Art. 7). This is another area where the criminal procedure codes of the five countries are generally in compliance with European standards, but where in practice the standards appear to be frequently, if not routinely, breached. Sometimes, this results from the physical structure of the facility; for example, lack of private consultation rooms in police stations in Bulgaria and Moldova, and the use of cages to contain defendants in court in Ukraine. This could be relatively easily remedied by adjustments in design or, where the resources to achieve this are not available in the short term, by adjusting procedures to allow time for confidential consultation in whatever private facilities are available. However, it would seem that in all of the jurisdictions the issue is avoided by lawyers by not insisting on private facilities (for example, in Moldova), or by not visiting clients in police detention (most countries) or in pre-trial detention (for example, in Bulgaria and Moldova). In a number of the jurisdictions lack of confidentiality results from deliberate interference by state officials, for example, by the interception of prisoner correspondence in Lithuania and Ukraine, and interference with lawyers' files in Georgia. These forms of interference with the right to confidentiality require political will and concerted action by governments and judicial authorities to give effect to the right as expressed in the law.

5.3 Practical arrangements for access to a lawyer

Even where the law clearly provides for a right to legal assistance, and even if the police are not inclined to adopt strategies to avoid the right, whether it translates into a 'practical and effective' right depends on procedures adopted and decisions taken at a very basic level. This is particularly true in respect of the right to legal assistance at the investigation stage where, because of the time imperatives, procedures need to work swiftly (including decisions about legal aid, where relevant) in a context where demand for legal assistance is unpredictable. The ECtHR cannot be expected to establish standards at this level of detail; the court is concerned that the right to legal assistance is practical and effective, but it is a matter for state parties to determine how that is achieved. Similarly, the proposed EU Directive on Access to a Lawyer requires member states to ensure that suspected and accused persons are granted access

30 ECtHR 12 May 2005, *Öcalan v. Turkey*, No. 46221/99.

to a lawyer, but does not seek to regulate how it should be done. Nevertheless, if arrangements are not in place to ensure that a suspected or accused person knows of the right and how they may take advantage of it, that they are given assistance to contact a lawyer, and that a lawyer is ready, willing and able to attend on the person at short notice, then the right to legal assistance will not amount to a 'real' right. So the purpose here is not to assess the countries by reference to standards, but to briefly consider the procedures that are in place, and to provide an indication of some of the problems that are encountered.

In Moldova, the arrangements for access to a lawyer are closely regulated by the criminal procedure code and legal aid regulations. How this works in practice is variable, but the introduction of an urgent legal aid scheme, and a duty lawyer scheme, does appear to have improved the promptness of access. In Lithuania, a legal aid co-ordinator organises a duty lawyer rota, and also appoints a lawyer in mandatory defence cases. Major problems with this system are a lack of continuity between stages of the criminal process, because a new appointment is made at the beginning of each stage, and delays in appointment following the end of the pre-trial stage which can take up to one month even where the accused is in pre-trial detention. In Bulgaria, Georgia and Ukraine emergency legal aid schemes either do not exist or do not operate effectively. In Bulgaria, appointment of a lawyer in legal aid cases is made by the local Bar Association following notification from the investigative or judicial authorities. This system was introduced in 2005 to avoid the previous problem of the appointment of 'pocket lawyers'. However, a practice has since developed whereby the Bar Association provides the police with a list of lawyers willing to accept urgent requests for assistance, which means that the problems associated with 'pocket lawyers' may not have been adequately addressed. In Georgia there is no effective system for the appointment of a lawyer at the early stages of police detention, particularly in legal aid cases. The process for appointment in mandatory defence cases, and where the suspect or accused is indigent, appears to be quite bureaucratic, with the prosecutor or judicial authority notifying the 'relevant service' which, in turn, refers the request to the Legal Aid Service (LAS), which then assigns the case to a lawyer. In Ukraine there is no police station legal advice scheme, and the problem of 'pocket lawyers' remains.

5.4 Choice and legal aid

The counties in the present study stand out from many others in the region in that during the past decade they have all introduced, or are planning to introduce, laws

making provision for legal aid, and for the reform of legal aid management and the delivery of legal aid services. Bulgaria, Georgia and Moldova have introduced independent, or quasi-independent, legal aid management institutions (legal aid boards). Lithuania has established territorial structures for legal aid management, and Ukraine is currently undertaking such reforms. Georgia and Moldova have introduced a public defender model to provide legal aid services; either an exclusive scheme, where most cases are conducted by public defenders (Georgia), or as part of a mixed delivery system, as in Moldova and potentially in Ukraine.

The structures and mechanisms for delivering legal aid are not within the competence of the ECtHR, the concern of which is whether the right to legal assistance is a practical and effective right, not how it that is achieved. With regard to free legal assistance, the ECHR Article 6 (3)(c) provides that legal assistance must be provided free of charge where a person charged does not have sufficient means to pay (the means element) and the interests of justice so require (the merits element). ECtHR case law on means is limited, but broadly provides that whilst the burden of proving inability to pay rests on the person claiming it, they do not have to prove inability beyond all doubt. Case law is also limited on merits, but in determining whether legal assistance is necessary in the interests of justice, the relevant authority should take into account the seriousness of the alleged offence and the potential sentence, the complexity of the case, and the social and personal position of the accused. In particular, the merits condition is normally to be considered satisfied where deprivation of liberty is at stake. Whilst remuneration for lawyers undertaking legal aid cases may have implications for both the availability and quality of legal assistance, it is not an issue that has been considered by the ECtHR.[31] Choice of lawyer is considered together with legal aid because choice is most likely to be compromised where a lawyer is appointed under a legal aid scheme. The ECHR Article 6 (3)(c) confers a right on a person charged to choose a lawyer where they are able pay from their own resources. However, where a lawyer is provided free of charge, there is no right of choice, although the authorities should have regard to the preference of the suspect or accused.[32]

A condition precedent to the right to legal assistance free of charge is the right to legal assistance. Whilst this is, of course, an obvious point to make, in considering the national positions regarding legal aid, regard must be had to the various mechanisms

31 See Chapter 2, Section 5.6.

32 See Chapter 2, Section 5.6.

by which the authorities in a number of countries in the study, and in particular the police, seek to avoid the effective use of procedural rights generally, and the right to legal assistance in particular (see Section 5.2 above). Also of relevance is the fact that in all countries in the study, the proportion of suspects who have access to legal assistance at the investigative stage is small and difficulties associated with *free* legal assistance is one of a number of operative factors. Thus even if free legal assistance is, in principle, available, it may not be available in practice. An example of this is provided by Moldova. Despite the fact that the law provides that an arrested person is entitled to free legal assistance irrespective of means, evidence from victimisation surveys indicate that only 10 per cent of persons called to a police station, or detained by police, were allowed to call a lawyer, a figure that is supported by comparing arrest statistics with the figures on the grant of emergency legal aid.

Generally, in the countries in the study, those who are the subject of mandatory defence provisions automatically satisfy the means test, although in some countries they may be ordered to repay legal aid costs if convicted. This is the case, for example, in Bulgaria and in Ukraine, although it appears that in Bulgaria the recovery rate is low. In cases where a means test is applied, in some countries such as Lithuania the level of means for the purposes of determining financial eligibility is set out in national regulations, but the level is low compared to average earnings. In others, such as Bulgaria and Georgia, there is no clear, transparent level of means under which a person is eligible. Approaches to determining merits in cases where mandatory defence rules do not apply varies not only between countries, but also by reference to the stage of the proceedings for which legal assistance is sought. Furthermore, rules as to eligibility are often not set out with the degree of precision necessary to enable a suspect or accused person to know with any degree of certainty that they are eligible. In Lithuania, for example, the criminal procedure code more or less repeats the wording of ECHR Article 6 (3)(c), which refers only to free legal assistance being necessary in the interests of justice. In Bulgaria, eligibility for legal aid is a matter for the investigative or judicial authorities to determine.

In this context, and given the lack of detail in the ECtHR jurisprudence, it is difficult to evaluate whether, and to what extent, the countries in the study comply with ECHR requirements regarding *free* legal assistance. The task is a little easier with regard to choice of lawyer. Here, it would seem that formally, in non-legal aid cases, the law in the respective countries provides for freedom of choice, although there are concerns in some countries, such as Georgia, that pressure is sometimes placed by prosecutors on suspects or defendants to choose a particular lawyer. As we have seen,

the ECHR provides that choice may be limited in legal aid cases, and it appears that choice is limited in such cases in all of the countries. In Lithuania, the law provides that the legal aid service should take account of a suspected or accused person's preference, but in practice they have no choice.

As noted above, remuneration of lawyers acting in legal aid cases is not something that has been considered by the ECtHR, and assessing whether levels of remuneration are adequate is difficult because of differences in standards of living, the complexity (and lack of comparability) of legal aid remuneration regimes, and lack of transparency concerning fees charged by lawyers when acting privately. In Moldova, levels of remuneration are considered to be low, but nevertheless attractive to sections of the legal profession because of the certainty of payment and the fact that they can constitute a regular income. Similarly, in Bulgaria, whilst the average fee for a legal aid case is only 93 Euro, there is apparently no shortage of lawyers willing to undertake legal aid work. However, low levels of remuneration almost certainly create problems in attracting experienced, competent lawyers to legal aid work and in Bulgaria, for example, it may explain why lawyers reportedly refuse requests to attend police stations at short notice.

5.5 Role, independence and standards of lawyers

The ECHR contains no explicit provisions on the independence or role of lawyers acting for suspected or accused persons, although ECtHR jurisprudence places limits on the margin of appreciation accorded to national governments with regard to interference with the independence of lawyers, and there appears to be an emerging body of case law on the proper role of defence lawyers.[33] The ECtHR takes a 'light touch' approach to the state parties' responsibilities regarding the standards to be required of defence lawyers, having particular regard to the sensitivities arising from the importance of the independence of the legal profession.

Lithuania appears to be unique amongst the five countries in that the independence of lawyers is guaranteed by law. Conversely, Ukraine's Criminal Procedure Code contains a provision that defence lawyers owe a duty not to hinder the determination of truth by means of protracting an investigation or trial, and there is concern that this is sometimes used to remove defence lawyers where, for example, they have advised a client to remain silent. Whilst this example from Ukraine, and the phenomenon

[33] See Chapter 2, Section 5.7.

of 'pocket lawyers' referred to earlier, demonstrate that the independence of private lawyers cannot be taken for granted,[34] the creation of public defender schemes also raise issues of independence. Whilst public defender schemes can be significant in ensuring access to legal assistance, and in raising standards, they can also raise concerns about the independence of employed lawyers. Such concerns are evident in Georgia, and it is imperative that appropriate mechanisms are put in place to ensure that independence is preserved.

Generally in the countries in the study, the role and standards of defence lawyers is left to bar associations to regulate – although in Ukraine there is a problem with unlicensed legal specialists who are not subject to profession rules and discipline. However, it appears that none of the bar associations has a specialist criminal law section, and although the bar association in Lithuania has a continuing professional development requirement, and in Bulgaria the bar association has an active training programme, generally the professional associations play only a minimal role in assuring the quality of lawyers acting for suspects and accused persons. In Moldova there has been an attempt to introduce peer review as a quality assurance mechanism, but unlike in some other jurisdictions[35] it seems that in none of the five countries do the legal aid authorities, where they exist, take an active part in seeking to assure, or improve, quality. The failure of the bar associations and the legal aid authorities to take steps to deal with quality and standards is particularly important given the low levels of confidence in, and perceptions of poor standards of, criminal defence lawyers, especially amongst those private practitioners who provide legal aid services. At present this is largely 'under the radar' of the ECtHR, but tackling poor quality is an essential element of improving access to effective criminal defence. Indeed, failure to do so could mean that attempts to improve access to legal assistance, such as that represented by the *Salduz* doctrine and the proposed EU Directive on Access to a Lawyer, could actually have a detrimental effect on the procedural rights of suspects and accused persons. Access to poor quality legal assistance may leave suspects and defendants vulnerable, ill-advised and poorly equipped to defend themselves whilst enabling the police and prosecution authorities (and, indeed, governments) to claim that procedural rights have been respected and, therefore, that the trial process has been fair.

34 Inadequate remuneration for legal aid services also potentially interfere with the independence of lawyers since they constrain the professional judgment of lawyers in terms of determining what work should be carried out in any particular case.

35 For example, in England and Wales, and in the Netherlands. See, for example, Cape et al. 2010, pp. 150 and 565.

6. Procedural rights

6.1 Right to be presumed innocent and the right to silence

The presumption of innocence, which is set out in the ECHR Article 6 (2), is proclaimed in the constitution and/or the criminal procedure code of each of the five countries. The analysis in Chapter 2, Section 6.1, shows that the presumption of innocence has a number of meanings and that the ambit and parameters of the rights are not precisely drawn. Thus, for example, the requirement in some jurisdictions that defendants in court be kept in a cage (for example, Moldova and Ukraine) or be handcuffed (for example, Moldova) is questioned on the basis that such requirements constitute a public expression that the person is, or must be, guilty. Here, we confine our analysis to concerns in some of the countries about official pronouncements and judicial practices that indicate or imply guilt breach the presumption of innocence. The question of the relationship between the presumption and pre-trial detention is dealt with in Section 6.2 below.

The case law of the ECtHR shows that an important aspect of the presumption of innocence is that judicial or other public officials must not presume, nor make statements that indicate a presumption, that a suspected or accused person is guilty unless and until guilt is proven according to law.[36] In Bulgaria, Georgia, Lithuania and Moldova there is significant concern about breach of the presumption in the form of public statements by members of the judiciary, prosecutors, and other public officials, which are widely reported in the media. In Georgia it appears that the police or prosecutors regularly supply the media with information about inculpatory evidence in advance of trial, including evidence of confessions. In the case of Bulgaria, this has led to an adverse judgment by the ECtHR in respect of a case in which the prosecutor publicly expressed his opinion, prior to trial, that the accused was guilty.[37]

There is also significant concern in a number of the jurisdictions about pro-prosecution bias on the part of the judiciary which has the effect of undermining the presumption, and in some that there is systemic or institutional pressure on judges to convict (for example, in Bulgaria,[38] Georgia and Ukraine). In a number of the

36 See Chapter 2, Section 6.1.1.

37 ECtHR 7 January 2010, *Petyo Petkov v. Bulgaria*, No. 32130/03, and see Chapter 3, Section 3.3.3.

38 Such concerns were expressed not only by lawyers interviewed for this study, but also by members of the judiciary. See Chapter 3, Section 3.3.3.

jurisdictions such concerns are supported by statistics showing that an extremely small proportion of cases result in an acquittal. In Georgia the acquittal rate is a miniscule 0.01 per cent, and in Ukraine the courts make extensive use of the provision in the criminal procedure code that enables them, faced with insufficient evidence to convict, to refer the case back for further investigation rather than acquit.

