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ANALYSIS OF THE CRIMINAL JUSTICE SYSTEM OF ALBANIA

REPORT BY THE FAIR TRIAL DEVELOPMENT PROJECT

OSCE

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Written by: Mari-Ann Roos, LL.M
Statistical information: Ama Kraja

Cover by: Bledi Shkalla



Organization for Security and Co-operation in Europe
Presence in Albania
Sheraton Tirana Hotel & Towers, 1st floor
Sheshi "Italia"
Tirana
www.osce.org/albania

SHTËPIA BOTUESE & SHTYPSHKRONJA

PEGI

Lundër – Tiranë

Tel.: 04 374 947, Fax.: 04 88 10 177

Cel: 069 20 26 773

E-mail: pegi@icc-al.org
TIRANË, SHQIPËRI

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Introduction

In recognition of the fundamental nature of the right to a fair trial, the OSCE participating States have committed themselves to permit national and international observers to monitor trials.¹ Experience from other OSCE missions, e.g., the missions to Kosovo and to Bosnia and Herzegovina, also show that trial monitoring and analysis of the judicial system are efficient ways to improve the justice system in countries in transition. Although no one likes to be criticised, trial monitoring is often welcomed by both parties and the courts. The reason for this is that monitoring has a direct impact on the transparency of proceedings and may function as a safeguard against maladministration of justice. The findings might also be used by the courts in budget negotiations with their governments when they seek to improve conditions. Finally, as the quality of the justice system is one of the reform benchmarks in talks with international organisations, such as the European Union, governments may refer to findings in trial monitoring reports to show achievements as well as concrete steps to be taken to improve the justice system. This line of argumentation is supported by the National Committee on American Policy in its Project on Preventing Failed States, Albania. In a report in May 2005, the Project recommends that international donors should support a legal monitoring system (e.g., via the OSCE). . . .”²

According to its mandate, the OSCE Presence in Albania will provide assistance and expertise to the Albanian authorities as well as to representatives of civil society groups, with particular focus on – *inter alia* – legislative and judicial reform. In order to fulfill its mandate and based on an analysis of the legal institutions and the legislative framework underlying them,³ the OSCE Presence in Albania, among other projects, created and initiated the Fair Trial Development Project (FTDP) in 2003. Based on observations of how the legal system functions *de facto*, the FTDP analyses both the material and the procedural legislation forming the justice system in Albania. The analyses, with specific recommendations on how to improve the judicial system, are published in Albanian and English.⁴ The aim of the project is to increase the transparency and to raise trial standards within the justice system, as well as to improve the respect for the rule of law in general, and for human rights in particular. The first analysis, the *Fair Trial Development Project Interim Report* [Interim Report], was published in February 2005 and covered the period between October 2003 and July 2004. The Interim Report focused mainly on Tirana District Court (TDC) and the First Instance Court for Serious Crimes (CSC), which, following suggestions from the international community to fight organized crime, was inaugurated in January 2004. In the report it was noted, among other matters, that the courts suffer from a variety of logistical problems that often hamper the proceedings. It was further noted that the right to public trials is not always respected at TDC where

¹ See <http://www.osce.org/odihr/13473.html> [Accessed 3 August 2006]

² <http://www.ncafp.org/projects/failedstates.htm> [Accessed 18 July 2006]

³ See the OSCE, PiA, Legal Sector Report for Albania, 2004; http://www.osce.org/documents/pia/2004/02/2117_en.pdf [Accessed 18 July 2006]

⁴ http://www.osce.org/documents/pia/2004/09/4280_en.pdf [Accessed 18 July 2006]

trials are frequently carried out in judges' offices. Other problems identified were that trials are frequently delayed for extended periods of time, that trials are often carried out in the absence of defendants or as accelerated trials, that no measures are taken to protect witnesses from threats or intimidation, that there is no unified system for case assignment and finally that judgments often fail to reflect how the court reached its conclusion.

While many of the problems identified in the Interim Report still hamper the Albanian justice system, the last year and a half has also been a period of some improvement for the justice system. After having been housed in cramped facilities within the Tirana District Court, in September 2005, the CSC moved to its own temporary premises.⁵ In the new court building, there is a separate room for witnesses. The court has been computerised and has an informative internet page and also offers persons coming to court a handbook with basic information about the activities of the CSC as well as information directed to defendants, witnesses, the media and the general public.⁶ While still lacking some administrative staff, the CSC is now fully staffed with judges and it is expected that this will increase the speed with which cases are adjudicated. Despite the initially difficult working conditions combined with political pressure and intense media attention, the CSC also has shown itself to be an institution of comparatively high professional standards and integrity and a court that works hard to carry out justice in a transparent and fair manner. On the legislative side, an "anti-mafia legal package", consisting of a law on fighting organised crime, a law against the financing of terrorism and a law on protection of witnesses and those who co-operate with the authorities, was adopted in 2004.⁷ The package provides a much-needed legal definition of criminal organizations and of trafficking in human beings. It further introduces new legal tools to facilitate the seizure of the proceeds of crime and provides for the use of special investigative means to tackle corruption and abuse of office, as well as to reward co-operation with the authorities. The necessary secondary legislation under the Law on the Protection of Witnesses and Collaborators of Justice was, belatedly, adopted in the summer of 2005.⁸ After the adoption of the secondary legislation the Witness Protection Sector, which is part of the Unit of Organized Crime and Witness Protection under the

⁵ This is a temporary solution while a new building for the Serious Crimes Courts, i.e., the First Instance Court for Serious Crimes and the Court of Appeals for Serious Crimes, as well as for the Serious Crimes Prosecution Offices, is being constructed under the 2003 EU CARDS program

⁶ As part of a Capacity Building Project for the CSC, the OSCE Presence in Albania has donated a number of computers and a telephone switchboard, provided software to facilitate minute taking during court sessions, furnished the witness room, funded the internet page and the publication of the handbook and provided training for the court clerks and secretaries at the CSC

⁷ Law no. 9205, dated 15 March 2004, "On the Protection of Witnesses and Collaborators of Justice"; Law no. 9284, dated 30 September 2004, "On the Prevention of and Fight Against Organized Crime"; Law no. 9275, dated 16 September 2004, "On some additions and amendments to Law no. 7895, dated 27 January 1995, 'The Criminal Code of the Republic of Albania', amended"; and Law no. 9276, dated 16 September 2004, "On some additions and amendments to Law no. 7905, dated 21 March 1995, 'Criminal Procedure Code of the Republic of Albania' amended"

⁸ Law no. 9205, dated 15 March 2004, "On the Protection of Witnesses and Collaborators of Justice" and the secondary legislation as published in Official Journal no. 61, dated 3 August 2005

Albanian State Police, has started implementing the witness protection programme. On the political side, the new government, which came into power after the July 2005 elections, has shown a commitment to fighting organized crime and corruption. This has resulted in some progress in breaking up criminal organizations and bringing their members to justice, as well as in some legislative attempts to tackle corruptive practises.

The second analysis by the FTDP (i.e., the present publication) covers a variety of rather disparate issues. The first and most extensive chapter discusses the extent to which the procedural and human rights of persons deprived of their liberty based on suspicions of criminality are respected by the Albanian authorities. This is followed by a chapter scrutinizing the conditions under which persons deprived of their liberty are living. Chapter two discusses the right to an effective defence and chapter three contains two cases studies. The fourth chapter analyzes how cases of domestic violence are treated by the criminal justice system in Albania. Chapter five discusses transparency and access to information, whereas chapter six discussed corruption within the justice system. Chapter seven, finally, contains two discussion papers that have previously been presented in different contexts. While the aim of the second phase of the FTDP was to analyse on one hand the situation of pre-trial detainees and on the other hand how cases of domestic violence are handled by the criminal justice system, the other topics covered in this book are issues that emerged during the course of those analyses. With the exception of the case studies chapter, each chapter contains a number of specific recommendations on how identified problems within the justice system could be addressed.