Even though not expressly mentioned in the ECHR, the right to silence and the privilege against self-incrimination are regarded by the ECtHR as 'generally recognised international standards which lie at the heart of the notion of a fair trial procedure'.[39] The right to silence is not regarded as absolute, but the ECtHR places strict limits on any exception. In the ECDE study the problems associated with the right to silence were found to lie in practice, rather than in respect of the right as formally expressed in the law,[40] and this is also the case in the present study. The right to silence is guaranteed by the constitution and/or the criminal procedure code in each of the five jurisdictions, but in practice there is evidence of breaches of the right in most, if not all, of them. The strategies for avoiding procedural rights adopted by the police in Bulgaria, Moldova and Ukraine were explained in Section 5.2 above. Where such strategies are adopted, one consequence is that the person either does not have, or does not have to be informed of, the right to silence. In Ukraine (where the confession rate of suspects detained without access to a lawyer is higher than 90 per cent) there is evidence of routine pressure being exerted by the police on suspects to confess. It is also likely that, as found in other European jurisdictions,[41] the exercise of the right to silence will adversely affect decisions made in respect of the accused. Moldova has been the subject of an adverse decision of the ECtHR, which found that pre-trial detention justified by the fact that the accused refused to disclose the names of witnesses breached his right to silence.[42] There is also evidence from Moldova that judges may justify negative attitudes to the credibility of evidence of the accused by reference to the exercise of their right to silence during the investigative stage. It is likely that similar attitudes to 'silence' exist in other jurisdictions, although evidence of it is hard to uncover.

39 See Chapter 2, Section 6.1.2.

40 See Cape et al. 2010, p. 551.

41 See Cape et al. 2010, p. 183 (Finland), p. 349 (Hungary), p. 405 (Italy) and p. 459 (Poland).

42 ECtHR 23 October 2007, *Turcan and Turcan v. Moldova*, No. 39835/05, and see Chapter 6, Section 3.3.4.

6.2 The right to release pending trial

The right to production before a judicial authority and to release pending trial, under ECHR Article 5 (3), concerns two separate stages: the period following arrest when a person is taken into the power of the authorities; and the period pending eventual trial before a criminal court.[43] Here, our analysis focuses on the latter. According to ECtHR jurisprudence, trial within a reasonable time and provisional release pending trial are not alternatives. The presumption of innocence leads to a presumption in favour of release, which can only be displaced by an assessment that involves consideration of the facts of the individual case, and which is evidenced by adequate reasoning. Reasonable suspicion that the person has committed an offence is a pre-requisite of pre-trial detention, and the seriousness of the alleged offence cannot, in itself, justify a lengthy period of detention. Deprivation of liberty may be justified by reference to a well-grounded fear of re-offending or absconding, or interference with the investigation or trial, but it is incumbent on judicial authorities to consider alternative measures to detention.

Generally, the law governing pre-trial detention in all five countries is compliant with the ECtHR jurisprudence, but in all of them apart from Bulgaria there is significant evidence of non-compliance in practice, and Georgia, Moldova and Ukraine have all been the subject of a number of adverse ECtHR decisions concerning pre-trial detention. In Bulgaria significant progress towards compliance, both in terms of law reform and judicial practice, was made in response to a number of adverse ECtHR judgments. However, since 2009 there has been a series of public attacks by officials and politicians, including the Minister of Justice, on judges regarding individual pre-trial release decisions. The situation was so serious that both the European Association of Judges and the United Nations Special Rapporteur on the independence of judges and lawyers have paid special visits to the country, and have expressed serious concerns about the impact on judicial independence.

Non-compliance with ECHR standards involves a number of separate but interconnected factors: treating seriousness of the alleged offence as the determining factor; lack of consideration of the individual facts; the use of standard templates; and the lack of adequate reasoning for decisions. These shortcomings are evident in all of the countries apart from Bulgaria. Consideration of an alternative measure appears not

[43] See Chapter 2, Section 6.2.

to be given adequate consideration in many of the countries, although Lithuania is an exception in that alternative measures are used much more frequently than detention. In Moldova and Ukraine in particular, the accused or their lawyer has difficulty in accessing prosecution material that is to be used to justify an application to detain the accused in pre-trial detention (see Section 4.3 above). Taken together, the result of the combination of these factors is that pre-trial detention rates are generally high, and the vast majority of prosecution applications to detain in custody are granted. In Ukraine, for example, nearly 90 per cent of prosecution applications are successful, and in Georgia the figure is over 95 per cent.

Georgia provides an example of the difficulties of translating legal reforms designed to comply with ECHR standards into practice. The Georgian Criminal Procedure Code provides that an accused can only be kept in pre-trial detention if one or more conditions (that substantially meet ECHR standards) are satisfied. The burden of establishing the need for detention rests on the prosecution, and the Code provides that detention must not be ordered if alternative measures can achieve the relevant objectives. In filing an application for preventive measure the prosecutor must set out the reasoning behind the measures requested, and why less restrictive measures are not appropriate. In making the decision, the court is required to take into account the individual facts of the case, having regard to the personal and social circumstances of the accused. Yet, as noted above, prosecution applications for detention are almost always granted, about 40 per cent of those arrested and initially detained in a police station are subsequently held in pre-trial detention, and pre-trial detention is ordered in about half of all cases in which preventive measures are imposed. By contrast, it appears that in Bulgaria changes to practice have, to a large extent, been successful in terms of ECHR compliance (although, as noted, this has prompted a hostile political reaction). We were not able, within the confines of this study, to examine the question of why experience has differed in the two jurisdictions, but we suggest that it could usefully be pursued. Pre-trial detention rates were found to be high in a number of the jurisdictions examined in the ECDE study, and there were similar problems in many of them regarding pre-trial detention hearings and decision-making to those found in the present study.[44] The EU currently is considering whether to legislate in respect of pre-trial detention and the data from this study suggests that it should consider what mechanisms might be put in place to aid, and ensure, practical implementation.[45]

[44] See Cape et al. 2010, p. 552.

[45] See Chapter 1, Section 4.3.2.

6.3 The right to reasoned decisions and the right to appeal

It was seen in Section 6.2 above that the lack of reasoned decisions for pre-trial detention is a significant problem in the majority of the countries in the study. Here, we examine the right to reasoned decisions together with the right to appeal because the ability to appeal a decision or judgment is normally predicated on a sufficient explanation having been given for the decision or judgment. All of the five countries have ratified the Seventh Protocol of the ECHR, Article 2 of which provides that, subject to limited exceptions, everyone convicted of a criminal offence must have the right to have his/her conviction or sentence reviewed by a higher tribunal. ECtHR case law requires that where appeal procedures have been provided for, they must comply with the guarantees of ECHR Article 6.[46] The law in each of the five countries provides for a right of appeal for those convicted of a criminal offence, although in Georgia there is no appeal on the facts from the decision of a jury.[47] However, in Georgia, Moldova and Ukraine the evidence suggests that the right to appeal is inhibited in practice by the lack of adequately reasoned decisions.

The case law of the ECtHR provides that courts must indicate with sufficient clarity the grounds on which they base their decision, and whilst they do not have to address every issue raised, they should deal with the essential issues explaining where appropriate why evidence was accepted and/or relied upon or, where applicable, why it was rejected.[48] The constitutions and/or criminal procedure codes of all five countries require judgments and decisions to be reasoned, although there are differences as between the jurisdictions as to the extent of the requirements. The provisions in some of the countries are quite prescriptive as to what must be included. In Bulgaria, for example, the law provides that reasons must be given for why the court came to a particular finding of fact, as well as the evidence and legal analysis the decision is based upon. In Lithuania, the criminal procedure code specifies the parts of the reasoning that must be included, and the constitutional court has reinforced the requirements of legal clarity, and that a judgment should not contain concealed arguments nor fail to identify facts or arguments that are relevant to the decision made.

46 See Chapter 2, Section 6.5.

47 The ECtHR has held that even in the case of a jury trial, there must be sufficient safeguards to enable an accused to understand why they have been convicted. See ECtHR 16 November 2010, *Taxquet v. Belgium*, No. 926/05.

48 See Chapter 2, Section 6.4.

The focus on the detail of reasoned decisions in Lithuania appears to result in the legal requirements being complied with, albeit that there is concern about the reliance on legal language that may not be understood by the accused. Similarly, in Bulgaria, it appears that the reasoned decision requirements are complied with. However, in Georgia, Moldova and Ukraine reasoning is often 'thin' or poor, or even non-existent – in Moldova this has been observed in a trial monitoring programme, and in Georgia the Georgian Ombudsman has identified substantial problems in this regard. Moreover, in all three countries there is evidence that reasoned decisions frequently favour the prosecution, ignoring evidence or argument that favoured the accused, or failing to explain why the court did not rely on it. The case law of the ECtHR shows that determining whether any particular decision is compliant is highly fact specific, but the evidence from Georgia, Moldova and Ukraine indicates routine non-compliance with the spirit, if not the letter, of the ECHR requirements.

7. Rights promoting effective defence

7.1 The right to investigate the case

The ECHR does not contain any explicit provisions giving a suspected or accused person a right to investigate facts concerning the suspected or alleged offence,[49] and in this sense, such a right does not exist. However, in both inquisitorial and adversarial systems, law enforcement agencies and the prosecution have a monopoly on investigative powers, and a near monopoly on resources, to investigate suspected crimes. In this context, our approach to effective criminal defence involves the proposition that a suspected or accused person should have some ability to either conduct investigations themselves, or to require that investigations are carried out. This receives some support from the proposed EU Directive on Access to a Lawyer, which includes provisions giving a lawyer acting for a suspect or accused to be present at some procedural acts, and from the ECtHR decision in *Dayanan v. Turkey* which refers to 'collection of evidence favourable to the accused' as a function of a defence lawyer at the investigative stage.[50]

[49] See Chapter 2, Section 7.1.

[50] ECtHR 13 October 2009, *Dayanan v. Turkey*, No. 7377/03, para. 32, and see generally Chapter 2, Section 7.1.

Thus a right to investigate might include any, or all, of the following: a right to be present, or to participate, in a procedural action;[51] a right to interview potential witnesses and to gather evidence; a right to require the police or prosecutor to pursue particular enquiries; and a right to add material to the case file. They are, of course, interlinked. For example, a right to be present at procedural actions requested by the suspected or accused person will be limited if they have no effective right to require a procedural action to be carried out. Further, to the extent that such rights exist, the question arises as to whether in legal aid cases use of such rights is facilitated or restricted by the provisions governing payment for legal aid work.

An example of whether and how such rights operate, and are interlinked, is provided by Moldova. Here, although the Moldovan Criminal Procedure Code provides no express right for the suspect or accused person to collect evidence, there are a number of provisions enabling them to collect information. Such information may be presented to the investigative body at the pre-trial stage or to the court, and the accused has the right to add such material to the case file.[52] However, the right to collect information is limited by the fact that potential witnesses are under no obligation to speak to the accused or their lawyer (a feature that is commonly encountered in most jurisdictions), and such work is not be specifically covered by legal aid fees. Access to documentary evidence held by public authorities is limited because the authorities normally refuse to provide it on the grounds of data protection. There is no general right for the accused or their lawyer to participate in investigative actions. They may participate if invited by the investigative authorities, or if they requested the investigative action, but they have no right to insist that a particular investigative act (for example, interview of a witness) be carried out, and in practice lawyers say that such requests are normally refused. In fact, requesting a witness to be interviewed can present dangers to the accused since it is reported that where a request is refused, the investigative authorities will often interview the potential witness identified in

51 The proposed EU Directive on the Right of Access to a Lawyer does provide that a defence lawyer has a right to be present during any questioning or hearing, and to be present at any other investigative or evidence-gathering act at which the suspect or accused person's presence is required or permitted as of right. Therefore, it would permit the investigative authorities to refuse permission unless a right to be present was provided by domestic law.

52 If the investigative body refuses to add it to the case file the accused can complain to the investigative judge. In practice, lawyers produce basic materials at the pre-trial stage (for example, information relevant to pre-trial release), but the most significant material is left for court stage. At that stage the judge must provide a reasoned decision for refusing to accept material produced by the defence

the request in the absence of the defence lawyer. Lawyers say that this often results in witnesses then providing information that is favourable to the prosecution. As a result, they are often reluctant to ask the investigative authority to interview a witness at the pre-trial stage. Defence lawyers claim that prosecutors routinely include unlawfully obtained evidence in the case file. The criminal procedure code contains no express provisions for the exclusion of evidence unlawfully obtained evidence – for example, 'explanations' provided by the accused in the absence of procedural safeguards, or unlawfully obtained audio or video recordings – and whilst such material may not formally constitute evidence, it will be seen by the trial judge. Defence lawyers say that applications to remove such material are normally refused.

Although the law and practice in the other four jurisdictions is not identical, the Moldovan position on the right to investigate broadly reflects that in the other countries. The position is also not dissimilar to many, if not most, European jurisdictions that are based on the inquisitorial tradition.[53] In those that have an adversarial tradition, such as England and Wales, the suspect or accused has an absolute right to investigate, and to present evidence at trial, provided it is relevant, and there are exclusionary rules regarding unlawfully obtained evidence (although no absolute right to have unlawfully obtained evidence excluded at trial). However, suspects have no right to require the police to carry out investigative acts, no powers to require co-operation by potential witnesses, limited powers to obtain materials from third parties, and limitations flowing from the legal aid regime. As a result, in practice the position regarding investigation by the accused (as distinct from producing evidence at trial, in respect of which there are real differences) is quite similar to that found in inquisitorial jurisdictions. The general approach is to place great reliance on the willingness and ability of the investigative authorities and prosecutors to act in a neutral, dispassionate manner, and for judges to be alive to the potential for unfairness in relying on evidence in the case file and in considering evidential motions from the accused. The evidence from the countries in the study is that these are not safe assumptions, although there have been significant developments in the Georgian criminal procedure code. However, as noted earlier, European standards in respect of a right to investigate are limited at present, and whilst there is some indication that the ECtHR is beginning to articulate the proper role of defence lawyers, improvement in the short term will rely on an active approach to defence rights by lawyers and bar associations, and reflection

[53] See Cape et al. 2010, p. 567.

by investigative and judicial authorities on their responsibilities towards the principles of equality of arms and fair trial.

7.2 The right to adequate time and facilities to prepare the defence

The right to adequate time and facilities for preparation of the defence is guaranteed by the ECHR Article 6 (3)(b). It is closely linked to the other, more specific rights in Article 6 (3), and is essential to enabling the suspect or accused person to effectively participate in the criminal process and to ensuring that those rights are real and effective.[54] However, the broad nature of the right means that the ECtHR consideration of it is highly fact specific and, therefore, that it is not possible to establish clear standards for the purpose of assessing compliance.

The right is explicitly provided for in the criminal procedure codes of Georgia, Lithuania and Ukraine, and even in those countries where it is not explicitly provided, such as in Bulgaria, it is a well-established principle reflected in legislation and case law. The research in the five countries did not identify any systemic difficulties in relation to adequate time and facilities, and generally, defence lawyers interviewed for the study did not have major concerns. However, a range of practical problems associated with time and facilities for preparation of the defence were identified. We have already referred to the lack of private consultation facilities in police stations in Bulgaria (see Section 5.2 above), and lawyers in Georgia face significant impediments in visiting their clients in detention.[55]

In Moldova the law provides that a person summoned before an investigation authority or prosecutor must be given five days' notice, although this does not apply in respect of an urgent procedural action. The evidence suggests that this is not routinely complied with at the investigative stage, but lawyers nevertheless generally comply with requests to attend for fear that another lawyer will be appointed. In Ukraine the time for defence inspection of materials may be limited by the judge, and access to the case file may be limited where the accused is in custody (see Section 4.3 above), but otherwise no particular difficulties were identified. A problem found in a number of countries in the ECDE study concerned facilities for copying the case file,[56] and this was also identified as a problem in Moldova and Ukraine. Another problem of general

54 See, in particular, access to the case file in Section 4.3 above.

55 See Chapter 4, Section 3.22.

56 For example, in Belgium. See Cape et al. 2010, p. 91.

concern in the ECDE study was the lack of adequate time for preparation in respect of expedited and/or guilty plea hearing procedures. However, despite the increase in recent years in the use of such procedures in some of the countries in the study, such as in Bulgaria, no significant concerns were reported. It may be that this is, in part at least, a function of the largely undeveloped, and passive, role played by defence lawyers in the countries in the study.