The hope is that this analysis will serve as a useful tool for the Albanian justice authorities and for international actors in the field of justice in their continued efforts to improve the judicial system in Albania. The intention is further that the various parts of the analysis will be useful for individual actors, such as judges, prosecutors and defence lawyers, as well as for non-governmental organizations (NGO) working against domestic violence or otherwise active in the field of justice. Last but not least, we hope that the Albanian School of Magistrates and the various law faculties in Albania will find this book useful in their endeavours to educate future generations of judges, prosecutors and lawyers in Albania.

Summary of findings

General observations

The Albanian justice system has undergone radical changes and a significant improvement during the past decade or so. The present analysis, however, indicates that there is a need for further improvement in order to create a stable and transparent justice system based on the rule of law. As will be seen in both the case studies chapter and in the other chapters in this report, the legal rules are frequently not respected or are abused in order to achieve “desired” – but not necessary lawful – results. As a consequence, the rights and freedoms of individuals are frequently violated, and an impression of a justice system that is neither fair, nor independent, is created.

Rights and conditions during pre-trial detention

Deprivation of a person’s liberty puts the individual in an extremely vulnerable position. It is therefore important that any deprivation of liberty be kept to an absolute minimum and follow the strict procedures set out in international documents and domestic law. All actors involved have a crucial role to play in upholding those standards and in taking action against any abuse. In this respect, there is room for substantial improvement within the Albanian context. Thus, it has been noted that persons deprived of their liberty are in most cases not informed about the reasons for their arrest or about their rights; they are regularly maltreated by the police; they do not get timely access to a defence lawyer and they are not brought in front of a judge within the time period set by the Constitution. Decisions are poorly reasoned and give an impression that detention on remand is often ordered without legal grounds. Lawyers do little to challenge decisions or to bring into light incidents of abuse or other malpractice. Preliminary investigations are many times characterised by extended periods of inactivity and time periods for pre-trial detention are suspended without legal cause and for extended periods. They are also frequently exceeded without this leading to the release of the defendant. The conditions under which persons are kept in pre-trial detention are poor and fail to meet international standards.

Domestic violence and the criminal justice system

Domestic violence in Albania is under-reported, under-investigated, under-prosecuted and under-sentenced. Prosecution in most cases of domestic violence depends entirely on the woman and sentences provided in the Criminal Code are low compared to the levels of punishment for other violent crimes. Neither the basic sentences nor the aggravating circumstances provided in the Criminal Code take into account the systematic nature of domestic violence or the impact on victims who may have suffered years of violence at the hands of their husbands. As a result, the overwhelming majority of perpetrators can behave with impunity, while women who seek redress against domestic violence get little or no support from the authorities. Police officers, prosecutors, judges and lawyers lack awareness and training regarding how to deal with cases concerning domestic violence.

The draft Law on Domestic Violence, and the strong popular support it has already received through the collection of signatures, shows that the Albanian society is ready to

take concrete steps to fight the prevalence of domestic violence. By providing protection to women who are victims of domestic violence, implementation of the law could also serve to increase prosecution of cases concerning domestic violence. It is, however, important that the adoption of the draft law on Domestic Violence be seen only as a first step in the fight against domestic violence in Albania and that measures be taken to strengthen the legislative framework to fight domestic violence, which is a crime.

Transparency and access to information

Transparency and access to public information are key elements in a democratic society and serve to give media, civil society and other interested bodies the necessary tools to scrutinize how state power is used and resources are managed. The computerization of some of the main courts in Albania and the creation of internet pages where court decisions are posted in full is a significant step towards a more transparent justice system in Albania. Before continuing this development, however, rules that strike a proper balance between the interests of transparency on the one hand, and the security of personal integrity on the other, need to be established. Apart from this, however, much remains to be done to give media and the general public the insight into the Albanian justice system that is necessary in a democratic society based on respect for human rights and the rule of law. Thus courts and prosecution offices need to establish internal rules as well as to create structures to respond diligently to requests for access. The general public also needs to be made aware of their right to participate in trials and have access to court decisions as well as information about other official documents at courts and prosecution offices.

Corruption within the Albanian justice system

Both international and domestic studies indicate that corruption within the Albanian justice system is perceived to be very high and to seriously impede the functioning of the justice system. While the new government has shown serious commitment to fight corruption, few concrete measures have as of yet been taken to tackle corruption within the justice system. In order to come to terms with both the actual and the perceived corruption within the justice system, decisive measures need to be taken. A first step would be to put an immediate end to inappropriate contacts between members of the judiciary and parties to a trial or their representatives. Furthermore, each court and prosecution office should be asked to set up concrete strategies and undertake concrete measures to fight corruption within the respective institution. Any strategy contemplated also would have to take into consideration the levels of pay and other benefits of staff within the justice system in general and of judges in particular. An adequate level of pay and other benefits is probably one of the most efficient ways to “immunize” an employee against corruption.

Efficient Trials and Witness Issues

Trials in Albania are marred by frequent delays and as a result even simple cases may take months, or sometimes even years, to complete. This creates suffering and costs for the parties and costs for the justice system. Lengthy trials have a negative impact on public confidence in the justice system and probably also creates space to enter into corruptive

agreements. Legislative and practical measures should therefore be undertaken to address unjustified trial delays. While increased efforts to ensure the timely participation of all involved, might require increased expenditure, shorter and more efficient trials would substantially reduce costs for all involved and would free resources to adjudicate more cases.

Witnesses are an important part of most trials and, as a consequence, for the functioning of any justice system. It is therefore necessary to ensure, to the extent possible, that witnesses appear in court and give correct and truthful statements, i.e., that there are measures that serve to prevent witnesses from being harmed, intimidated, threatened or otherwise influenced. While the Witness Protection Law and its secondary legislation represent a significant step forward, much remains to be done to ensure the security of other witnesses and to increase the credibility of witness testimonies in Albania.

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Abbreviations

ABA-CEELI	American Bar Association-Central and East European Legal Initiative
ALL	Albanian lek
AI	Amnesty International
CAO	Citizen's Advocacy Office
CASC	Court of Appeals for Serious Crimes
CC	Criminal Code
CCBE	Council of the Bars and Law Societies of the European Union
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination Against Women
CoE	Council of Europe
CPC	Criminal Procedure Code
CPI	Corruption Perception Index
CPT	European Committee for the Prevention of Torture and Inhuman Treatment or Punishment
CSC	First Instance Court for Serious Crimes
DV	Domestic Violence
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EU	European Union
CARDS	Community Assistance for Reconstruction, Development and Stabilisation (EU CARDS Programme)
FTDP	Fair Trial Development Project
GNI	Gross National Income
HR	Human Rights
ICCPR	International Covenant on Civil and Political Rights
IDRA	Albanian Institute for Development and Research Alternatives
JPO	Judicial Police Officer
NGO	Non-Governmental Organization
NPO	Non-Profit Organization
OSCE	Organization for Security and Co-operation in Europe
OSCE PiA	Organization for Security and Co-operation in Europe, Presence in Albania
PPP	Purchasing Power Parity
TDC	Tirana District Court
UDHR	Universal Declaration of Human Rights
UN	United Nations
USAID	United States Agency for International Development
WASP	Women's Association with Social Problems (in Durrës)

I. RIGHTS DURING PRE-TRIAL DETENTION

1. Introduction

The right not to be arbitrarily deprived of one's liberty is a fundamental human right and appears in all major human rights documents such as the Universal Declaration of Human Rights,⁹ the International Covenant on Civil and Political Rights,¹⁰ The European Convention on Human Rights (ECHR),¹¹ the African Charter on Human and Peoples Rights¹² and the American Convention on Human Rights.¹³ Personal liberty is closely linked to the concept of human dignity and is a pre-condition for the enjoyment of other human rights and freedoms. There are situations, however, in which a state has a legitimate interest to deprive a person of her/his liberty in order to protect the individual, other individuals or other important interests. As the deprivation of liberty by the state authority puts an individual into an extremely vulnerable position, it is of utmost importance that any deprivation of liberty follow a lawful and transparent procedure and that it not last longer than absolutely necessary to satisfy the purpose of the deprivation of liberty.