7.3 Right to equality of arms in calling and examining witnesses

Although not explicitly referred to in the ECHR, equality of arms is regarded as a fundamental feature of fair trial meaning, *inter alia*, that an accused must be given the opportunity to present his case under conditions that do not place him under a disadvantage as compared to the prosecution. Although ECHR Article 6 (3)(d) does not give the accused an absolute right to call witnesses, it provides for a right to call, and to examine, witnesses in their favour on the same terms as those against him/her. These requirements are reflected in the law of all of the countries in the study,[57] but in practice there are considerable impediments to the accused exercising their rights effectively, largely as a result of procedural difficulties and judicial practices and attitudes.[58]

Generally, in all five countries the right of the accused to call witnesses is subject to the approval of the judge. Since this is also the case for prosecution witnesses, this is in accordance with ECHR standards. However, it is reported in a number of the countries, such as Bulgaria, Georgia and Ukraine, that judges are often not even-handed where considering defence and prosecution requests to call witnesses. In part, this may result from the process by which a witness may be identified and called to give evidence. As is pointed out in Chapter 3 (Bulgaria), witnesses called by the prosecutor will already have been interviewed by the police or prosecutor, so the relevance of their evidence will already have been established. As noted earlier, the defence does not have the power to require a witness to co-operate with an interview. This means that for a prosecutor, the basis for persuading the judge of the relevance of the evidence has already been established, whereas this is a more difficult task for the

[57] Note that in Moldova the Criminal Procedure Code does not currently provide for a right of cross-examination, although there are proposals to amend the Code in this respect.

[58] Note the general lack of a right for the accused to add material to the case file, and a lack of exclusionary rules regarding evidence unlawfully obtained by the police or prosecution. See Section 7.1 above.

accused or their lawyer. However, not all inequalities in practice can be explained in this way. In Ukraine, in particular, the accused faces a number of difficulties in calling witnesses. Defence motions to call witnesses are routinely opposed by the prosecutor, and frequently refused by the judge. Even if a witness is summoned to give evidence, many fail to appear, and the police routinely assert that they have made all possible efforts to secure their attendance. Also in Ukraine, whilst the law permits the accused to submit the conclusions of an expert (although no right to call expert evidence as such), in practice it is rarely permitted by the judge.

With regard to examination of prosecution witnesses by the defence[59] it appears, other than in Moldova,[60] that the law in all of the countries makes provision for cross-examination. Again in Ukraine, however, the accused faces particular difficulties in this regard. Whilst the law provides that witnesses must normally give oral evidence, the exceptions to the rule are liberally interpreted by the courts. Even where a witness does give oral evidence, the reading into evidence of a prior written statement made by the witness is often used as a substitute for oral testimony, and defence attempts to cross-examine a witness as to their credibility are often rejected by the judge.

7.4 The right to free interpretation and translation of documents

The ECHR Article 6 (3)(e) gives a person charged with a criminal offence a right to the free assistance of an interpreter if they do not understand the language of the court and, given the autonomous meaning of the term 'charge',[61] it extends to the pre-trial stages. The right is supplemented by Articles 5 (2) and 6 (3)(a) which provide that a person must be informed of the reasons for arrest or detention, and the nature or cause of the charge or accusation, in a language that they understand. Case law of the ECtHR requires judicial authorities to take an active approach to determining need, and this is extended by the EU Directive on Interpretation and Translation to requiring states to have in place a procedure for determining whether the suspect or accused speaks or understands the language. Broadly, all things said by, or to, an accused who does not

59 Strictly, the inquisitorial approach means that it is inappropriate to refer to a witness as being a prosecution witness. What is meant here is a witness who gives evidence against the interests of the accused.

60 See note 57 above.

61 See Chapter 2, Section 3.

speak or understand the language during the course of criminal proceedings must be interpreted, and the EU Directive sets out this requirement in some detail, including interpretation of lawyer/client consultations where this is necessary for the purpose of safeguarding the fairness of the proceedings. Not all documents are required to be translated, but the EU Directive provides that all documents that are essential to ensure that the suspect or accused person is able to exercise their right of defence and to safeguard the fairness of proceedings must be translated, and sets out a list of documents that must, as a minimum, be translated.[62]

The constitution and/or criminal procedure code in all of the countries in the study contain some provision for interpretation and/or translation although they vary in terms of the extent of the provisions. Note that they all provide for mandatory defence where the accused does not speak or understand the language (see Section 5.1 above). It is not clear what procedures are in place for determining whether a suspect or accused person speaks or understands the language, but generally responsibility for determining need is placed on the investigative or judicial authorities. It is also not clear how well identification of need works in practice, although there is some evidence in Moldova that investigators may exert influence on suspects to confirm that they do not need an interpreter. In Bulgaria and Ukraine there is no provision for interpretation of lawyer/client consultations which, in the case of the latter country, will amount to a breach of its obligations under the EU Directive on the Right to Interpretation and Translation if appropriate provisions are not introduced by October 2013.[63]

With regard to translation, the law and practice varies. In Moldova the law provides that judgments must be translated, and the charge sheet, indictment and court decisions are, as a matter of practice, routinely translated. Similarly, in Ukraine, whilst the law does not provide that all documents must be translated, it does provide that documents that must be supplied to the accused – the decision to open an investigation, the charge and the indictment – must be. However, the law does not require all of the documents in the case file to be translated. In Bulgaria, the right to translation was introduced as recently as 2010, and in addition to those documents that must be translated in Ukraine, the verdict and any decision on appeal must be translated. It would seem, therefore, that there is some shortfall in compliance with

62 See Chapter 2, Section 7.4.

63 See Chapter 1, Section 4.3.2.

ECHR standards and, in particular, with the more exacting requirements of the EU Directive on Interpretation and Translation. In particular, it is difficult to see (having regard to the right to adequate time and facilities for preparation of the defence) how an accused can have a fair trial if the parts of the case file that are to be used against the accused at trial are not translated – yet the law in most, if not all, of the countries does not seem to require this.

The ECtHR case law is clear that the requirement that interpretation (which includes translation) be free means that the suspected or accused person cannot be required to pay for the costs of interpretation even if they are convicted. This is also explicitly stated in the EU Directive on Interpretation and Translation. Bulgaria stands out as potentially being in breach of this provision in that a convicted person may be required to reimburse the cost of interpretation or translation. Despite the fact that Bulgaria has been the subject of an adverse ECtHR decision in this regard, it appears that there is no clear legal provision, and domestic case law is contradictory.

ECtHR case law provides that mere appointment of an interpreter or translator does not absolve the state of further responsibility, and that both states and judicial authorities must take some responsibility for the adequacy of interpretation and translation. The EU Directive on Interpretation and Translation goes further, requiring states to take concrete measures to ensure quality, to seek to establish a register of appropriately qualified interpreters and translators, and to establish a mechanism by which suspects and accused persons can complain about inadequate quality. Lithuania is notable in that the criminal procedure code regulates the competence and independence of interpreters, although there is no information on how this regulation works in practice. None of the countries in the study has a certification or quality assurance scheme for interpreters and translators,[64] and in fact the operation of the interpretation/translation requirements is quite opaque, with little evidence of how the provision of interpreters and translators works in practice, and little if any official information as to expenditure or fees. The practical difficulties, and cost, of providing competent interpretation and translation in respect of a potentially broad range of languages should not be underestimated. However, all of the countries have some way to go in demonstrating compliance with ECHR, and EU, standards.

[64] In Moldova the Ministry of Justice is responsible for authorising and ensuring the quality of translators, but it is not yet functional.

8. Conclusions

We have argued that access to effective criminal defence is a necessary pre-condition for the enjoyment of fair trial guarantees and that it should be assessed, in the European context, by reference to standards that may be determined by close analysis of the ECHR, as interpreted by the ECtHR, and EU law on procedural rights as it is being developed. Whether suspects and accused persons have access to effective criminal defence in any particular jurisdiction relies on the interplay between constitutional and legal rights, the regulations, institutions (and institutional cultures), and procedures that enable (or not) those legal rights to be effective, and the organisation, competence and professional cultures of the legal professionals who advise and assist suspects and accused persons. Compliance with ECHR and EU standards is a necessary condition for ensuring access to effective criminal defence, but it is not sufficient: not all aspects of effective criminal defence are the subject of clear standards; some requirements or standards lack precision (sometimes inevitably so); and the institutional, procedural and cultural requirements that determine whether suspects and accused persons do have access to effective defence are often too detailed, or too variable, to be adequately governed by supra-national standards. This is apparent from our analysis of the level of compliance by the countries in the study with European standards. To a large extent (although there are important exceptions), the constitutions and criminal procedure codes of the five countries in the study are compliant with European standards. However, it is clear that suspects and accused persons in all of the jurisdictions covered by the study suffer from serious disadvantages in terms of access to effective defence, although more so in some jurisdictions than in others. There is a variety of reasons for this, but they include insufficient political and institutional commitment to defence rights, inadequate regulation, resources and enforcement mechanisms, and legal professions that lack the level of resources, organisation and what might be termed 'professional confidence' to deliver good standards of legal assistance when and where it is required.

Progress made towards delivering effective defence rights should not be underestimated – all of the jurisdictions have carried out significant reforms of their criminal justice systems and processes, albeit that it sometimes appears as if progress in terms of fair trial rights has largely been at the prompting of the ECtHR or the EU. It is also evident that rights for suspects and defendants are not always popular with the general public, although there is a complex mix of opinion that is often expressed in terms of lack of confidence in criminal justice institutions and personnel, related in

some of the jurisdictions to concerns about corruption. In Chapter 9, building on the analysis of compliance with European standards in this chapter, we identify a number of common themes arising from the data and analysis which, if reflected and acted upon, could contribute to improvements in access to effective criminal defence.[65]

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[65] Chapter 9 also includes conclusions and recommendations in respect of individual countries that are also set out in the final sections of each country chapter.

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CHAPTER 9 IMPROVING ACCESS TO EFFECTIVE CRIMINAL DEFENCE

1. Introduction

Access to effective criminal defence is an essential component of the right to fair trial. A key aspect of effective criminal defence is a right to legal advice and assistance. Access to competent legal advice and assistance, at least from the time that a person suspected of committing a criminal offence is first interviewed by the police or other investigative authority, is essential. Effective access to legal assistance requires laws and systems to be in place to ensure and verify that suspected and accused persons know and understand their right to a lawyer, can make a knowing and intelligent choice about whether to exercise it, are given the necessary assistance to contact a lawyer, and that a competent lawyer is available to provide advice and assistance when and where it is needed. However, access to effective criminal defence means more than simply access to a lawyer. Access to a competent lawyer will not guarantee fair trial if other fair trial rights – access to information and evidence, the presumption of innocence and the right to silence, the presumption of release pending trial, effective participation on equal terms with the prosecution, adequate time and facilities, reasoned decisions and, where necessary, interpretation and translation – are non-existent or inadequate.

Examining whether, in any particular jurisdiction, suspected and accused persons have access to effective criminal defence entails a three-stage assessment: whether there exists a constitutional and legislative structure that adequately provides for criminal defence rights; whether there are in place regulations, institutions, procedures and judicial cultures that enable those rights to be practical and effective; and whether there exists a competent legal profession, willing and able to provide legal advice and

assistance to those that need it, especially those who are unable to pay for such assistance out of their own resources. In the European context, it is appropriate to make such an assessment by reference to the standards embodied in the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR), and to the emerging law on procedural rights of the European Union (EU).

In this study we have made an assessment, by reference to those standards, of access to effective criminal defence in five Eastern European jurisdictions – Bulgaria, Georgia, Lithuania, Moldova and Ukraine. We have found, subject to some important exceptions that are summarised in respect of the five countries in Section 3 below, that the laws of the five jurisdictions largely comply with European standards. Yet all of those jurisdictions have been the subject of adverse judgments of the ECtHR (some more so than others), and our study has shown that there are some serious deficiencies in the practical implementation of fair trial rights generally, and in access to effective criminal defence in particular.[1] Whilst some of these deficiencies, in particular, state funding of legal aid services, require financial resources to remedy them, many of them result from regulatory, procedural and cultural factors that could be effectively tackled without significant cost. Indeed, when other costs are taken into account (for example, the costs of unnecessary, or unnecessarily prolonged police detention), remedial action could be cost-neutral or – as in the case of pre-trial detention – cost-saving

In Section 2 we identify a number of themes that are common across the jurisdictions that inhibit access to effective criminal defence, and make proposals as to appropriate remedies. In Section 3 we set out the conclusions for each of the countries in the study together with recommendations for action.

2. Common themes

2.1 Rights avoidance mechanisms

In all of the countries in the study the police, and to a lesser extent, prosecutors engage in practices which, whether by design or consequence, deprive suspects of some or all of their procedural rights. Most starkly, this is the case in Ukraine, where most formal arrests are preceded by informal, unauthorised detention that may last for

[1] See generally Chapter 8.

hours and sometimes days. Alternatively, offences may initially be dealt with under the administrative procedure, but subsequently converted into criminal proceedings. To a greater or lesser extent, similar processes occur in the other countries – 'initial arrest' in Bulgaria, the unlawful use of provisional arrest powers in Lithuania, and investigating without opening a formal investigation in Moldova. Another common mechanism is for *de facto* suspects to be treated as witnesses as, for example, in Bulgaria, Georgia, and Moldova. In many of them, information about procedural rights is not provided to suspected or accused persons promptly and fully even where the law so requires. There is also some evidence of misuse of expedited hearing or guilty plea procedures, by the exertion of pressure on suspects or accused persons to consent, thereby avoiding full judicial examination of the evidence.

Such practices are often deeply embedded in police and prosecution cultures, and tacitly accepted by the judiciary, rendering positive change a lengthy and challenging process. However, given the political will and with some adjustments to criminal procedure codes – and possibly some well-directed strategic litigation – change is possible. The law should provide that any form of detention, or significant curtailment of freedom of action, by the police or other investigative authorities in the context of a criminal investigation, should trigger full procedural rights for the suspect. This is required by ECtHR case law,[2] including where a person is held in administrative detention,[3] and should be reflected in criminal procedure codes. Further, the law should require that where there are sufficient (or reasonable) grounds to suspect them of an offence, a person interviewed as a witness must be treated as a suspect for the purposes of procedural rights even if they are not arrested. Again, this is required by ECtHR case law.[4] In order to ensure that such provisions are effective, the law should provide that evidence obtained from a witness or suspect in circumstances that are contrary to these requirements is excluded from the case file. ECtHR case law provides that evidence obtained from a suspect in the absence of legal assistance should not be

2 In Scotland, for example, for many years the right of a detained suspect to legal assistance was denied on the grounds that it was not defined, in law, as an arrest. However, in 2010 the Supreme Court in *Cadder v. HMA* [2010] UKSC 43 decided, following the ECtHR decision in *Salduz*, that this was no longer tenable, and the law was changed to give suspects the right of access to a lawyer in such circumstances.

3 See ECtHR 18 February 2010, *Zaichenko v. Russia*, No. 39660/02; and ECtHR 21 April 2011, *Nechiporuk and Yonkalo v. Ukraine*, No. 42310/04, and see generally Chapter 2, Section 5.3.

4 ECtHR 14 October 2010, *Brusco v. France*, No. 1466/07.

relied upon as evidence against them,[5] and the proposed EU Directive on Access to a Lawyer provides that a statement made by a witness before he is made aware that he is a suspect shall not be used against them (Art. 10). Exclusion from the case file is necessary because of widespread concern, reinforced by the lack of adequate reasoning for judgements in most of the jurisdictions, that judges take into account material in the case file even if it is formally inadmissible as evidence.

2.2 Pre-trial detention

The overuse of pre-trial detention is a feature of many criminal justice systems around the world, with millions of people unnecessarily detained, and for unnecessarily lengthy periods of time.[6] The approach of the ECtHR is to limit detention to circumstances where this is necessary in the interests of justice or the interests of public safety, having regard to the right to liberty of a suspect or accused person who, at the stage when the decision is taken, has not been found guilty of an offence. The law in the countries in the study is generally compliant with European standards, but the fact that four of them have been the subject of adverse ECtHR decisions demonstrates that there are considerable deficiencies in the practical application of those laws.[7] The major forms of non-compliance involve failure to provide the accused with access to relevant materials, the use of criteria for ordering detention that are not legitimate according to ECtHR case law, the failure to consider the particular facts of the case (adopting a 'template' approach to decision-making), the lack of adequate reasoning, and the failure to consider alternatives to detention.[8]

To achieve change in this area does not require significant legal reform, although in Moldova and Ukraine legal changes are necessary to provide a clear right of the accused to access to materials on which an application for detention is based prior to

5 ECtHR, Grand Chamber, 27 November 2008, *Salduz v. Turkey*, No. 36391/02.

6 See OSJI 2008, OSF 2012, and the series of publications by the Open Society Justice Initiative, available at http://www.soros.org/initiatives/justice/focus/pretrial-justice.

7 Note that the decisions against Bulgaria predated the most recent round of reforms. See Chapter 3, Section 3.3.1 above.

8 In addition to the requirement for reasonable suspicion, deprivation of liberty must be justified by reference to a well-grounded fear of re-offending or absconding, or interference with the investigation or trial. Judicial authorities must consider whether such fears may be adequately dealt with by measures short of detention. See Chapter 8, Section 6.2.

the hearing. However, major changes to pre-trial detention will depend upon changing professional cultures and practices. Most obviously, it requires judges to take seriously the requirement that detention be ordered only where alternative measures are not adequate to achieve the relevant objectives, to take decisions having regard to the facts of the case (and only considering relevant factors), and to provide adequate reasons for the decision. However, compliance with European standards will also require changes to the practices and attitudes of investigative authorities and prosecutors. In Georgia and Ukraine, for example, the vast majority of prosecution applications for detention succeed. Although the figures are high, when compared internationally, this is not unusual. For example, in England and Wales, research indicates that about 86 per cent of prosecution applications for pre-trial detention are granted. However, only about three per cent of defendants are kept in pre-trial detention as a result of a court order. The reason for this apparent discrepancy in the figures is that prosecutors apply for pre-trial detention in only a small proportion of cases – less than 15 per cent.[9] Therefore, whilst changing judicial attitudes and practices is important, it is likely that the greatest impact on the use of pre-trial detention would be made by changing the approach of prosecutors and investigators. This indicates a need to examine institutional incentives and training.

2.3 Access to information and consideration of the evidence

There is a nexus of issues concerning defence access to material relevant to guilt or innocence, and to judicial consideration of evidence, which inhibits access to effective defence across the five jurisdictions. Investigative authorities and prosecutors have a virtual monopoly on the gathering of evidence, both for and against the suspect or accused, who have little or no leverage on the gathering of such material. Suspected and accused persons cannot, in practice, require witnesses to be interviewed or lines of enquiry to be pursued, and there is no effective system of third-party discovery. In all of the countries, to a greater or lesser extent, investigative authorities and prosecutors use unlawful means to gather evidence, especially from suspects, and most countries do not have effective mechanisms for the exclusion of such evidence from the case file and/or for preventing it from being taken into account in determining guilt or innocence. Accused persons generally have no absolute right to add material to the case file, and no absolute right to call witnesses to give evidence, and obtaining

[9] Hucklesby 1997.

judicial permission to call witnesses is dependent on demonstrating relevance, which in practice is often difficult to achieve.

Such problems are not peculiar to the countries in the study, and they feature particularly prominently in jurisdictions with an inquisitorial tradition.[10] Yet they are largely beyond the purview of the ECtHR because evidence is generally regarded as covered by the margin of appreciation accorded to national governments. However, as is apparent from the chapters on the respective countries, the EHCR requirement for adversarial hearing is limited in practice by the limitations on the ability of the accused to secure access to material which may assist them (both pre-trial and at trial), to prevent the court from taking into account prejudicial material unlawfully obtained, and to subject material to full and proper scrutiny.

To an extent, this is another aspect of access to effective criminal defence where cultural attitudes of investigators, prosecutors and judges plays a significant part. The approach of the police and prosecutors in many of the jurisdictions is to limit defence access to material, and to contain or deflect the attempts of suspected and accused persons to have an impact on the course of investigations. Judges in a number of the countries favour, or give priority to, prosecution evidence and argument in a variety of ways. The adoption of strategies to change such cultural attitudes and habits is, therefore, necessary if suspects and accused persons are to be able to effectively defend themselves. However, reform of criminal procedure codes is also necessary, for example, to enhance the opportunities for suspects and accused persons to have an influence over the course of investigations, to enable them to secure discovery of relevant materials, and to inhibit the ability of courts to, in effect, condone unlawful conduct by police and prosecutors by allowing the prosecution, directly or otherwise, to make use of the product of such illegality.

2.4 Professional cultures and practices

The professional cultures of the police (and other investigators), prosecutors and judges are all important in ensuring access to effective criminal defence, as the discussion of pre-trial detention in Section 2.2 above showed. Fair trial rights rely, as we have

[10] Of the five countries, Georgia has reformed its criminal procedure code to cater for a number of these problems, although implementation of the reforms in practice is variable. It is not suggested that they are not also problematic in adversarial jurisdictions. For example, see the account regarding England and Wales in Cape 2010, especially at p. 143.

argued, on appropriate laws, structures and procedures but they also, crucially, rely on criminal justice personnel. It was observed in respect of Ukraine, for example, that acquittals are perceived as representing a failure of the criminal justice system. Thus emphasis is placed not on the principles of fair trial and just decision-making, but on convicting those who are accused of committing a criminal offence. This approach is not confined to judges and prosecutors, but is built in to the criminal justice process: acquittals can have adverse consequences for the investigators and prosecutors concerned. This may be compared with Bulgaria, where the former practice of judges sending cases back to investigators to strengthen the evidence, or to prosecutors to amend the charges, has been changed by a combination of legal reform and decisions of the Supreme Court.

Many other examples of the critical effects of professional cultures on access to effective criminal defence are evident in all of the countries concerned, and in this respect they are no different from other jurisdictions.[11] However, all five countries in the study have had to deal with the legacy of the Soviet era, under which investigators and prosecutors, and to some extent judges, owed a primary allegiance to the state, and the degree of progress towards liberal democratic conceptions of their role varies. Whilst the respective institutions have primary responsibility for giving effect to the implications of European standards regarding the rule of law, fair trial, and the independence of the judiciary, in terms of processes and attitudes, governments also have responsibilities in this regard. For example, for as long as acquittal is regarded as 'failure', reinforced by personal and institutional targets and career opportunities, criminal justice personnel are likely to respond to those imperatives rather than to principles of fair trial and justice.

The professional culture of lawyers who advise and assist suspected and accused persons is also critical to the delivery of effective criminal defence. The most extreme illustration of an inappropriate legal professional culture is to be found in the phenomenon of the 'pocket lawyer'. Yet in the study we saw no example where a pocket lawyer was disciplined by their professional body. The study also found evidence in some countries of the reluctance by lawyers to accept clients at police stations, or to attend on them in person at police stations or in pre-trial detention. Lawyers frequently

[11] This is an extensive English-language literature on police cultures and, to a lesser extent, prosecutors and judges, although most are jurisdiction specific. For an overview of literature on police cultures, see Westmarland 2008. See also Hodgson 2005, Hodgson 2001, Vander, Becken and Kilching 2000, Field 2006, Jehle and Wade 2006, Montana 2012, and Nelken 2010.

appear to take a passive role, and to be unwilling to act as zealous advocates for their clients. With the exceptions of Bulgaria and Lithuania it appears that bar associations do little to improve and assure the quality of legal defence work. There are many examples of work done by bar associations (and sometimes legal aid authorities) in a range of other European jurisdictions on articulating the role of defence lawyers, and in working to improve both the status and quality of criminal defence work through continuing professional development and quality assurance schemes. Criminal defence work is challenging for individual lawyers, especially for those who are inexperienced or non-specialists, and zealous defence in a changing procedural context can leave lawyers exposed and sometimes vulnerable. Bar associations have an important part to play in forming and reinforcing an appropriate professional culture in which lawyers regard the interests of their client as their primary professional obligation.

2.5 Legal assistance and legal aid

Legal aid was described in the ECDE study as 'the Achilles heel in many criminal law systems of the EU',[12] and that is also an apt description of legal aid in the five countries in the study. Legal aid spending is generally minimal in the countries in the study, remuneration is inadequate, the mechanisms for delivering legal aid are (with some notable exceptions) generally deficient, and legal aid work is often regarded as being of low status.

Whilst ECHR standards regarding the right to legal assistance are clear, we have seen that this is not the case in respect of standards of legal assistance or legal aid. In essence, delivering consistently competent and effective legal assistance to suspects and accused persons – who have limited financial resources when and where they need it in order that they can, in practice, make use of the right to legal assistance – requires laws, institutions, procedures and resources that ensure that:

- suspects and accused persons have a right to legal assistance, and a right to legal aid where this is necessary to enable them to exercise the right, at least no later than the time that their freedom of action is significantly curtailed;
- suspects and accused persons are informed (and, where necessary, reminded) that they have such a right, that they understand the significance of the right, that they know how (or are assisted) to take advantage of the right,

12 Cape 2010, p. 41.

and that there is a mechanism for verifying that they have been given the information, the decision taken, and the action taken to give effect to the decision;
- there are prompt and effective procedures for determining, in accordance with nationally agreed and transparent criteria, whether the suspect or accused person qualifies for free legal assistance;
- there are prompt and effective procedures for notifying the relevant lawyer of the request for legal assistance, and (in the absence of strictly defined urgent circumstances) that investigative or other procedures involving the suspect or accused person are prohibited until legal assistance has been received;
- a suspect or accused person who wants legal assistance has a right to have the lawyer present at procedures involving the suspect or accused (other than in respect of strictly defined urgent circumstances);
- a competent lawyer attends on the suspect or accused person without unwarranted delay, and is provided with the facilities and information to enable them to speak to the person in private for as long as is necessary, and to advise and provide assistance to them; and that
- quality assurance and equality of arms mechanisms are in place which promote zealous advocacy by criminal defence lawyers in the interest of their clients; continuous increase of competence; respect of the work of criminal defence lawyers by other actors of criminal justice systems and adequate remuneration.

Some of the countries in the study have made significant progress towards satisfying some of these requirements, but the fact that across the jurisdictions so few suspects receive legal assistance at the investigative stage demonstrates that there is still a long way to go. Responsibility does not just rest with governments and legal aid authorities (where they exist). Particularly at the investigative stage, police aversion to involving defence lawyers – which is to be found in many jurisdictions – has to be tackled by clear laws, workable procedures, methods of verification and effective mechanisms for holding them to account. However, both bar associations and individual lawyers must also take responsibility for ensuring access to competent and effective legal assistance. Low levels of remuneration and esteem for legal aid lawyers, which are found in most if not all of the jurisdictions are, of course, both interrelated and challenging. But whilst poor levels of remuneration may, in part, be the cause

of poor standards of service and competence, low standards do not warrant good remuneration. In other words, if remuneration is to be improved, we suggest that bar associations and lawyers must take responsibility for demonstrating that lawyers provide a standard of legal assistance that warrants reasonable reward.

3. Conclusions and recommendations for individual jurisdictions

3.1 Bulgaria

3.1.1 Major issues

The legal framework in Bulgaria has developed significantly over the last 10 years to establish a procedure that guarantees the basic rights of criminal defendants. Both the legislation and the case law of the courts have evolved considerably in this respect, creating strong legal guarantees, in line with international law. While legal regulations are generally in place, there are, however, some real concerns with respect to the rights of criminal defendants. These could be addressed by a combination of measures, legislative as well as organisational, together with a heightened sensitivity of the courts to the rights of the accused. Data on key aspects of the functioning of the system from a criminal defence rights perspective, as well as relevant research and critical analysis, are also often missing or insufficient, thus hindering improvements to the system.

The issues that stand out could be grouped into four main areas. The first is timely access to quality legal advice and representation. There are insufficient guarantees with respect to access to a lawyer, both privately retained and legal aid lawyers, during the 24-hour police arrest. Suspects arrested by the police for 24 hours are not informed of their right to free legal aid and only about four per cent are visited by a lawyer during this time period. The statutorily defined right to a lawyer for a suspect questioned as a witness is also too limited. Further, there are outstanding issues with respect to the funding, recruitment and quality control of legal aid work. While legal aid is generally under-funded, the system does not use the existing resources in the most efficient manner, with fees for legal aid work not reflecting sufficiently the actual work performed. Moreover, the system of selection of legal aid lawyers does not function well and needs to be reconsidered.

The second group of issues relates to some rules of evidence and other procedural guarantees for a fair trial. The one issue that stands out is the common practice of

including in the case file manifestly inadmissible evidence, such as police reports, statements in writing by the accused, and testimony given by the accused as a witness. The standard legal answer is that this is inadmissible evidence and cannot therefore be taken into account by the courts. This answer, however, does not in practice withstand scrutiny. Such manifestly inadmissible evidence does influence the courts and therefore should not be presented at all. This issue is closely linked to the obligation of the police and prosecution to disclose to the defence all material that might be relevant to the case. While such obligation exists, it is of a more general nature, and there are no sanctions for lack of disclosure.