In this chapter, issues related to the security measure of pre-trial detention will be discussed. The legal framework as well as the handling of issues related to pre-trial detention in practice will be presented and analyzed. The emphasis will be on how the procedural rights of a person who is arrested and detained on remand are respected. The presentation will start with a discussion of who makes the decision to arrest in a particular situation and go on to discuss the actual arrest, access to defence counsel, initial interrogation, the detention hearing and decision, as well as the continued scrutiny over decisions to detain on remand. The presentation will then go on to discuss the suspension of pre-trial detention time periods and what happens when the legal time period for pre-trial detention expires. This will be followed by a discussion of the pre-trial investigation in cases where the defendant is detained on remand and how this relates to the time periods for pre-trial detention. The analysis is based on trial observations, court decisions and a number of surveys carried out at detention centres and among defence counsel as well as on the study of a number of prosecution files. The chapter will end with some concluding observations and a comprehensive set of recommendations to come to terms with identified shortcomings in law and in practice. In the following chapter, conditions of pre-trial detainees and pre-trial detention sites in Albania will be discussed.

⁹ Article 9

¹⁰ Article 9

¹¹ Article 9

¹² Article 9

¹³ Article 9

1.1 The pre-trial detention survey and the study of prosecution files

The pre-trial detention survey was carried out between October and December 2005 at the pre-trial detention centres of Saranda, Gjirokastra, Vlora, Fier, Lushnja, prisons 302 and 313 in Tirana, Durrës, Kruja, Lezha (Shënkoll prison), Shkodra, Kukës and Bajram Curri. The survey consisted of three parts and three questionnaires. Firstly the director of the pre-trial detention centre was asked questions regarding the capacity and conditions of the detention site.¹⁴ Secondly several detainees were interviewed individually,¹⁵ and thirdly the Regional Chambers of Advocates distributed questionnaires to be completed on a voluntary basis by their members.¹⁶ While the questions in the survey are generally such that there is little reason to provide incorrect information, the information in the responses represents the viewpoints and perceptions of those interviewed and not of the OSCE. Furthermore of number of decisions to detain on remand were analyzed.¹⁷ Finally a number of prosecution files were studied in order to get a picture of how pre-trial investigations are carried out in Albania.¹⁸

Terminology related to “pre-trial detention” used in this chapter

Arrest – the action of the police actually apprehending someone (European Court of Human Rights uses “arrest and detention” to describe a person who has been arrested and is then detained by the police, whereas the Albanian Code of Criminal Procedure (CPC) uses arrest to describe the apprehension based on some evidence, and detention the apprehension based on suspicion)

Police custody – the place where the arrested person is being kept

Detention hearing – a hearing during which the legality and the continuation of the deprivation of liberty is tried, as opposed to the main hearing. In the Albanian context, this means that both the *verification*¹⁹ and the *evaluation*²⁰ hearings are included in this notion

Detention on remand – the situation after the “pre-cautionary” measure has been decided by a court.

Pre-trial detention centre – the place where a person who is in detention on remand is being kept

Pre-trial detention – any form of deprivation of liberty until there is a final decision on the merits of a case

¹⁴ See further Pre-trial detention - Annex 1

¹⁵ Pre-trial detention - Annex 2

¹⁶ Right to an efficient defence - Annex 1

¹⁷ For basic information regarding the decisions, see Pre-trial detention – Annex 3

¹⁸ For statistical information based on the surveys see Pre-trial detention - Annexes 4 and 5

¹⁹ Criminal Procedure Code, art. 248

²⁰ Criminal Procedure Code, art. 258 and art. 259

2. Decisions to arrest and detain on remand

Legal framework

The conditions under which a person may be deprived of her/his liberty and the rights of a person deprived of her/his liberty are set by the Albanian Constitution.

Constitution of Albania²¹

Article 27

1. No one may be deprived of his liberty except for in the cases and according to the procedures provided by law.
2. The liberty of a person may not be limited, except in the following cases:
 - a. when he is punished with imprisonment by a competent court;
 - b. for failure to comply with the lawful orders of the court or with an obligation set by law;
 - c. when there is a reasonable suspicion that he has committed a criminal offense or to prevent the commission of a criminal offense or his escape after its commission;**
 - ç. for the supervision of a minor for purposes of education or for escorting him to a competent organ;
 - d. when a person is the carrier of a contagious disease, mentally incompetent and dangerous to society;
 - dh. for illegal entry at state borders or in cases of deportation or extradition.
3. No one may be deprived of liberty just because he is not in a state to fulfill a contractual obligation.

Article 28

1. Everyone who has been deprived of his liberty **has the right to be notified immediately, in a language that he understands, of the reasons for this measure, as well as the accusation made against him. The person whose liberty has been taken away shall be informed that he has no obligation to make a declaration and has the right to communicate immediately with his lawyer, and he shall also be given the possibility to exercise his rights.**
- 2. The person whose liberty has been taken away, according to article 27, paragraph 2, subparagraph c, must be brought within 48 hours before a judge, who shall decide upon his pre-sentence detention or release not later than 48 hours from the moment he receives the documents for review.**
3. A person in pre-sentence detention has the right to appeal the judge's decision. He has the right to be tried within a reasonable period of time or to be released on bail pursuant to law.
4. In all other cases, the person whose liberty is taken away extra judicially may address a judge at any time, who shall decide within 48 hours regarding the legality of this action.
5. Every person whose liberty was taken away pursuant to article 27 has the right to humane treatment and respect for his dignity.

²¹ 1998 Constitution of the Republic of Albania. Text approved by referendum on 22 November 1998 and promulgated on 28 November 1998 [emphasis added]

The Albanian Criminal Procedure Code²² (CPC) divides precautionary measures into coercive and prohibiting measures.²³ Detention on remand is classified as a coercive measure.²⁴

1. According to the Criminal Procedure Code “no one may be subject to a precautionary measure (e.g., detention on remand) unless he/she is under a reasonable suspicion, based on evidence [of having committed a crime]” [*the reasonable suspicion criterion*].²⁵
2. The precautionary measure shall be imposed when (and only when²⁶) “there are important causes which threaten the obtaining or the truthfulness of evidence” (*risk of destroying evidence*), when the defendant has *escaped or there is a risk that he/she escapes (risk of escape)* or, due to the circumstances of the fact and the defendant’s personality, there is a risk that the defendant will *commit serious crimes or offences similar to the one for which he/she is detained (risk of more crimes)* [*the specific criteria*].²⁷
3. The court shall consider the security needs in the individual case and each remand order must be in proportion to the importance of the act and the sentence provided for the offence in question [*the proportionality criterion*].²⁸
4. Detention on remand may be ordered only when other measures are not sufficient because of the dangerousness of the offence or the defendant [*the necessity criterion*].²⁹
5. When the defendant is a juvenile, the court shall consider the importance of not interrupting any educational programs.³⁰ Juveniles suspected of minor offences cannot be detained on remand.³¹
6. Pregnant or breast-feeding women, persons with particularly serious health problems, or who are more than 70 years old, drug or alcohol addicts or persons under special therapeutic treatment may be detained on remand only under particularly important circumstances and for crimes punishable by up to at least ten years imprisonment.

Who decides to detain on remand or to arrest on the spot?