A few other issues, noted in this report should also be addressed by the courts through case law. These include the introduction of practical guarantees for an 'immediate' bail hearing after arrest; compliance with international standards on the re-opening of proceedings after a trial *in absentia*; refraining from claiming from the accused the costs for interpretation, where the accused is found guilty; and providing full enjoyment by the defendant of the right to cross-examine a witness in line with international standards, in cases of protected witnesses, anonymous witnesses and where the witness was questioned before a judge at the pre-trial stage. The use of expedited proceedings and guilty pleas has increased significantly since their inception in 2000, without an assessment of their overall fairness.

The final group of issues relates to public criticism of court decisions by government officials and the public announcement of incriminating evidence in pending proceedings. While the courts should certainly not be immune from criticism, public criticism is all too often not based on a careful and detailed analysis of the facts and involves strong and emotional language and personal attacks that might undermine the institutional integrity and independence of the courts. Some public announcements by officials about pending investigations could also easily be seen as compromising the right of defendants to be presumed innocent.

3.1.2 Recommendations

1. Ensure timely access to quality legal advice and representation, including during the 24-hour police arrest, through strengthened statutory guarantees of the right to a lawyer for the suspect.

2. Improve the quality of legal aid by matching more closely legal fees with legal aid work actually performed, introducing basic quality control for legal aid work,

and strengthening the right of criminal defendants to choose an individual lawyer under the legal aid scheme.

3. Terminate the practice of including in the case file manifestly inadmissible evidence, and strengthen the legal obligation of the police and prosecution to disclose to the defence all material that might be relevant to the case.

4. Guarantee through the court's case law full compliance with international standards on the right to an 'immediate' bail hearing after arrest, re-opening of proceedings after a trial *in absentia,* the right of the accused to free interpretation of the criminal proceedings, and full enjoyment by the defendant of the right to cross-examine a witness.

5. Ensure that public criticism of the courts and court decisions by government officials is well balanced and does not undermine the integrity of the judiciary. Public announcements of incriminating evidence in pending proceedings should not compromise the right of the accused to be presumed innocent.

6. Collect data on a regular basis on key aspects of the functioning of the system from a criminal defence rights perspective, and develop capacity for critical research and analysis of the outstanding issues.

3.2 Georgia

3.2.1 Major issues

Since the Rose Revolution in 2003, Georgia has made some serious efforts to reform its justice system. The process of criminal justice reform implemented by the state authorities has had numerous positive impacts, including a drastic reduction in crime and corruption and an increase in public trust towards law enforcement bodies. However, this process has also had negative effects in relation to the provision of effective criminal defence.

A stringent criminal justice policy, dubbed as a 'zero tolerance' policy against petty crime, was launched in 2006 and is still in force in Georgia. One of the results of the policy has been a more than three-fold increase in the overall prison population, and Georgia currently has one of the highest per capita rates of prison population in

the world. The official announcement of the 'zero tolerance' policy was welcomed by a broad sector of society and has resulted in more stringent measures, with the consequence that criminal justice policy has become much more punitive in nature. This is apparent from the official statistics provided by the Supreme Court of Georgia in relation to the very small rate of acquittals.

As noted, the stringent measures and policies being implemented by the state have resulted in a significant reduction in the level of crime in Georgia. This is also due to the more effective work of law enforcement institutions, as well as the increasing level of trust of the public in the police and the timely reporting of crimes. While in 2006 the Ministry of Interior registered 62,283 crimes, by 2010 this had declined to 34,739 (2007 – 54,746; 2008 – 44,644; 2009 – 35,949).[13] According to the most recent survey conducted by the GORBI, the Ministry of Justice of Georgia and the EU,[14] 98 per cent of people felt safe at all times of the day, and 96 per cent during the night. Some 87 per cent of the respondents assess the work of the police as effective and emphasise their increased trust towards the police.

However, along with these positive aspects, factors such as the increased influence of the law enforcement agencies, and the alleged control of the judiciary by the executive, have significantly undermined the role of criminal defence counsel in criminal proceedings. The role of the lawyers has often become nominal, and they frequently claim not to be in a position to effectively defend the interests of their clients.

One of the major problems related to the effective enjoyment of the right to defence is the lack of an adequate system for involving lawyers at the earliest stages of police detention, particularly in legal aid cases. During this period, the defendant is in the most vulnerable situation, and this is often used by authorities to carry out interviews, declare that the defendant did not request the assistance of a lawyer, obtain his agreement on a plea agreement on certain conditions, and so on.

The obligation to provide information to the defendant regarding his/her rights at the time of arrest is usually not complied with by the relevant authorities. Generally speaking, authorities try to take advantage of an unexpected arrest and obtain as much evidence/testimony from the arrested person as possible, without informing him/her about his/her rights.

13 http://www.police.ge/uploads/statistika/shss_statistika/BIULETENI.saqartvelo.ianvari.14.02.10.pdf.

14 http://www.justice.gov.ge/index.php?lang_id=GEO&sec_id=130.

The 'presumption in favour of liberty' has not been effectively implemented in Georgia. Although legislation in force clearly requires the imposition of preliminary detention as a last resort, when the prosecution requests imposition of preliminary detention, domestic courts tend to meet their request in almost every case without adequate substantiation of their intermediary and final decisions.

Equality of arms is not fully guaranteed in the process of obtaining evidence. Since the entry in the force of the new CCP, lawyers can seek to obtain any prosecution evidence to be used against the defendant any time. However, the defence is unable to request evidence (within the possession of a third party) that may be obtained by the conduct of a search, even if it can potentially corroborate or acquit the defendant. While the prosecution is obliged to reveal to the defence any evidence to be used against it, there is no obligation on the prosecution to reveal or provide to the defence evidence, within its possession, which they do not intend to use against the defence, but which may potentially corroborate the position of the defence. Frequently, where evidence that could corroborate the position of the defence is held by the prosecution, it claims that it will not use it against the defence, and is therefore not under an obligation to disclose it.

Another major issue affecting the equality of arms between the prosecution and the defence is the temporary rule in the revised CCP authorising the prosecution, until 1 October 2012, to summon witnesses and to impose obligations to provide testimony. Witnesses remain criminally liable until 1 October 2012 for refusing to provide, or for providing false witness statements to the prosecution. Conversely, the defence has no such tools at its disposal, and is not in position to somehow impose obligations on a witness to provide a statement/evidence and corroborate the defence position.

The unequal position of the defence compared to the prosecutor is frequently based upon the fact that defence lawyers' motions or defence evidence are dismissed by judges, who do not always provide adequate reasoning for doing so. Furthermore, the failure of judges to mention and analyse in their judgments evidence submitted by the defence, and the lack of adequate substantiation of convictions and judgments, negatively affect effective implementation of defence rights.

The plea bargain process is used in Georgia in a majority of criminal cases. Here, the judge has only a formal role, the prosecutor the leading role and the defence lawyer only a nominal one. This also negatively affects the essence of effective criminal defence.

3.2.2 Recommendations

1. Establish an effective system for ensuring that lawyers are involved at the earliest stages of police detention, particularly in legal aid cases, and that lawyers are given access to their clients in detention.

2. Establish an effective mechanism to ensure and verify that defendants are informed about their rights immediately from the outset of police custody.

3. Require judicial authorities to substantiate in their decisions why it is not possible to use alternative preventive measures, and why it is necessary to use preliminary detention to ensure that the defendant does not abscond, interfere with the proper administration of justice, commit a further offence, or remain a threat to public security.

4. Law enforcement authorities should be required to stop providing investigative materials, video footage, records of interrogation, telephone tapping materials or recordings of admission of guilt to TV companies. TV companies must do their best to respect the principle of the presumption of innocence.

5. In order to guarantee the full equality of arms between prosecution and defence, the CCP must clearly guarantee the right of the defence to request, through a court order, evidence that is in the possession of the law enforcement agencies or third parties; and adequate funding should be provided for the investigation of cases by legal aid lawyers.

6. The role of the national judicial authorities must be increased in the plea bargaining process, in order to balance the interests of parties. Judges should be empowered to examine the details of a plea agreement, assess its reasonableness and, where necessary, modify it.

7. Ensure that judicial authorities take into consideration evidence submitted by the defence and make a relevant and appropriate assessment of such evidence, and that decisions are substantiated and provide adequate justification for the decisions taken.

3.3 Lithuania

3.3.1 Major issues

While the legal framework of the Lithuanian system of criminal procedure does guarantee the most important rights of effective criminal defence, improvements in the practical implementation of these rights by the responsible institutions are still necessary.

There is a strong demand for an adversarial trial process in Lithuania. The lack of a proper application of this principle at the trial stage of criminal proceedings is demonstrated by the significant rate of criminal convictions, and the high percentage of dismissals of appeals against judgments, which clearly discourages sentenced persons from appealing. Acquittal rates are very low.

There commonly exists a general prejudice towards accused persons in both the courts and broader society. The low acquittal rate is regarded as one of the consequences of this prejudice. Despite its importance in theory, the principle of the presumption of innocence is not widely respected and is continuously violated in practice.

Following the reform of the legal aid process, a new state guaranteed legal aid system was created in Lithuania. While it is regarded as a major improvement that helps to more effectively implement defence rights for indigent clients, the legal aid system needs further revision, mostly in respect of the quality assurance of criminal legal aid services and the continuity of the criminal defence throughout all phases of the criminal procedure.

There are also other shortcomings that have to be addressed at the earliest possible time, including the notification of the designated lawyer to the defendant, particularly when the defendant is detained, access to the lawyer during different phases of the criminal procedure, restrictions on defendants when choosing a legal aid lawyer, and to be represented by the same lawyer during all criminal phases in criminal procedure, and the inadequate remuneration of the legal aid lawyers. The performance of criminal legal aid lawyers in criminal cases is not satisfactory in all cases and there is no quality assurance mechanism for criminal defence. There is no competition among legal aid lawyers, and the services provided in certain cases therefore do not meet an appropriate general standard.

There are no established clear rules on how the fundamental rights of the defendant are explained to that person and no verification requirement. Indeed, it is

generally the case that no such explanation at all takes place at the moment of his/her provisional arrest.

The use of preventive measures rather than pre-trial detention appears to be quite high, which is regarded as a positive factor. However, the use of preventive measures as such in criminal cases is very high, and in a certain number of criminal cases is not legally grounded; they are rather applied as a matter of routine practice. Detention as a coercive measure is also applied too often. The courts fail to assess the individual circumstances of the defendant when deciding on pre-trial detention, instead relying to a large extent on the seriousness of the offence of which the defendant is suspected, as well as the possible applicable punishment upon conviction.

3.3.2 Recommendations

1. Introduce measures to change the punitive attitude of society towards convicted persons, and to increase the use of preventative measures in respect of criminality and crimes.

2. Revise the practice of imposing penalties and coercive measures, and introduce the necessary legal changes to reduce the use of imprisonment and detention for, respectively, convicted persons and detainees.

3. Take appropriate measures to hold to account those who violate the principle of the presumption of innocence, with the aim of preventing future violations of the principle.

4. Introduce measures to ensure the earliest possible notification to the defendant of the appointment of a lawyer (particularly when the defendant is detained), access to a lawyer during different phases of the criminal procedure, reduction of the restrictions on defendants when choosing a legal aid lawyer, representation by the same lawyer during all phases in the criminal procedure, and the adequate remuneration of legal aid lawyers.

5. In order to raise the professional standards of criminal defence lawyers, develop an effective system for individual and general quality assurance of legal aid lawyers.

6. Introduce a standard 'letter of rights' into the CPC and ensure that the rights in the letter are explained to the suspect/accused in a comprehensible manner and at the very beginning of police custody.

3.4 Moldova

3.4.1 Major issues

The Moldovan legal system has gone through significant changes in the past decade, with the incorporation of human rights principles into the criminal justice system, and its Criminal Procedure Code does guarantee the basic rights of criminal defendants. Case law, and the practice of the criminal justice actors, has also developed, although much less than the progress made at the legislative level.

The main positive features regarding access to effective criminal defence are the legislative framework that guarantees the basic rights of the criminal defendant in compliance with the ECHR, and the creation a criminal legal aid system in order to provide legal services to all defendants who cannot afford to pay for a lawyer.

Defendants have a right to information on their rights, but this is a rather theoretical right, as criminal investigation bodies routinely do not properly inform defendants of their rights and do not explain what these rights mean. The written information about rights that is handed to every defendant is a merely a copy of the Criminal Procedure Code provisions, with little practical value for the defendant.

The role of the defence at the pre-trial stage is very limited. Although by law defence lawyers can request the criminal investigating body to collect information in favour of the defendant, such requests are not normally accepted by the criminal investigation body. Lawyers can talk to potential witnesses about the alleged crime or the defendant, but they are not obliged to speak to the lawyer and nothing that the lawyer collects counts as evidence unless the witness is interviewed by the criminal investigation body. However, the latter is not obliged to inform the lawyer about such interviews. This acts as a major deterrent to lawyers requesting witnesses to be interviewed at pre-trial stage, since they fear losing witnesses to the prosecution.

The defence has limited access to the case file, receiving full access only at the end of the criminal investigation before the case file is sent to court. The defence can see the protocols of those procedural actions in which the defendant participated, but even these are not routinely provided to the defence. Access to pre-trial arrest materials is a major problem. Lawyers are, in effect, required to improvise when representing

their clients at pre-trial detention hearings since they rarely see any evidence other than the prosecutor's request for pre-trial detention. In addition, judges continue to issue poorly reasoned pre-trial detention warrants. Acquittal rates remain very low.

Defendants have the right to a lawyer immediately after arrest, and no later than three hours from the moment of arrest, and have the right to a confidential meeting with the lawyer prior to the first police interview. In practice these rights are routinely infringed. Criminal investigation bodies invite potential suspects and witnesses for 'discussions' with the criminal investigation body prior to opening the case file. The statements provided at this stage (so-called 'explanations') are not considered evidence; however, they are routinely included in the case file and relied upon during the case. Criminal investigation bodies often start interviewing the suspect before the lawyer arrives, and then subsequently ask the lawyer to sign the respective protocol. However, although there is no conclusive evidence, anecdotal evidence suggests that the phenomenon of 'pocket lawyers' has decreased.

Legal aid is provided to all defendants who do not have a private lawyer. The means test is not yet well developed and practically every defendant who requires a legal aid lawyer does have one (however, this does not mean every defendant gets effective legal defence, see the above paragraph regarding the 'informal' discussions prior to lawyer's arrival and the pocket lawyer phenomenon). Whilst, *prima facie*, this is a positive feature, in practice it means that resources for legal aid are thinly spread and remuneration is not sufficiently attractive to encourage competent and active defence lawyers. For example, only the first meeting with the client, or up to five meetings if the client is detained throughout the entire criminal case, is paid for and there is a cap of 200 MDL per day (12 Euro), except when legal aid is provided in two or more cases.

Although accountability of legal aid lawyers has increased since the adoption of the new Legal Aid Law, mainly due to the quality monitoring mechanism of the NLAC, the overall perception of the quality of legal aid lawyers is not very positive. In fact, the legal profession as a whole lacks suitably articulated quality standards and quality assurance mechanisms regarding legal services provided by lawyers, including legal aid lawyers.

Some court practices are particularly worrying from the perspective of the defendant's right to effective defence. For example, convictions are confirmed by appeals courts without hearing the witnesses directly in court, the courts basing their decisions on the witnesses' statements given at the pre-trial stage. This issue has been raised in several ECtHR judgments. Although the Criminal Procedure Code

guarantees the right to silence, lawyers interviewed for the study complained of the practice of courts in drawing negative inferences where the defendant has relied on their right to silence, which is obviously contrary to the law. Courts are also normally reluctant to exclude illegally obtained evidence from the case file.