The law provides that, as a main rule, the court makes decisions to *detain on remand*,³² in which case it is clear that all the conditions enumerated above apply. As will be seen below, however, there are several exceptions to the rule, giving the prosecutor or the police power to arrest a person.³³ In practice it also seems that most apprehensions/arrests in Albania are carried out by the police without a court order. As the *arrest* is not defined as a precautionary measure by the CPC, it is not obvious that the provisions in the CPC

²² Law no. 7905, dated 21 March 1995

²³ CPC art. 227

²⁴ CPC art. 232 section 1. f)

²⁵ CPC art. 228

²⁶ Constitution art. 27, section 2 c

²⁷ Constitution art. 27, section 2 c

²⁸ CPC art. 229, section 1 & 2

²⁹ CPC art. 230

³⁰ CPC art. 229, section 3

³¹ CPC art. 230, section 4

³² CPC art. 244, 245 and 246

³³ CPC art. 251 and 253

regarding *reasonable suspicion, risk of destroying evidence, escape or repeated crime*, apply. Considering article 27 section 2 (c) of the Constitution, however, it is clear that for any deprivation of liberty (i.e. arrest or detention on remand) the arresting authority has to be satisfied that the mentioned conditions are in place.³⁴ This is also in line with article 5, paragraph 1 (c), of the ECHR.

- According to the CPC an arrest on the spot is an arrest in the state of *flagrancy*. A person arrested in this manner is described as: “A person who is caught while committing a criminal offence or who, immediately after committing the offence, is followed by the judicial police, by the damaged person or by other persons, or who is captured with objects and material evidence from which it is obvious that the person has committed the crime, is in a state of flagrancy.”³⁵

Type of crime	Pre-requisite	Who decides	Rule
Any crimes	Reasonable suspicion, risk of: - destroying evidence - escape - more crimes	The court	The main rule is that the Court, upon the request of a prosecutor, decides on remand in detention. ³⁶ The arresting authority, i.e., the police, delivers a copy of the court decision to the person and notify her/him of the right to chose defence counsel. The chosen or court-appointed counsel shall immediately be notified. ³⁷
Maximum imprisonment <u>not less than 5 years</u>	Caught on the spot/ In flagrancy	The judicial police	The judicial police are under the obligation to arrest anyone caught on the spot/during the commission (completed or attempted) of an intentional crime, with a maximum punishment of not less than five years imprisonment. ³⁸
Maximum imprisonment <u>not less than 2 years</u>	Caught on the spot/ in flagrancy ³⁹	The judicial police	The judicial police have the right to arrest anyone caught on the spot/during the commission (completed or attempted) of an intentional crime, with a maximum punishment of not less than two years imprisonment. ⁴⁰

³⁴ This is also confirmed by the Commentary to the Criminal Procedure Code; *Criminal Procedure – Commentary*; Halim Islami, Artan Hoxha and Ilir Panda (2003) [the CPC Commentary] p. 343

³⁵ CPC art. 252, see also the CPC Commentary, p. 346

³⁶ CPC art. 238 and 244

³⁷ CPC art. 246

³⁸ CPC art. 251, section 1

³⁹ CPC art. 252

⁴⁰ CPC art. 251, section 2

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Type of crime	Pre-requisite	Who decides	Rule
Maximum imprisonment <u>not less than</u> 10 years	Caught on the spot/ in flagrancy <u>and</u> negligent crime	The judicial police	The judicial police <i>have the right</i> to arrest anyone caught on the spot/during the negligent commission of a criminal offence with a maximum punishment of not less than ten years imprisonment. ⁴¹
Any crimes	Caught on the spot/ in flagrancy. Necessity because of importance of the fact or danger of offender	The judicial police	The judicial police has the right to arrest anyone caught during the commission, if this is necessary due to the importance of the fact or danger posed by the offender and this is substantiated in a separate document. ⁴²
Maximum imprisonment <u>not less than</u> 2 years	Grounded suspicion, danger of fleeing/ and urgency	The prosecutor or, when urgent, the judicial police	When there are grounded reasons to believe that there is a <i>danger of escape</i> , the prosecutor can order the arrest of a person suspected to have committed a crime with a maximum punishment of not less than 2 years imprisonment. ⁴³ • In case of <i>urgency</i>, the judicial police can arrest a person on its own initiative.⁴⁴

Analysis

As was noted above, an arrest can be carried out on the order of the court or the prosecutor as well as on the initiative of the police. Regardless of the circumstances of the decision, the actual apprehension of a suspect is carried out by the police. To fulfill the obligations under the Constitution the police should either hand over a court decision detailing the reasons for the detention on remand to the suspect, or inform the suspect orally of the reasons for the arrest, as well as of the right to remain silent, to notify family and to have defence counsel. As mentioned above, however, the CPC does not expressly oblige

⁴¹ Ib.

⁴² CPC art. 251 section 3

⁴³ CPC art 253

⁴⁴ Ibid.

the judicial police as the arresting authority to inform the arrestee of the reasons for the measure, only about the right to remain silent and the right to defence counsel.⁴⁵

The survey carried out clearly indicates that in most cases an arrested person is not informed about the reason for the arrest. The survey further indicates that in contradiction with the CPC, an arrested person is rarely informed by the police about all her/his rights (to silence, to defence counsel and to inform family). Thus, out of 71 interviewed detainees, 26 (37%) stated that they had been handed a decision by the court, whereas 23 (32%) stated that they were informed of the reasons for the arrest. Nineteen detainees (27%) stated that they had neither received a copy nor been informed about the reasons for their arrest at the time of the arrest.

Of those who were informed, most were not informed at the moment of their apprehension, but after they had arrived at the police commissariat. Furthermore, most of the persons who said they had been informed had not received information about *all* their rights. Only 17 detainees (24%) stated that they had been informed about each of their rights. The information given, was mostly about the right to remain silent (70%), sometimes about the right to defence counsel (34%) and rarely about the right to notify family (28%). In a number of cases, the defendants were arrested in the presence of their family, for which reason notification was obviously not necessary. There is some indication that in serious cases, in particular where defendants turned themselves over to the authorities, the police is more careful with giving the required information and that the police in Durrës is more diligent in this respect, especially when juveniles are concerned, than are police in other areas covered by the survey.

There is obviously a possibility that some of the interviewees were informed, but that they had forgotten or had not understood about the information they received. When asked about routines during arrest, some police directors explained that every arrestee is informed about her/his rights in writing and is asked to sign a document. This seems to be confirmed by some of the interviewees, who stated that they were asked to sign something at the police commissariat. None of these persons, however, had read what they were being asked to sign and in no case did the police explain what it was they were asked to sign and why they were asked to sign it.

As rights guaranteed by the ECHR are intended to guarantee rights that are *practical and effective rather than theoretical and illusory*,⁴⁶ in order for the police to fulfill its obligations, they need to ensure that the arrestees are informed in a clear and coherent manner. The survey thus clearly indicates that the police are not fulfilling their obligations under the ECHR and the Constitution to inform persons deprived of their liberty of the reason for the arrest and of their rights.

⁴⁵ CPC, art. 255 and 246, section 1. See also the CPC Commentary p. 351

⁴⁶ See, e.g., *Artico v. Italy*, 13 May 1980

As for the legal grounds for an arrest, a person can be deprived of her/his liberty only for the reasons provided in the Constitution, i.e., risk of destroying evidence, risk of escape or risk of committing similar or more serious crimes. This is, however, not reflected by the CPC and it seems that when the police carries out arrests, they do not take these factors into consideration, but only consider whether or not there is a “flagrancy” situation. There are also indications that persons are arrested and kept until the detention hearing as a “preliminary punishment” rather than as a measure to ensure the integrity of a trial, or to prevent further crimes.

An example:

According to GY, on 17 March 2005, he was called as a witness in a case heard by the First Instance Court for Serious Crimes (CSC). As GY left the court room, after giving his testimony, he was followed by the prosecutor who grabbed him from behind and told him that he was accused of false testimony. The prosecutor also told him that he would be detained for the three days the law allowed. GY was then taken to the cells in the court house and later to the police commissariat. The next day the judicial police came and asked whether he wanted to have a defence lawyer. In any case, GY did not see a lawyer prior to the detention hearing, which was held three days later. Before the detention hearing, GY met with the lawyer in the courtroom in the presence of the police. The lawyer told GY that he would be released and this was also what the judge decided and GY was ordered to report to the police every week. GY had a steady job and no previous criminal record and duly showed up for the perjury trial.

3. Access to defence counsel ⁴⁷

Legal framework

- The judicial police shall *immediately* inform the arrested person that he/she is not obliged to make a statement (i.e., has the right to remain silent) and that anything he/she says can be used against her/him and finally that he/she has the right to appoint defence counsel.⁴⁸
 - o If the arrested person has insufficient means he/she shall be provided with legal aid and defence counsel shall be appointed by the proceeding authority, i.e., the prosecutor or the court.⁴⁹
- The arrested person has the right to consult defence counsel *immediately* upon the arrest.⁵⁰
- Defence counsel has the right to confidential communications with the arrested person.

⁴⁷ See also the chapter on the right to an efficient defence

⁴⁸ CPC article 255

⁴⁹ CPC art. 6, 48 & 49

⁵⁰ CPC art. 53

o Defence counsel has the right to be notified in advance and to participate in any investigations where the defendant is present and – at the end of the investigation – to get familiar with all the materials.⁵¹

- According to the law on the rights and treatment of detainees, except in high-security prisons, defence lawyers do not need authorization to visit their clients.⁵²
- Access is normally restricted to weekdays between 9.00 and 15.00.

Analysis

As has been noted above, the Constitution grants everyone who has been deprived of her/his liberty the right to communicate *immediately* with her/his lawyer (and the person shall also be given the possibility to exercise this right). Both the ECHR and the Constitution further grant everyone involved in criminal proceedings the right to defend themselves in person or through legal counsel of their own choosing and, if they do not have sufficient means to pay for this service, free of charge. Under article 5 of the ECHR, the right to legal assistance – which is linked to the right under ECHR article 6 – stems from the right to initiate proceedings to challenge a deprivation of liberty. For this right to be effective, the arrested person needs to be able to establish contact with a lawyer, to communicate with the lawyer and to have the necessary time and facilities to prepare a claim for release. Immediate access to a defence lawyer is also a safeguard against police abuse and is important for ensuring an effective defence at trial for the arrested person.

The pre-trial detention survey shows that arrested persons generally are not given immediate access to defence counsel in Albania. In many cases, arrested persons do not meet their defence lawyer until the detention hearing. If there is any consultation before the hearing, it is normally conducted in the presence of the police, the prosecutor and anyone else who happens to be present in the courtroom or judge's office where the detention hearing is being held. This is a violation of international standards. The consultation lasts no more than a few minutes and mainly consists of an introduction between the parties. Thus, 29 (or 41%) of the detainees interviewed stated that they had not met their defence lawyer before the detention hearing. Of these, 28 stated that the initial meeting was not held in private, but in the courtroom and in the presence of whoever was there.

On the other hand, out of the 69 lawyers who replied to the questionnaire for defence counsel, 41 (59%) stated that they were *not* present at the initial interrogation of their clients. Regarding the detention hearing, 45 (65%) of the lawyers stated that they always consult with their clients prior to detention hearings. Eighteen (26%) of the lawyers stated that they mostly consulted with their clients prior to detention hearings whereas six lawyers (9%) stated that they *sometimes* (two lawyers/3%), *rarely* (two lawyers/3%) or *never* (two lawyers/3%) consulted with their clients prior to detention hearings. That

⁵¹ CPC art. 50

⁵² Law no. 8328, dated 16 April 1998, "On the Rights and Treatment of Detainees", article 43 section 3, *see also* Ministry of Public Order Regulation no. 1075, dated 15 September 1999, "On the Security and Treatment of Pre-Trial Detainees", chapter III

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means that 35% of the surveyed defence counsel stated that they do not always consult with their clients prior to detention hearings. This matches rather well with the result of the detainee survey indicating that 41 per cent of the interviewed detainees had not met with their defence lawyer before the detention hearing. Regarding the venue for the consultation, 38 (55%) of the defence lawyers stated that the first consultation took place at the detention centre, whereas only 9 (13%) stated that this consultation took place in court. From the defence counsel survey, it is not possible to draw any conclusions as to the length or quality of this first consultation.⁵³ It is noteworthy that one defence lawyer stated that access to detainees was denied because it was not permitted to consult with defendants prior to the detention hearing.⁵⁴

Comment: Regarding information and access to counsel, the chair of the National Chamber of Advocates has confirmed that it is common that arrestees are not informed of their right to counsel or that they are informed only after 24 hours, thus giving the police time to put pressure on the arrestees. He also noted that it is common that defence counsel are given access to an arrested person only after a delay.⁵⁵ This is in line with the findings of the Albanian Helsinki Committee in a recently published study.⁵⁶

Many of those interviewed reported that they had been expressly denied access to a lawyer when requesting to have one present. On the question whether they requested to have a lawyer present during the interrogation, quite a few arrestees reported that they were not aware that they had this possibility, which is once more an indication that they had not been properly instructed about their rights. There thus seem to be various reasons for the delay in access to defence counsel, including lack of awareness about and information on this right.

Some examples of interviewee statements about access to counsel:

Male 1: *I was informed about the right to silence and to contact family prior to interrogation but only after the interrogation was I told about the right to have defence counsel.*

Male 2: *I was told I could have access to a lawyer once I had told them all the circumstances of the crime.*

Male 3: *I requested to have a defence lawyer but was told that I did not need one.*

Male 4: *I asked for a lawyer but was told that the police had no telephone.*

Another problem is that detainees are not provided facilities to contact counsel and that, even if contact facilities are provided, the defendants hardly know which lawyer to contact or how to get in touch with that lawyer. Instead, most detainees reported that it was their family who appointed a lawyer for them. This in turn presupposes that the defendant is able to contact her/his family immediately upon arrest, which is rarely the case. As some

⁵³ See Right to an efficient defence – Annex 2

⁵⁴ See Right to an efficient defence – Annex 3, question 16 b

⁵⁵ Meeting, 27 April 2005

⁵⁶ The Right to Free Legal Aid in Albania, p. 23, where it is said that only 50,09 % of the 350 interviewed detainees or convicted persons reported to have been informed about their rights

defendants do not have the financial means to pay for legal services, they are also at the mercy of the prosecution to have a defence lawyer appointed by the state. In cases where the detainee has been interrogated by the prosecutor before the detention hearing, which would normally be done if the detainee was arrested on the spot,⁵⁷ a defence counsel as a rule seems to be present. In many cases, however, this seems to be a mere formality and is not intended seriously to protect the interests of the defendant. There are cases where the defence counsel did not introduce him/herself to the detainee and where the defence lawyer never showed up again.

A further factor that limits access by defence lawyers is that visits can only take place weekdays between 9.00 and 15.00. This means that anyone apprehended after 15.00 on a Friday will be denied access to a defence lawyer at least until the following Monday at 9.00. This is in clear violation of the ECHR, the Constitution and the CPC. Some lawyers also state that they need authorization from the prosecutor to visit. It has, however, not been possible to identify the legal grounds for this practise. This could also easily be abused to deny access. While there is a legitimate need to ascertain that defence counsel requesting access to clients held at police commissariats or pre-trial detention sites are indeed who they claim to be and also that they are authorized to represent the person in question, this can easily be done by checking their identity and licence and by comparing this with the member directory of the Chamber of Advocates.