At a general level, the functioning of the criminal justice system is handicapped by the tradition that application of the law is confined to that which is written in the law, giving very little room for creative application of the law by criminal justice professionals. What is not written in the law becomes material for variable interpretation and abuse.

3.4.2 Recommendations

1. Enhance the role of the lawyer at the pre-trial stage, in particular: expressly providing the defence with full and timely access to all materials related to the pre-trial detention hearing; strengthening the obligation on criminal investigation bodies (police and prosecutor) to disclose to the defence all materials that are relevant to the case, including considering disclosure earlier than the end of the criminal investigation; providing for a procedure for collecting and presenting evidence by the defence that does not depend on the prosecutor's discretion.

2. Put into place sufficient practical tools to ensure that no illegally obtained evidence is used in a case, and enabling the defence to secure the effective exclusion of illegally obtained evidence. In particular, the provisions regarding the opening of a criminal case should be amended, and safeguards created that ensure that no statements taken outside of the formal criminal procedure can be included in the case file.

3. Guarantee the right that all court decisions will be properly reasoned.

4. Review the legal aid eligibility criteria for defendants, in particular to make a distinction between the right to legal aid irrespective of financial means and the requirement for mandatory legal representation, and introduce rules for checking financial eligibility and for the recovery of legal aid costs.

5. Develop standard forms for informing defendants of their rights, in simplified and accessible language. The EU Directive on the Right to Information should

be used as guidance. It should also be made part of the professional requirements of the criminal investigation bodies to inform and clearly explain, procedural rights to defendants.

6. Improve the quality of legal aid by developing quality standards and quality assurance mechanisms for lawyers, ensuring an appropriate balance between the right to a competent defence and the independence of lawyers. Ensure that the remuneration scheme for lawyers is adequate for the required legal aid work, providing sufficient incentives for active defence work.

7. Routinely collect criminal justice statistics, including those related to the defendants' rights, and use this data for projections and evidence-based policy-making related to legal aid and effective defence.

3.5 Ukraine

3.5.1 Major issues

Over the past two decades, the Ukrainian criminal justice system has undergone numerous changes. Principles of equality of arms and of adversarial proceedings have been introduced, and significant amendments to legislation were designed to enhance defence rights. The power to intervene in fundamental human rights during the course of criminal prosecutions was placed mostly under judicial control, improving the safeguards against arbitrariness. Nonetheless, actual practice, taken together with the absence of a system of legal aid, show that the aim of securing effective criminal defence is still quite far away.

Under the law, access to a lawyer must be ensured as soon as a person is acknowledged as either a suspect or an accused and, in any case, before the initial interrogation. However, there is no statutory definition of the moment of arrest, which leads to a widespread practice of unacknowledged arrest. For the purposes of criminal investigation, an arrest for an administrative offence, when a person has no defence rights under the law, is also frequently used by police; the effect of such arrest is practically the same as with an unacknowledged arrest. During this period, a person, while being in fact a suspect, remains beyond the reach of basic safeguards applicable to the suspect under the law (including notification of those rights). As a result, the police, using various forms of coercion, obtain a so-called 'explanation', which

frequently contains a confession of the commission of a crime and often creates a basis for further formal investigations. As a consequence, the practice of unacknowledged or administrative arrests nullifies these supposedly strict safeguards.

Given the frequent use of extrajudicial written statements at trial and the difficulties associated with having witnesses called for cross-examination in court, the confession plays a crucial role in the conviction of defendants. Moreover, the court has no procedure for verifying the 'voluntariness' or otherwise of a confession, and frequently relies on the decision of the prosecution authorities in this regard. The stark reality is that, with a confession obtained by the police, a finding of guilt is usually predetermined, and any efforts by the defence to rebut this are practically futile.

In the situation where a witness cannot recall the circumstances of a crime, the court commonly has read out the preliminary testimony of that witness 'to refresh' his/her memory. In effect, this often substitutes for the witness's oral testimony, thus making effective cross-examination impossible. As a result, the reading of written records (protocols) containing the testimony of witnesses, instead of having him/her examined in the court room, is an all too common practice.

Pre-trial detention is overused and frequently unreasonably long, and courts' decisions on pre-trial detention or its prolongation frequently rely on the gravity of the charges against a defendant and use stereotyped formulae, without addressing the specific facts of the case. Moreover, the defendant has no legal right to initiate court proceedings to review the grounds for detention during the pre-trial investigation, and only has the opportunity to rebut the prosecutor's submission during the automatic review of the detention. Moreover, the position of the defence is weakened at such a review due to lack of access to the case-file before the completion of the pre-trial investigation.

There also remains a lack of clear and detailed rules of evidence, which results in the inequality of arms between the prosecution and the defence in criminal proceedings. Under both the law and judicial practice, the court is obliged to consider all of the evidence adduced by the prosecutor in pre-trial investigation case file, due to the lack of a procedure for the exclusion of unlawfully or unfairly obtained evidence. At the same time, the admissibility of evidence presented by the defence is subject to an unrestricted discretion of the judge, after taking account of the opinion of the prosecutor. This problem is exacerbated by the unavailability of an alternative expert's opinion on behalf of the defence.

3.5.2 Recommendations

1. To create an effectively administered system of free legal aid, including a police station legal advice scheme, with secure and adequate budget funding; in creating a legal aid system, to develop an appropriate system of quality control, securing and maintaining at the same time the principle of independence of the lawyer; to provide a feasible procedure for assessing the eligibility of persons applying for legal aid, so as to secure prompt access to a lawyer; to provide sufficient funding for investigation of the case by the defence.

2. To eliminate the practice of unacknowledged arrest and any manipulation by legal procedures; the securing of practical and effective defence rights for any person 'charged' in accordance with Article 6 of the ECHR (including the introduction of a 'letter of rights' and the obligation to verify that the person adequately understands his/her rights); to identify the commencement of the arrest as the moment when the person, by force or by obeying a police order, is required to remain with a police officer or in a place identified by a police officer; to extend those guarantees attached to a criminal suspect also to persons arrested for an administrative offence.

3. To introduce clear rules of evidence in criminal proceedings, including rules suppressing any evidence obtained by coercion and/or as a result of a flagrant violation of human rights, as well as detailed procedures for the exclusion of evidence before completion of the trial, for verifying the voluntariness of any alleged confession, with the court to have broad powers to examine any evidence and related issue; to limit the discretion of the judge with regard to the admission of evidence, through the introduction of clear and predictable rules.

4. To secure in the law the right of the defence to direct examination and cross-examination of witnesses in the courtroom, and the inadmissibility of extrajudicial statements subject to exceptions only in very rare cases and to counterbalance such admission by additional safeguards for effective defence.

5. In case of any expedited proceedings based on a plea of the defendant, to provide strict guarantees against involuntary pleas providing, for example, mandatory representation of the defendant in such cases, strict judicial procedures for

verification of its voluntariness, and verification of the probable cause for the charge against the defendant.

6. To eliminate the practice of sending a case for additional pre-trial investigation and to exclude any power of the court to collect evidence *proprio motu* on behalf of the prosecutor; to secure the disclosure of the evidence by the prosecutor during the pre-trial investigation in time and scope sufficient for preparation of the defence, including for important steps, for example, such as bail hearings or any plea.

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ANNEX 1 DESK REVIEW PRO-FORMA

This pro-forma sets out the information to be obtained in the Desk Review phase of the research. Although the order in which the information is collected does not matter, it is important that the report of the desk review sets out the data in the same order as in this pro-forma, referring to the question number as appropriate. Where it helps, for example, to provide important contextual information, or to indicate recent or prospective changes, the information requested should be accompanied by a narrative account. Also, where appropriate, the in-country researcher should include proposals and recommendations, for example, regarding the need for routine data collection as to legal aid expenditure and so on.

Sources of data will include: laws (constitution, statutes, codes and case law, as relevant); professional rules; statistics (both official and statistics collected by non-government bodies); existing research. In each case, the source of the data should be specified. Where the question concerns whether there is a right, regulation, exception and so on, specify the source with as much precision as possible: for example, the Police and Criminal Evidence Act 1984, s 58; the Criminal Procedure Code, Art. 3 (1); Constitutional Court, Decision No. 82/94, 1 December 1994; the Law Society's Code of Conduct 2007, rule 1.01. Referencing should follow the style used in *Effective Criminal Defence in Europe*.

If data requested in this pro-forma is not available, this fact should be noted – the fact that data is not routinely collected, or is not made publicly available, is an important research finding in itself. For example, if no statistics are routinely collected (or are collected but are not made available) on the proportion of defendants who are represented at court, it would be difficult for a country to demonstrate whether, and the extent to which, it is in compliance with Article 6 (3)(c).

Some questions specifically ask whether a rule or practice differs depending upon whether a suspect or defendant is able to pay privately and/or is in receipt of legal aid. In gathering the data, consider whether there are, or are likely to be, any differences in principle or in practice depending upon whether the suspect/defendant –

(a) is able to pay for legal services at a full commercial rate, or
(b) pays privately, but at lower than the commercial rate, or
(c) is in receipt of, or is entitled to, legal aid (or other forms of state assistance, such as legal provision by a public defender service).

You should try to limit the number of words to 15,000, although this is a guideline rather than a strict limit. If appropriate, you can cross refer to the critical account rather than duplicate information.

Country/jurisdiction:

Data collected by:

Dates of data collection: Between and

1. General statistical and other information

(Generally, statistics should be for the most recent year available, although an indication should be given if there are significant changes form year to year. If there is relevant data on ethnicity relating to any of the following categories of data, this should also be included.)

(1) Legal aid and state expenditure

- (a) Absolute and per capita expenditure on criminal legal aid –
  - (i) at investigative stage
  - (ii) at later stages
- (b) Proportion of the population who are eligible for legal aid
- (c) Proportion of suspects/defendants who have legal advice and/or representation –
  - (i) at investigative stage
  - (ii) at later stages
- (d) Proportion of suspects/defendants in receipt of legal aid –
  - (i) at investigative stage
  - (ii) at later stages
- (e) Proportion of suspects/defendants who make a financial contribution or against whom a contribution order is made on conviction, and figures on amounts of contributions/orders.
- (f) Average remuneration per case (that is, amounts paid to lawyers).
- (g) Legal aid expenditure by type of work (for example, profit costs, travelling/waiting, experts and so on.).
- (h) Number of cases and expenditure on interpretation/translation.

(2) Criminal justice system

- (a) Number of arrests
- (b) Proportion of those arrested who are then proceeded against
- (c) Proportion of those proceeded against who are kept in custody pending trial, including any data on average length of time spent in custody awaiting trial, or who are subject to conditional release pending trial.
- (d) Proportion of those proceeded against who are convicted/found guilty.

(e) Proportion of those who are convicted/found guilty who are given a custodial sentence.
(f) Proportions of those in (b), (c), (d) and (e) who are legally represented.
(g) Where there is a guilty plea or expedited hearing procedure, in what proportion of cases is there a guilty plea or expedited hearing.

(3) The legal profession

(a) Number of lawyers belonging to bar associations.
(b) (If it is possible to practice without belonging to a bar association) Proportion of lawyers belonging/not belonging to bar associations.
(c) Number and proportion of practising lawyers who engage in criminal defence work.
(d) Number and proportion of lawyers who receive legal aid for (i) and work, and (ii) criminal defence work.
(e) Number and proportion of lawyers working for public defender services.
(f) Number of complaints about lawyers, and outcomes of any complaints/ disciplinary procedures.

2. Right to information concerning the accusation

(1) Is there a legal obligation requiring –

(i) a suspect (that is, person being questioned by police or prosecutor in circumstances where there are grounds to suspect that they have committed an offence), and/or
(ii) a defendant (that is, person against whom criminal proceedings have commenced),

to be informed of the nature and cause of the accusation against him/her?

If so –

(a) What is the source of that obligation?
(b) When does the duty arise?
(c) Is the right absolute or conditional?
(d) What is the extent of the information that has to be supplied?
(e) In what form does the information have to be supplied (for example, verbal, writing, summary or in full)?

(f) Are there any time limits for the provision of information?
(g) Is there a continuing obligation to provide information as the investigation/case develops?
(h) Is there any existing evidence as to whether and how this obligation is complied with?
(i) Are there any sanctions or remedies if the obligation is not complied with?

(2) Is there a legal obligation requiring –

(i) a suspect (that is, person being questioned by police or prosecutor in circumstances where there are grounds to suspect that they have committed an offence), and/or
(ii) a defendant (that is, person against whom criminal proceedings have commenced),

to be informed in detail of the accusation against him/her (that is, information about the investigation and evidence obtained), including material that is not put/to be put before the court?

If so –

(a) What is the source of that obligation?
(b) When does the duty arise?
(c) Is the right absolute or conditional?
(d) What is the extent of the information that has to be supplied?
(e) In what form does the information have to be supplied (for example, verbal, writing, summary or in full)?
(f) Are there any time limits for the provision of information?
(g) Is there a continuing obligation to provide information as the investigation/case develops?
(h) Is there any existing evidence as to whether and how this obligation is complied with?
(i) Are there any sanctions or remedies if the obligation is not complied with?

(3) Is there a legal obligation to provide the information referred to in (1) and (4) to the suspect or defendant in a language which he/she understands?

If so –

(a) What is the source of that obligation?

(b) Is there any existing evidence as to whether and how this obligation is complied with?
(c) Are there any sanctions or remedies if the obligation is not complied with?

(4) Is there any difference between poor or legally-aided suspects and defendants and those who are well able to pay privately –

(a) in law?
(b) in practice?

(5) Is there any obligation to give a suspect or defendant a 'letter of rights' informing him/her of his/her rights?

If so –

(a) What is the source of that obligation?
(b) Who has to provide the 'letter of rights'
(c) At what stage does the letter of rights have to be provided?
(d) Is there an obligation to provide the 'letter of rights' in a language that the suspect/defendant understands?
(e) Is there an obligation to verify whether the suspect/defendant understood the rights included in the 'letter of rights'?
(f) Is there any existing evidence as to whether and how this obligation is complied with?
(g) Are there any sanctions or remedies if the obligation is not complied with?

3. The right to defence

(1) Does the suspect/defendant have the right to defend him/herself -

(i) at the investigative stage?
(ii) at the trial stage?
(iii) is there any difference between the first instance and appeal or cassation stage?

If the suspect/defendant does have the right to defend themselves –

(a) What is the source of that right?
(b) When does the right arise?

(c) How is the suspect/defendant to be informed of the right?
(d) Does the right differ depending on the financial resources of the suspect/defendant and/or whether they are legally aided?
(e) Is there any existing evidence as to whether and how this right is exercised?

(2) Does a suspect/defendant have the right to the assistance of a lawyer?