An example of ineffective representation by a defence lawyer

A juvenile detainee: After 12 days the investigator wanted me to sign something. I refused. The next day the prosecutor came and brought with him a defence lawyer. They said I had to sign and laughed. When I refused to sign the defence lawyer signed for me. I never saw this lawyer again. After some 30 days, my family appointed a defence lawyer for me.

Finally, even when a defence lawyer is appointed, it seems that the defence lawyers themselves rarely take the time to visit and consult with a detainee before the detention hearing. The reasons for this may vary but one reason might be that defence lawyers do not see the detention hearing as a real opportunity to challenge a deprivation of liberty.

To conclude, a person deprived of liberty in Albania does not get timely access to defence counsel and is in effect deprived of her/his right to challenge the deprivation of liberty. This problem is aggravated by the fact that decisions to detain on remand are rarely appealed.

⁵⁷ CPC articles 255 and 256

4. Initial interrogation of the arrested person

Legal framework

- The judicial police shall immediately inform the prosecutor of the arrest.
- With the consent of the arrested person, the judicial police are obliged, without delay, to inform the family of the arrested person. If the arrested person is a juvenile, the notification is compulsory and not dependent on the juvenile's consent.⁵⁸
- The prosecutor interrogates the arrested person in the presence of the selected or court-appointed defence counsel. The arrested person shall be informed about the charges and, again, of the right to remain silent.⁵⁹
 - o Note: International conventions, such as the ECHR, and the Constitution require immediate notification of charges in a language understood by the arrested person. The Constitution has precedence over the CPC provision that only obliges the prosecutor, not the arresting authority, i.e., the police, to inform the arrested person.⁶⁰
 - o According to the CPC a person/suspect who has not yet been formally charged is considered a “person to whom a criminal offence is attributed” or a “person under investigation”. After having been formally charged, the person is considered a “defendant”.⁶¹
- Although the CPC clearly states that it is the prosecutor who leads a criminal investigation, it gives some power to the judicial police to acquire statements from a person under investigation.⁶²

Analysis

The prosecutor leads the criminal investigation and, as a consequence, as soon as an arrest has been carried out, the judicial police shall inform the prosecutor and make the arrestee available to the prosecutor for interrogation.⁶³ Under the general provisions governing criminal investigations, however, the judicial police are given some power independently to interrogate persons under investigation.⁶⁴ Neither the CPC nor the Commentary gives any explanation as to how these provisions relate to each other.

Moreover, while article 296, which gives the judicial police authority to “collect data from a person under investigation”, starts with providing for the compulsory presence of a defence lawyer,⁶⁵ it goes on to state that at the crime scene or when there is obviously a crime they may collect data *necessary to continue the investigation* without the presence of a defence lawyer.⁶⁶ It ends by stating that the judicial police *may acquire statements*

⁵⁸ CPC art. 255

⁵⁹ CPC art. 256 and art. 38, section 3

⁶⁰ Constitution art. 31 and 4. See also the CPC Commentary p. 351

⁶¹ CPC art. 34, see also High Court Unifying decision, no. 3, dated 27 September 2005

⁶² CPC art. 277 and 296, section 3

⁶³ CPC art. 277

⁶⁴ CPC art. 296

⁶⁵ CPC art. 296, section 1

from the person under investigation, but their use in trial shall not be permitted, except when the content of the deposition is challenged. This seems to open the floodgate for the judicial police to interrogate any suspect without the presence of a defence lawyer and to use incriminating statements, possibly acquired using violence or other forms of coercion, to challenge later statements with a different content. On the other hand, this has to be compared with CPC articles 36 and 37, which expressly provide that statements made by the defendant during the investigation cannot be used against the defendant and that when a person “who is not [yet] held as a defendant” makes self-incriminating statements, the authority interrupts the person and informs her/him that the statements may lead to an investigation and invites the person to appoint a lawyer. Such statements may not be used against the person.

The practice of police to interrogate arrested persons without properly informing them about their rights and without the presence of defence counsel is thus clearly unlawful and also in breach of the right of a defendant not to incriminate herself/himself. The lack of coherence between various parts of the CPC is also deeply troubling and leaves the CPC open to abuse and malicious interpretations. As will be seen below, this initial interrogation by the police is frequently carried out using physical violence, which is yet another argument immediately to stop this practice.

5. Physical maltreatment by the police ⁶⁷

Analysis

Many arrestees, i.e., 35 out of 71 (49%) interviewed, 7 of whom were juveniles, stated that they were physically maltreated during either the arrest, the transport to the police station or the first interrogation at the police commissariat. None said they had experienced maltreatment after that. Some of the persons who allege that they were physically abused claim this was in order to make them admit a crime, while others state that they had no idea what the police wanted from them! In many cases, the beating was carried out with police batons or other tools and it seems that it was directed primarily to areas of the body that are normally covered, such as the legs. Some interviewees stated that they had clearly visible bruises on their faces and one stated that he had told the judge during the detention hearing about the maltreatment, but that the judge did not pay any attention to this.

⁶⁶ Ibid. section 2

⁶⁷ See also Amnesty International's Annual Report 2006, Albania. <http://web.amnesty.org/report2006/alb-summary-eng> [Accessed 27 May 2006] and Council of Europe's Report to the Albanian Government on the visit to Albania carried out by the European Committee for the Prevention of Torture and Inhuman Treatment or Punishment (CPT) from 23 May to 3 June 2005; CPT/Inf (2006) 24; Strasbourg 12 July 2006 <http://www.cpt.coe.int/documents/alb/2006-24-inf-eng.pdf> [Accessed 20 July 2006]

Some examples of mistreatment by police:

A woman arrested in her house: *They were pulling my hair, beating and punching me in my stomach and on my legs. They said insulting words to me.*

A minor arrested in the street: *I was maltreated at the police commissariat. There were 4-5 police officers there. They burned me with cigarettes on my right arm and one took an electric cable and beat me. They also took off my socks and put oil on my feet and then beat me on the feet with their batons. I had bruises everywhere. It went on for 2 to 3 hours. They wanted me to admit everything.*

A male: *It was the day after the arrest. There were seven police officers. My hands and feet were cuffed and I was only wearing my underwear. They were beating me with their batons everywhere, especially on my legs and thighs. Two police officers stretched my arms from the back. They also hit me over the nose with the butt of a gun and put the gun into my mouth and told me they would shoot me. I have a scar on my nose after that and I had bruises especially on my legs and thighs. I also have pain in my ribs and jaw since then. I don't know what they wanted. Maybe they wanted me to admit...*

A male: *The questioning lasted 5 to 6 hours without interruption and during this time I was beat up several times by different police officers.*

A male: *The questioning took 5 or 6 hours and everybody who felt like it was beating us. They beat us with pieces of wood. My t-shirt was covered in blood. Finally they forced us to sign a document.*

A male: *They beat me every time they did not like my answer and used mainly their hands and fists. At the end they wrote what they wanted and made me sign it.*

The practice of the police to mistreat arrestees is unlawful and in violation of international human rights standards. The upper levels of the Albanian police forces and the justice system have failed effectively to react against indications of police abuse, which discredits the system. There is an urgent need to undertake immediate measures to put an end to this practice and to address every instance where it has occurred. Here it should also be born in mind that any information collected from a suspect who is not yet formally informed about the charges is inadmissible at trial and moreover that any information obtained using coercion is inadmissible as such.⁶⁸

⁶⁸ CPC art. 296, section 3 and Constitution art. 32, section 2

6. Timing of the detention hearing

Legal framework

- According to the Constitution, a person deprived of her/his liberty shall be brought before a judge within 48 hours of the arrest and the judge shall decide on the pre-trial detention or release within 48 hours of receiving the documents.⁶⁹
- According to the CPC, however, where the court, prior to the arrest, has ordered the detention on remand, the arrested person shall be interrogated by the court no later than three days from the execution of the decision to detain on remand [verification hearing]. The purpose is to verify the necessity of the continued detention on remand. The prosecution and defence counsel shall participate.⁷⁰
 - o Note: This is a day longer than the Constitution provides and as the Constitution has precedence,⁷¹ 48 hours is the time limit.⁷²
- Where the prosecutor has decided on the arrest, the prosecutor shall *request*, within 48 hours, the evaluation of the measure by the court [evaluation hearing]. Failure to meet this time period voids the arrest. The court then sets the hearing as soon as possible.⁷³
 - o Note: Again, because the Constitution requires the person deprived of her/his liberty to be brought before a judge within 48 hours, this provisions is in violation of the Constitution. Thus, according to CPC, the prosecutor can file the case at the 48th hour, *after which* the court sets the hearing.
- The *evaluation hearing* is held in the presence of the prosecutor and defence counsel.
- The arrest loses its effect if the court has not announced its decision within 48 hours from the moment the prosecutor makes the request available to the court.⁷⁴

Analysis

The CPC does not correctly reflect the 48-hour time limit set by the Constitution. Thus, where an arrest has been ordered by a court, the CPC requires a judge to hold a verification hearing *no later than three days* after the arrest.⁷⁵ When the arrest was ordered by the prosecutor or made by the judicial police at their own initiative, the prosecutor, within 48 hours, shall *request* the court to evaluate the arrest, *after which* the court shall set the time for the evaluation hearing as soon as possible. In most cases, both procedures will result in the detention hearing being held *after* the expiry of the 48-hour time limit provided in the Constitution. If for example, the prosecutor submits the request at the 48th hour, it is virtually impossible for the court to hold a hearing before the expiry of the time period.

According to the European Court of Human Rights (European Court), article 5 of ECHR

⁶⁹ Art. 28, section 2

⁷⁰ Art. 248

⁷¹ Constitution art. 4

⁷² Discussions with numerous prosecutors around Albania have shown, however, that the 48-hour limit provided by the Constitution is not respected; instead only the CPC is applied.

⁷³ CPC art. 258

⁷⁴ CPC art. 259, section 5

⁷⁵ CPC art. 248

*“enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the state with [her/his] right to liberty. Judicial control of interferences by the executive with the individual’s right to liberty is an essential feature of the guarantee embodied in Article 5, paragraph 3, which is intended to minimise the risk of arbitrariness.”*⁷⁶ The language of the Court in the decision cited could be interpreted to indicate that article 5 is applicable only when the executive, i.e., the police, has made the arrest at its own initiative and not when the arrest was ordered by the judiciary. This interpretation is, however, in contradiction with the express wording of article 5, paragraph 3, of ECHR which states that “[e]veryone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly⁷⁷ before a judge...”. Moreover, while a decision to arrest may be made by a judge, the arrest is *de facto* carried out by the executive, i.e., the police, which means that the subsequent review by a judge still serves to control the executive. The right to be brought before a judge also gives the arrested person a possibility to challenge the deprivation of liberty (*habeas corpus*) and ensures that the judiciary reviews any arrest carried out by the executive. This review also serves as a minimal guarantee against disappearances and police abuse. It is well documented by Amnesty International that most disappearances and police violence occur during the initial arrest period.⁷⁸

The Albanian Constitution, the wording of which is based closely on the ECHR, requires that *the person* who has been deprived of her/his liberty (on suspicions of a criminal offence), be brought before a judge within 48 hours.⁷⁹ This judge is to decide upon the pre-trial detention or release no later than 48 hours from the moment he/she received the documents for review. The wording of the Constitution does not distinguish between arrests made at the initiative of the executive and those carried out based on orders from the judiciary, which means that the Constitution requires that *every person* deprived of her/his liberty (on reasonable suspicions of having committed a crime) has the right – *in person* – to see a judge within 48 hours of the arrest. Moreover, while the CPC does not grant a person arrested at the order of a court the right to see a judge within 48 hours, it does recognize the right of the person *to see a judge*, but only within three days. The *second* judge is to verify the conditions and security needs [on which the decision of the first judge was based].⁸⁰ That the principle of *habeas corpus* is recognized within the Albanian justice system is confirmed by the Commentary to the Criminal Procedure

⁷⁶ Brogan and Others v. the United Kingdom, 28 October 1988, para. 58

⁷⁷ Emphasis added

⁷⁸ See e.g., <http://web.amnesty.org/library/eng-344/index> [Accessed 27 May 2006]. See also the Office of the High Commissioner for Human Rights, Fact Sheet No.6 (Rev.2), Enforced or Involuntary Disappearances <http://www.unhchr.ch/html/menu6/2/fs6.htm> [Accessed 27 May 2006]

⁷⁹ The time starts running from the moment of arrest/apprehension, not from some later time, e.g., when the person is locked up at the police station. CPC art. 250 and CPC Commentary p. 354

⁸⁰ CPC art. 248 section 2 and CPC Commentary p. 337, 337

Code.⁸¹ So why is there this discrepancy between the Constitution and the CPC?

Article 258 of the CPC, requiring the prosecutor to *request* the court to evaluate the arrest, was changed in 2002, i.e., after the adoption of the Constitution.⁸² Previously the request for evaluation was to be submitted within 24 hours, which means that it was this change that brought the CPC into contradiction with the Constitution as far as arrests at the initiative of the police or the prosecutor are concerned. A possible explanation for the contradiction may be traced to the Constitutional Debates,⁸³ where the discussions regarding the time-limits to bring an arrested person in front of a judge reveals that it is not clear for the members of the *ad hoc* committee that the ECHR and the Constitution grant a right *to the person* deprived of liberty to be brought in front, i.e., *to see*, a judge. In the debates, no distinction is made between the *act* or *file*, and the *person*. A further indication that this may be the source of the contradiction is that in the Constitutional Debates, there is much discussion about the second time period according to which “[the judge] shall decide upon [the arrestee’s] pre-trial detention or release not later than 48 hours from the moment [the judge] receives the documents for review.”⁸⁴ This in effect means that if the documents arrived at the court after 10 hours, the decision has to be rendered no later than 48 hours after that, regardless of when the arrested person appeared in front of the judge.⁸⁵ This was probably not the purpose.

⁸¹ CPC Commentary p. 337, “The obligation to examine the person under arrest arises from the well-known principle of Habeas Corpus, according to which an arrested person should be heard by a judge....”. See further *ibid.*, p. 364, “In this way, a violation of the principle of Habeas Corpus results, since that principle requires the arrested person to *be brought physically* before a judge in order to give her/him the opportunity to be heard before deciding further detention..”[Emphasis added]

⁸² Law no. 8813, dated 13 June 2006, changing paragraph 1 of article 258

⁸³ During the drafting of the Constitution in 1998, a series of debates were held in the *ad hoc* parliamentary committee for the drafting of the constitution. These debates were recorded and the OSCE Presence in Albania has subsequently funded the transcription and editing of the debates, which were published in June 2006. The publication of the Constitutional Debates presents the legislative history of the Constitution and will enhance the understanding and proper implementation of the Constitution

⁸⁴ *Debati Kushtetues; Diskutimet në Komisionin Parlamentar për Hartimin e Projektkushtetutës (Tirana, 2006) [Constitutional Debates], Part I, pp. 85-98*

⁸⁵ See also CPC art. 259, section 5

Some excerpts from the Constitutional Debates⁸⁶

Un-identified voice: So it is about 48 hours in point 2, within which the relevant body may *bring him* to the judge, and also about another 48 hours starting from the moment in which *the detainee* goes to the judge...