If so –

(a) What is the source of that right?
(b) When does the right arise? (for example, on arrest, only on being brought before a court and so on.)
(c) How is the suspect/defendant to be informed of the right?
(d) How is a request for a lawyer recorded?
(e) Does the right differ depending on the financial resources of the suspect/defendant and/or whether they are legally aided?
(f) Are there circumstances where legal assistance is mandatory?
(g) Are there any circumstances where legal assistance is not permitted (for example, during interrogation, at an appearance before a prosecutor, at a hearing before an examining magistrate)?
(h) Is there provision for a right or obligation to a lawyer to be waived by the suspect/defendant?

(3) Does a suspect/defendant have a right to choose his/her lawyer?

If so –

(a) What is the source of that right?
(b) Is the right absolute?
(c) Does the right differ depending on the financial resources of the suspect/defendant
(d) If choice is restricted, does the suspect/defendant have a right to ask for a replacement (for example, if they do not trust an appointed lawyer)?
(e) Is there any existing evidence as to the exercise of this right?

(4) What are the arrangements for contacting and/or appointing a lawyer?

(a) Are these arrangements contained in law, procedural rules, protocols and so on?

(b) Do they differ depending on the financial resources of the suspect/defendant and/or whether they are legally aided?
(c) How do the arrangements differ if the suspect/defendant is in custody?
(d) Is there any existing evidence as to how these arrangements work in practice? (for example, the proportion of requests that result in legal assistance being received, delay in contacting lawyers, facilities for legal consultations and whether they are in private and so on.).
(e) Where a suspect/defendant requests a lawyer, are there any restrictions on what the police/prosecutor/court may do before legal assistance is procured?

(5) What provision is there, if any, for indigent suspects/defendants to be provided with legal advice and/or representation free or at reduced cost –

(i) at the investigative stage?
(ii) at the trial stage?
(iii) is there any difference between the first instance and appeal or cassation stage?

If there is such provision –

(a) What is the legal framework for it?
(b) How are suspects/defendants informed of the provision?
(c) Are there any legal or professional obligations on lawyers to provide legal advice and/or representation?

(6) Who makes the decision regarding entitlement to free or subsidised legal advice and/or representation –

(i) at the investigative stage?
(ii) at the trial stage?
(iii) is there any difference between the first instance and appeal or cassation stage?

(a) How is this regulated? (for example, by law, procedural rules, professional conduct rules and so on.)
(b) Is there any existing evidence about how the decision-making and appointment process works?

(7) Is there a means test for free or subsidised legal advice and/or representation?

If so –

(a) What is the legal framework for the means test?
(b) How is the means test defined?
(c) Does the means test differ depending on the stage of the proceedings?
(d) How do eligibility levels relate to possible comparators, for example, minimum wage?
(e) Who applies the means test?
(f) What information has to be supplied by the applicant?
(g) Are there provisions for the suspect/defendant to make a contribution, and/or for recovery of costs from them (for example, on conviction)?
(h) Is there existing evidence about the means test, how it is applied, how long it takes for a decision to be made, what impact it has (if any) on the proceedings (for example, are proceedings adjourned whilst a decision is made, what length of delays are typical and so on.)?

(8) Is there a merits test for free or subsidised legal advice and/or representation?

If so –

(a) What is the legal framework for the merits test?
(b) How is the merits test defined?
(c) Does the merits test differ depending on the stage of the proceedings?
(d) Who applies the merits test?
(e) What information has to be supplied by the applicant?
(f) Is there existing evidence about the merits test, how it is applied, how long it takes for a decision to be made, and what impact it has (if any) on the proceedings (for example, are proceedings adjourned whilst a decision is made, what length of delays are typical and so on.)?

(9) Are there any special restrictions on the availability of legal aid, legal advice or representation, choice of lawyer and so on in terrorist cases?

If so –

(a) What is the source of the restrictions?
(b) How are terrorist cases defined?

(c) Is there existing evidence of the application of the restrictions?

(10) What types of work does legal aid cover, and does this differ depending on the stage of proceedings?

(a) Are there restrictions on the amount of work that can be done/will be paid for?
(b) Does legal aid cover –
– tracing and/or interviewing witnesses?
– carrying out other investigations?
– instructing experts?

(11) Are there any consequences for the accused, or the police/prosecutor, for the admission or use of evidence or for the final decision (sentence), if a suspect/defendant –

(a) Does not have legal advice/representation?
(b) Is not informed about his/her right to a lawyer or about his/her right to legal aid?
(c) Who wants a lawyer is denied access to a lawyer or when access to a lawyer is delayed (certain procedural actions (for example, interview) are carried out in the absence of a lawyer)?
(d) Is denied the right to have a lawyer of his/her own choice, or to have his/her lawyer replaced?

(12) What are the arrangements for the remuneration of lawyers in legal aid cases?

(a) What is the legal framework for remuneration?
(b) Does it differ depending upon the type of case, stage of proceedings and so on.
(c) How do levels of remuneration compare with remuneration for privately funded cases?
(d) Is there any existing evidence on how the system of remuneration works in practice?

4. Facilitating effective defence

(1) What rights and/or powers do the suspect/defendant and/or his/her lawyer have to –

(i) Seek evidence?
(ii) Investigate facts?
(iii) Interview prospective witnesses (or require the police/prosecutor to do so)?
(iv) Obtain expert evidence?

In relation to any such right or power –

(a) What is the source of that right?
(b) Is it absolute or conditional?
(c) Does the exercise of any such right depend on the financial resources of the suspect/defendant or on whether they are in receipt of legal aid?
(d) Does the exercise of any such right differ for a suspect/defendant who is in custody?
(e) Are there any professional limitations on a lawyer carrying out any of these activities?
(f) Is there existing evidence as to whether and how such rights are exercised?
(g) Are there any sanctions or remedies if a right/power is denied?

(2) What right does the suspect/defendant (personally or by his/her lawyer) have to apply for bail (that is, release from custody, whether or not involving a financial obligation) –

(i) during the period following initial (provisional) arrest?
(ii) pending the outcome of the investigation?
(iii) pending final determination of the case?

In relation to any right to apply for bail –

(a) What is the source of the right?
(b) Who makes the decision regarding bail?
(c) Is release on bail dependant on payment of money?
(d) What conditions, if any, can be imposed when a person is released on bail?
(e) Does the exercise of the right depend upon the financial resources of the suspect/defendant?

(f) Is there any existing evidence as to the practical implementation of any right to apply for bail?

(3) What period of notification to the defence is required before any appearance before a prosecutor, judge or court and what provision is there for any hearing to be delayed/adjourned in order to give the accused and/or his/her lawyer time to prepare?

(a) What is the source of any period of notification?
(b) Is there any existing evidence as to how this works in practice?
(c) Is there any sanction or remedy if the period of notification is not complied with?

(4) With regard to evidence put before a trial court, and witnesses giving oral evidence at court –

(a) Who decides what evidence is to be produced, and which witnesses are to be called to give oral evidence?
(b) If these decisions are not made by the accused or his/her lawyer, does the accused or his/her lawyer have a right to demand that evidence be produced and/or that witnesses be called to give oral evidence?
(c) What right does the accused or his/her lawyer have to examine or cross-examine witnesses?
(d) Is there any provision for evidence obtained illegally or unfairly to be excluded at trial?

In relation to these issues –

(a) What is the legal source of the procedures and rights (if there are such rights)?
(b) Does exercise of any rights depend upon the financial resources of the accused?
(c) Is there any existing evidence as to how the processes work in practice?

(5) Is there a guilty plea and/or expedited hearing procedure (in which the court does not hear and/or review the evidence)?

(a) What is the legal source of such procedures?
(b) How does any guilty plea procedure and/or expedited hearing procedure operate?

(c) What are the formal (legal) incentives for a defendant of entering into a guilty plea/expedited hearing procedure: for example, sentence discount, bail and so on?
(d) Is there any existing evidence as to how this process works in practice: incentives (formal and informal), plea bargaining and so on.

(6) Does a suspect/defendant have a right to a private consultation with his/her lawyer –

(i) at the investigative stage, and
(ii) at the trial stage?

(a) What is the source of any such right?
(b) Are there any sanctions or remedies if the right is breached?

If there is a right to a consultation in private –

(a) Are there any limitations on the right?
(b) What is the legal source of the limitations?
(c) Who decides whether a consultation is not to be held in private?
(d) Does it make any difference if the suspect/defendant is in custody?
(e) Is there any existing evidence as to the extent to which the power to limit private consultations is used?
(f) Are there any sanctions or remedies if the right is breached?

(7) Does a lawyer acting for a suspect/defendant have a right to communicate in private with third parties (for example, witnesses, experts and so on)?

(a) What is the source of any such right?
(b) Are there any limitations on exercising the right?
(c) Who decides whether any such right is to be interfered with?
(d) Is there any existing evidence as to the extent to which any such right is interfered with?
(e) Are there any sanctions or remedies if the right is breached?

(8) Are lawyers subject to any other form of interference with their ability to act in the best interests of their clients?

If yes –

(a) What interference is permissible, and in what circumstances?
(b) What is the legal source of any form of interference?
(c) Does it make any difference if the client is in custody?
(d) Does it make any difference if the lawyer is funded by legal aid or is a public defender?
(e) Is there any existing evidence as to the use of such power?
(f) Are there any sanctions or remedies if there is such an interference?

(9) Is there a bar association?

If yes –

(a) Is the bar association independent of government and government institutions?
(b) What is the legal entity of the association?
(c) Do practicing lawyers have to belong to the bar association?
(d) Are there any restrictions on membership of the bar association by qualified lawyers?
(e) Does the bar association have exclusive responsibility for discipline of the legal profession? How does the disciplinary process work?
(f) Does the bar association have a specialist section for criminal defence lawyers and/or is there a specialist organisation for criminal defence lawyers?
(g) What are the functions of such specialist section/organisation?

(10) How are the obligations of lawyers to their clients –

(i) Described, and
(ii) Regulated?

(a) Are there any differences in respect of criminal defence lawyers?
(b) Is there a complaints mechanism for clients dissatisfied with the service provided by their lawyer?
(c) Is there any existing evidence as to how the regulation and complaints mechanisms work, especially in relation to criminal defence lawyers?
(d) Are the results of complaints and/or disciplinary proceedings published?

(11) In relation to criminal defence work –

(i) Is the provision of legal services limited to qualified lawyers?

(ii) Are there any minimum quality of service requirements placed on lawyers doing criminal defence work?

If yes to (ii) –

(a) Who are the requirements imposed by?
(b) What are the requirements?
(c) How are they regulated and enforced?
(d) Is there any existing evidence as to how the quality of service requirements operate in practice?

5. The right to interpretation and translation

(1) Does a suspect or defendant have a right to free assistance of an interpreter if she/he cannot understand or speak the language of his/her lawyer, the investigator or the court?

If yes –

(a) What is the source of any such right?
(b) How is the need for an interpreter determined?
(b) Who has responsibility for determining it?
(c) Who pays for it?
(d) Is there any existing evidence as to how it works?
(e) Is there any remedy or sanction if the right is breached?

(2) Does a suspect or defendant have a right to free translation of documents, evidence and so on if he/she cannot understand the language in which they are written?

If yes –

(a) What is the source of any such right?
(b) How is the need for translation determined?
(b) Who has responsibility for determining it?
(c) Who pays for it?
(d) Is there any existing evidence as to how it works?
(e) Is there any remedy or sanction if the right is breached?

(3) Is there any regulation of the competence and independence of interpreters and translators?

(a) What is the source of any such regulation?
(b) How does it work?
(c) Is there any remedy or sanction available to the suspect/defendant if an interpreter or translator is not competent or independent?

6. Additional guarantees for vulnerable groups

(1) Are there any special provisions concerning -

(i) the right to legal assistance,
(ii) bail, or
(iii) court proceedings

for juvenile suspects and defendants?

If yes –

(a) What is the source of any such special provisions?
(b) How is 'juvenile' defined?
(c) What are the special provisions?
(d) Is there any existing evidence as to the use and application of the special provisions?
(e) Is there any remedy or sanction if the special provisions are not provided?

(2) Are there any special provisions concerning –

(i) the right to legal assistance,
(ii) bail, or
(iii) court proceedings

for mentally vulnerable suspects and defendants?

If yes –

(a) What is the source of any such special provision?
(b) How is 'mentally vulnerable' defined?
(c) What are the special provisions?

(d) Is there any existing evidence as to the use and application of the special provisions?
(e) Is there any remedy or sanction if the special provisions are not provided?

7. Guarantees for trials in absentia

(1) Can the accused be tried in his/her absence?

If yes –

(a) What protection or guarantees exist?
(b) What is the source of any such protection or guarantee?
(c) Is there any existing evidence as to the number and proportion of trials conducted in the absence of the accused, and as to how such trial work?
(d) Is there any remedy or sanction if any such protection or guarantee is breached?

ANNEX 2 CRITICAL ACCOUNT OF THE CRIMINAL JUSTICE SYSTEM PRO-FORMA

Purpose of the critical account

The purpose of the critical account of the criminal justice system in each jurisdiction included in the research study is to provide a critical, dynamic account of the system and processes using existing sources of information in order to provide a context against which data collected during the research study may be understood. Together with the Desk Review, it will provide a basis for determining what further research is required for the purposes of the country report, and much of the information gathered for both the critical account and the desk review will be used when writing the country report. Where relevant you may cross-refer to information in the Desk Review rather than repeat information.

The overarching goal of the project is to contribute to effective implementation of indigent defendants' rights to real and effective defence, as part of a process of advancing observance of, and respect for, the rule of law and human rights. Effective criminal defence has three dimensions: the contextual dimension; the procedural dimension; and the outcomes dimension. The critical account will be the principal source of information on the contextual and outcomes dimensions, but may also provide some information on the procedural dimension in so far as this data is available.

The guideline length for the critical account is 8,000 words, although you may feel it necessary to exceed this, and it should broadly follow the structure set out below. Since criminal justice systems in most jurisdictions are, to a greater or lesser extent, changing rapidly the account should be dynamic in the sense of conveying the primary characteristics of those changes and the 'direction of travel'. Where available, reference should be made to existing data, statistics and other existing research evidence. Referencing should follow the style in *Effective Criminal Defence in Europe*.

1. Introduction

A brief introduction to the criminal justice system and processes, describing its typical characteristics, the significant areas of change in the past 10 years, the application of

the European Convention on Human Rights (ECHR), major recent or current issues (for example, terrorism, prison overcrowding, immigrants and crime and so on).

2. Crime in its social and political context

(a) Brief geo-political information, for example, population, concentrations of populations, ethnicities.
(b) Crime levels, whether they increasing/declining/static, how crime is measured, incarceration rates (both for sentenced and non-sentenced prisoners), ethnic profiles of suspect/defendant and imprisoned populations.
(c) The public and political perceptions of crime – whether crime is a major consideration for the public and in the media, the place of crime in political debate, fear of crime, statistics on and perceptions of whether crime is largely committed by for example, poor people, 'outsiders' (for example, ethnic minorities), organised gangs and so on.
(d) Attitudes to dealing with suspects and defendants, and whether these are changing, for example, can attitudes be described as liberal, are they becoming more or less punitive, are punitive measure popular, perceptions of human rights norms as they relate to crime and those accused of crime.
(e) Political and public perceptions of criminal justice professionals and institutions – lawyers, police, prosecutors, judges and the courts.
(f) Political and public perceptions of and attitudes to state expenditure on the criminal justice system, and to expenditure on legal aid/assistance to suspects/defendants.
(g) Political and public perceptions of justice and access to justice, especially in the case of poor suspects/defendants.
(h) Perceptions and awareness of rights within the criminal justice system.

3. The structure and processes of the criminal justice system

(a) The basic tradition and characteristics of the criminal justice system, for example, inquisitorial/adversarial.
(b) Relevant stages of the criminal process and the relevant nomenclature (for example, in England and Wales there are essentially three stages:

(1) Pre-charge or investigative stage when the subject of the enquiry is known as the suspect; (2) From charge to trial, when the person is known as the defendant or accused; (3) Post-conviction, when the person is known as the convicted person or criminal, or appellant if they are appealing against conviction and/or sentence).

(c) Classification of offences.

(d) The structure and functions of the criminal courts, first instance and appellate.

(e) How criminal proceedings are initiated and processed, including the basic stages (for example, arrest, charge, plea), and whether guilty pleas or expedited proceedings are possible (and the extent of use of such procedures).

(f) Whether there are mechanisms for dealing with criminal conduct by administrative means (and the extent of use of such mechanisms).

(g) The relationship between the investigative stage and the trial stage – the principle of immediacy in theory and practice, the use of pre-trial statements of the accused and witnesses as evidence at trial, mechanisms for excluding illegally or unfairly obtained evidence.

(h) Who decides what material is to go before the trial court, and which witnesses are to be called to give oral evidence.

4. Criminal justice professionals and institutions

(a) The role of the police, prosecutors and judges, the structures and institutions within which they operate, and their relationships with each other.

(b) The role of criminal defence lawyers and the structures within which they operate (for example, public defenders, private practice, the extent of specialisation and so on).

(c) Perceptions of criminal defence work within the legal profession.

(d) The relationship between criminal defence lawyers and other criminal justice professions and institutions.

5. The organisation of legal aid

A description of the legal aid system and other mechanisms for providing legal services to poor and relatively poor suspects and defendants, including:

(a) whether there is an institution that has overall responsibility for legal aid, and a description of its status and functions;
(b) how legally-aided legal services are delivered, for example, through the private bar, through a public defender service and so on.
(c) if legally-aided services are provided through the private bar, the organisational arrangements, for example, restrictions on which lawyers/ firms can provide legal aid services;
(d) financial arrangements relating to legal aid, for example, whether lawyers are paid on a per case basis, whether they are paid for time spent or a fixed fee and so on.

6. Rights and freedoms

Whether, and/or how, the following are given effect, in theory and in practice:

(a) the presumption of innocence
(b) the 'right to silence'
(c) the burden of proof
(d) the right to a reasoned judgement
(e) the right to appeal

7. Conclusions

The major issues and challenges for the criminal justice system over the next few years, including the major issues arising from the desk review and major prospective changes to the criminal justice system and/or processes.

8. Selected bibliography

The major books, research reports and other sources on the criminal justice system and processes (both those in English and those in the language of the relevant jurisdiction).

ANNEX 3 GUIDANCE FOR COUNTRY REPORTS

1. Purpose of the country reports

The country reports serve two primary purposes. First, they provide the major source of information (in addition to the desk review and critical account) in respect of the nine countries in the study on which the research team will base its analysis, conclusions and recommendations. Second, they will form discrete chapters of the book that will be published out of the research.

2. The need to be analytical and critical

Before writing the country report you will have feedback from the country reviewer and the research team. It is important that the country reports are both analytical and critical. There are normally significant differences between what the law states and what actually happens in practice, and as far as possible a person reading your report should be left with an understanding of what those differences are and how important they are. Look at the chapter on England and Wales, or Hungary, in *Effective Criminal Defence in Europe* as examples of what we mean by 'analytical and critical'.

We recognise that in all jurisdictions there is a lack of data and empirical research on the criminal justice system and processes. Lack of data is, in itself, an important finding. Lack of empirical research should not prevent you from using the best available evidence in order to analyse, and draw conclusions about, the aspects of the criminal justice system and processes in which this research project is interested.

Researchers are encouraged to refer to ECtHR judgments against their country where relevant.

3. Word limit

The maximum total number of words (excluding footnotes) is 15,000 (excluding footnotes and the bibliography). It is important that, as far as possible, you comply with this as there are limits on the total size of the book of which the country reports will form a part. However, we recognise that this is a difficult task and that your report may be a few thousand more words than this.

4. Writing guidelines

In addition to this document, you will be supplied with *Authors instructions*. Please make sure that you look at them and follow them as far as possible. In addition, please note the following:

(a) Your report must follow the structure of the country report guidelines set out below.

(b) You must use no more than three levels of headings, following the numbering system below. In order to ensure that all country reports are consistently structured, all headings that are numbered in the structure below (for example, 2, 2.3, 2.3.1 – but not a), b)) must be used in the same way and in the same order, using the same words for the heading. Level 2 or 3 headings that are not specified below (for example, 1.1, 2.1.1) are within your discretion. You should not use numbered headings beyond Level 3 (for example, you should not have a heading numbered 2.1.1.1 or 2.1.1.2).

(c) In order to make the reports readable for a non-lawyer readership, the precise reference to code and legislative provisions should be put in a footnote rather than in the text. For example, in the text you may write 'The Criminal Code provides that ... ', with the relevant provision or paragraph number being placed in a footnote.

(d) All monetary values should be expressed in Euros, with the local currency equivalent being put in a footnote.

(e) Where interviews, or other forms of fieldwork, have been conducted for the purpose of writing the country report, this should briefly be explained, either in the introduction section or in a footnote when the research is first referred to. If the research includes interviews, a brief indication should be given of the status of the interviewees
(for example, five judges, three prosecutors and six lawyers who undertake criminal defence work) together with the period over which the interviews were conducted (for example, Interviews were conducted between 1 May 2009 and 15 June 2009 in three cities including London.).

5. Structure of the country report

As noted above, *the country report must follow this structure*. The numbers in brackets against each section is a guideline word limit for each section, but note that this is only a very rough guide.

5.1 Introduction (1,800)

This section should set the scene for understanding the report and its findings. Researchers can decide what information to include (for example, specificities of criminal justice systems; country information; poverty levels, discrimination and other major social and political issues if relevant and so on). There should be some reference to size of population and other basic demographic information so that a reader unfamiliar with the country has some understanding of it. It should also include any major changes, and the 'direction of travel'.

5.2 Legal aid (900)

This section should explain legal aid provision for criminal cases in your country, including –

- spending on criminal legal aid, broken down by reference to the various stages of the criminal process if this information is available
- organisational responsibility for administering legal aid, for example, whether there is a legal services commission or similar
- methods of delivering legal aid services (for example, private lawyers, public defenders, duty lawyer schemes and so on)
- eligibility for legal aid, by reference to the different stages of the criminal process
- methods of application for and/or appointment of lawyers funded by the state, and
- remuneration, if possible comparing legal aid remuneration rates with those applicable to privately funded work.

5.3 Legal rights and their implementation (9,300)

5.3.1 The right to information

This section should include a description of how the law regulates the following rights, and a critical account of how they work in practice –

- information on procedural rights (the 'letter of rights')
- information on the nature and cause of the accusation
- detailed information (right of access to, or copies of the file) concerning the relevant evidence/material available to the police/prosecutor/examining magistrate

5.3.2 The right to defend oneself

This section should include a description of how the law regulates the right of defence, and a critical account of how it works in practice, differentiating between (a) the right of a suspect/defendant to defend themselves, and (b) the right to legal advice and/or representation

The section should cover:

- the point at which the right arises
- whether there is a choice of lawyer
- whether there is provision for a lawyer to be provided free of charge or at reduced cost if the suspect/defendant cannot afford a lawyer and any eligibility conditions (cross-referring to section 2. as appropriate)
- arrangements for accessing legal advice and representation
- whether there is right to consult, and communicate in private, with the lawyer
- how the right to an independent and competent lawyer who is professionally required to act in the best interests of his/her client is given effect
- any special provisions for vulnerable (by reason of age and mental disorder) suspects/defendants
- whether there are any differences in law and/or in practice between suspects/defendants who pay privately, and those who rely on legal aid.

5.3.3 Procedural rights

This section should include a description of how the law regulates the following rights, and a critical account of how they work in practice.

5.3.3.1 The right to release from custody pending trial

5.3.3.2 The right of a defendant to be tried in his/her presence

5.3.3.3 The right to be presumed innocent

5.3.3.4 The right to silence

5.3.3.5 The right to reasoned decisions

5.3.3.6 The right to appeal

Analysis of each of the procedural rights listed above should include:

- legal recognition (of the right in general terms)
- procedural protection (procedural mechanisms designed to ensure that the right can be effectively realised)
- evidence about how the right is implemented in practice
- analysis/evidence of how it works for poor defendants
- analysis/evidence of how it works for ethnic minorities, where relevant (that is, when (a) laws and procedures discriminate against minorities on their race, or operate to have a disproportionate impact; and (b) there is evidence of discrimination against minorities in granting access to certain rights as established in prior research).

5.3.4 Rights relating to effective defence

This section should include a description of how the law regulates the following rights, and a critical account of how they work in practice.

5.3.4.1 The right to investigate the case

Including rights to –

- equality of arms (including the right to be *present* at investigative acts such as identification line-ups or search)
- seek evidence
- investigate facts
- interview prospective witnesses
- obtain expert evidence

5.3.4.2 The right to adequate time and facilities for preparation of defence

5.3.4.3 The right to equality of arms in examining witnesses

This refers to the right to secure the attendance of witnesses, and to examine or to have examined witnesses, favourable to the defendant on the same conditions as those against them.

5.3.4.4 The right to free interpretation of documents and translation

During interrogation, hearings, communication with counsel for suspects/defendants who cannot understand or speak the language.

5.4 The professional culture of defence lawyers (1,800)

This section should include a critical account of –

- lawyers' role in criminal proceedings and their duty to the client as reflected in ethical rules and standards, and as perceived by lawyers and other actors
- the existence (or otherwise) of unified professional body(ies) and their role/perceptions of their role
- the extent to which the legal profession(s) take responsibility for legal aid, and
- quality and quality assurance mechanisms.

5.5 Political commitment to effective criminal defence (600)

This section should include a critical analysis of government policies in the areas of criminal defence and legal aid, and in related fields, for example, crime and criminal justice policies, minorities, poverty – if they affect the realisation of effective criminal defence rights.

5.6 Conclusions (900)

Identifying and summarising (a) any positive features, and (b) any negative features and/or major concerns regarding access to effective criminal defence, and recommendations for improving access to effective criminal defence.

5.7 Bibliography

Listing all publications referred to in the Country Report.

ANNEX 4 THE ROLE OF THE COUNTRY REVIEWER

The role of the country reviewer is essentially to review the research for their respective country in order to 'validate' it. This is particularly important because (a) in most countries there is a lack of empirical evidence as to how the criminal justice system 'works', and (b) it is very important for the success of the project that the country reports are regarded as fair, valid and credible accounts.

The in-country researcher for each country will, in Stage 1, have worked on a Desk Review and a Critical Account. The country reviewer will provide feedback on these two reports on:

(a) whether the information adequately covers the questions and issues raised in the pro-formas for the Desk Review and the Critical Account;
(b) whether any of the information requires clarification; and
(c) what empirical research might be conducted.

The feedback will be supplied by the country reviewer to the project management team who will then incorporate it into a feedback report to the in-country researcher. The in-country researcher will make any necessary amendments to the Desk Review and Critical Account documents.

In Stage 2 the in-country researcher will conduct empirical research and then draft a country report in accordance with a Country Report Format Document, using information from the research, the Desk Review and the Critical Account.

The country reviewer will provide feedback on the draft Country Report, and should:

(a) correct any factual errors;
(b) make appropriate suggestions regarding the clarity of the report, taking into account the requirement that it be readily understood by readers from other jurisdictions; and
(c) consider the validity of any conclusions drawn from the available evidence and make any appropriate suggestions.

The feedback on the draft Country Report will be supplied by the country reviewer to the project management team who will then incorporate it into a feedback

report to the in-country researcher. The in-country researcher will then revise the Country Report taking into account that feedback.

Duration and Time schedule (relevant to the country reviewer)

- February 1 project management team sends the desk review and critical account to the country reviewer,
- February 21, 2011 – country reviewer sends comments on desk review and critical account to the project management team;
- June 30, 2011 – in-country researcher submits the draft country report to the project management team;
- July 1, 2011 – the project management team submits the draft country report to the in-country reviewer for comments;
- July 21, 2011 – country reviewer sends comments on the draft country to the project management team.

Confidentiality and copyright

The country reviewer/contractor shall treat the information relating to the project as confidential and shall ensure that this information is circulated no further than required for the execution of the activities assigned to him/her.

The country reviewer/contractor shall not issue any statement to third parties, in particular to the press and other communication media, concerning the research under this agreement or otherwise divulge information obtained in this context, except with prior written approval of the project management team. No texts shall be issued or published by the country reviewer/contractor except with the prior approval of the contracting parties.

This book is devoted to criminal defence in Eastern Europe, based on a research project conducted in Bulgaria, Georgia, Lithuania, Moldova and Ukraine during 2010 and 2011. The research relied on the methodology originally developed for a three-year research study on access to effective defence in criminal proceedings across nine European jurisdictions (Belgium, England & Wales, Finland, France, Germany, Hungary, Italy, Poland and Turkey), the results of which were published in 2010 in a book entitled *Effective Criminal Defence in Europe*.

The research was conducted under the framework of the Legal Aid Reformers' Network (LARN), with financial support from the Human Rights and Governance Grants Program of the Open Society Foundations. The project was implemented by the Soros Foundation–Moldova, in cooperation with Open Society Institute–Sofia, Open Society Georgia Foundation, International Renaissance Foundation–Ukraine, and the Open Society Justice Initiative.

The book starts with an analysis of the key requirements and standards concerning effective criminal defence according to the European Convention on Human Rights, the case law of the European Court of Human Rights, and legislation under the European Union's procedural rights 'roadmap'. Each country in the study is the subject of a separate chapter describing and analysing laws, institutions, processes, practices and attitudes relating to effective criminal defence, and concluding with recommendations for improving access to effective defence as an essential element of the right to fair trial. The data from the five countries is then subjected to a cross-jurisdictional analysis of compliance with European standards including, where relevant, reference to the findings of the original nine country study.

Overall, the study reported in this book provides a unique comparative account and analysis of criminal defence rights in the five jurisdictions, all of which have acceded to the ECHR, and two of which are member states of the EU. It is hoped that the book will not only provide useful information for further standard setting within the European Union and the Council of Europe, but also will assist policymakers and practitioners in the development of practical mechanisms to ensure access to effective criminal defence to all who need it across Europe.

LARN is an international information-sharing network of organisations and individuals working to promote the right to legal aid and effective defence. LARN builds on the experience of the Open Society Justice Initiative, which has been promoting legal aid reforms and created an informal network of public defenders and legal aid managers across Europe and globally. The Network provides a virtual platform for policymakers and legal practitioners to exchange experiences and to collaborate in further developing newly created legal aid systems. LARN is open to any interested organisations and individuals. More information about LARN is available at www.legalaidreform.org.

LARN LEGAL AID REFORMERS' NETWORK