Un-identified voice: Can we accomplish the transfer of detainee *documents* from the police to the prosecutor and, after the latter has studied and prepared them, pass them to the court for a final approval within the second 48 hours?...

Un-identified voice: Point 2 refers to an arrested person towards whom the police, within 48 hours, should take one of the following measures: to transfer *the documents* to the court through the prosecutor with a request that this person be transformed from a detainee to an arrestee, or to release him....

Un-identified voice: No one can be kept for more than 48 hours; if this continues after 48 hours, it means that this person's *file* is brought to the court for trial...

Un-identified voice: Does the suggestion according to which the police will be provided 48 hours to take steps *to bring the file* of the detainee to the court, and that the court is provided only 24 hours, sound reasonable to you?...

Un-identified voice: Within 48 hours the prosecutor must prepare *the file* of the defendant and send it to the court...

Un-identified voice: In order to evaluate whether the measure taken by the prosecutor is valid or not, maybe it would be better to put a phrase here which would further clarify the meaning of this article, stating that no one can be kept more than 48 hours before *his* presentation to the judge...

Un-identified voice: Different efforts are made to divide the time limits that other bodies have from the time of detention until the moment of transfer to the court of the *file* for evaluation of the measure. If you express it as Mr. Abdiu proposes, it seems that the prosecutor *brings the documents* for evaluation to the court at the last hour...

Arben Imami: In order to be in conformity with the European standards and the observations of the Council of Europe, our proposal is to remove from this article point 2: "no one can be kept detained for more than 72 hours", and that 48 hours in point 3 is provided for the detention before *the case* is brought to the court....

Pandeli Majko: So is it that within 48 hours *he* should be brought before the judge, and within 24 hours the judge should take the decision?...

Krenar Loloçi: There is unified practice by the Council of Europe according to which the first 48 hours are at the disposal of the police and the prosecutor, and after these 48 hours, when bringing *the documents* to the judge, the next 48 hours provided for the court to review *these documents* starts ...

Numerous conversations with prosecutors and judges in Albania also show that few are aware of the contradiction, and many stated expressly that they follow the CPC, not the Constitution. Interestingly enough, and despite the mentioning of the principle of *habeas corpus*, cited above, the Commentary does not mention the contradiction.⁸⁷

⁸⁶ Constitutional Debates, Part I, pp. 88-98

⁸⁷ The CPC Commentary p. 356

The pre-trial detention survey also confirms that only as an exception are arrested persons brought in front of a judge within 48 hours from the moment of apprehension, and that it is not infrequent that they are not brought in front of a judge until 4 or even 5 days after the arrest/apprehension. Thus, only thirteen per cent of the interviewed detainees stated that they had seen a judge within 48 hours of their arrest. Seventy-four percent stated that they had been brought before a judge later than 48 hours after the arrest, and out of these, 17 per cent stated that they had been brought before a judge later than three days after the arrest.⁸⁸ There is some indication that the longer delays may be the result of the malpractice of starting to count the hours not at the moment of arrest/apprehension, but only after registering and locking the person up at the police station.

7. The detention hearing

1. *The reasonable suspicion criterion.*
2. *The specific criteria*
 - a. *risk of destroying evidence,*
 - b. *risk of escape or,*
 - c. *risk of committing more crimes*
3. *The proportionality criterion*
4. *The necessity criterion*

The purpose of the detention hearing is to review the grounds and legality for a precautionary measure. This applies regardless of whether the arrest was ordered by a judge or prosecutor or it was carried out at the initiative of the judicial police. The review should thus consider whether, due to the particular circumstances of the case and the individual, there are reasonable grounds for suspicion, *as well as* whether there is a risk of destroying evidence, escape or further criminality. When the judge is satisfied that these conditions are met, the judge has to consider whether the measure is proportionate and finally whether any other measure, such as house arrest, bail or a reporting obligation would be sufficient.⁸⁹ The suspicion has to be based on facts and evidence and the establishment of the further conditions also has to be based on the facts in the individual case, not mere presumptions or beliefs of the prosecutor or the judge.⁹⁰ As one of the rationales for the detention hearing is to satisfy the right to *habeas corpus*, the hearing also has to give the arrested person a real opportunity to challenge the decision. Thus, at this hearing the arrestee can challenge the reasonable suspicion and/or allegations that the truthfulness of evidence is at risk, that there is a risk of escape or of further criminality, and also that the measure is proportional.

⁸⁸ See Pre-trial detention - Annex 4

⁸⁹ CPC art. 228, 229 and 230

⁹⁰ CPC Commentary p. 321

In practice, however, it seems that the detention hearing is mostly seen as a mere formality which in many cases is over within a few minutes. Many of the interviewed detainees thus reported that the judge only read out their personal information and the charge, sometimes asked whether they admitted the charge, and then rendered the decision. Regarding the decision, only 6 of the detainees interviewed (8 percent) in the pre-trial detention survey reported that the reasons for the decision to detain on remand were mentioned by the judge when the decision was rendered. Forty-five per cent, i.e., fewer than half of those interviewed, stated that they were informed that the decision could be appealed. To ensure that the arrested person can make use of her/his rights, however, the judge conducting the session should explain to the defendant in what kind of session he/she is participating, her/his rights, the reasons for the deprivation of liberty and the possibility to appeal either the decision causing the arrest (if the hearing is a *verification hearing*) or the decision following the *evaluation hearing*.

Given that defence lawyers in many cases see their clients for the first time *during* the detention hearing, it may not be surprising to find that their role during the hearing seems to be rather passive. While defence lawyers occasionally argued that a house arrest would be sufficient, there was no indication that the deprivation of liberty was substantially challenged in any of the cases reviewed.

8. Content of the decision; appeal & revocation

Legal framework

Decisions to detain on remand:

- The decision to detention on remand shall include the personal data of the defendant, the charge, facts and articles of the penal code, and the reasons for imposing the measure.
 - When a person is detained on remand because there is a risk that evidence will be destroyed, the duration of the measure shall be specified.⁹¹
- The prosecutor, the defendant and the defence counsel can appeal the decision directly to the High Court. The appeal has to be lodged with the secretary of the court that rendered the decision, within ten days from the execution or the notification of the decision.
- Within five days of receiving the appeal, the file shall be delivered to the court [i.e., a Court of Appals or the High Court] which will examine the appeal within an additional ten days, after having given the parties notice at least three days in advance.⁹²
- The prosecutor and the defendant can, at any time, request the revocation or replacement of the precautionary measure. The court is to examine such requests within five days. The court can also re-consider the measure on its own initiative.⁹³

⁹¹ CPC art. 245

⁹² CPC art. 249

⁹³ CPC art. 260

- If the time limits provided for the *evaluation* or *verification hearings* are not respected, the arrest will “lose its effect”, i.e., become null and void.⁹⁴ When the arrest “loses its effect” the court shall decide on the release of the defendant.⁹⁵

Analysis – Decisions to detain on remand

As mentioned above, a decision to detain on remand shall, among other things, contain a summary description of the facts, including reference to the criminal offence of which the arrested person is suspected, and a presentation of the special grounds and information that legally justify the remand order. When remand has been ordered to ensure the truthfulness of evidence, the duration of the remand order shall also be indicated.⁹⁶ If the arrest was carried out at the initiative of the prosecutor or police, the court *issues a decision for evaluating* the remand order.⁹⁷ Although not clear from the CPC, it can be assumed that the decision should be in accordance with what was outlined above. When the arrest was ordered after a court decision, the *verification hearing* will only be reflected as an entry of the date and time of the hearing in the court records.⁹⁸ The “original” court decision can be appealed within ten days from its execution or notification.⁹⁹

General comments

For the purpose of this study ten decisions to detain on remand have been analysed.¹⁰⁰ Apart from one case where no facts were presented and the defendants were released, all decisions explain – at least to some extent – the facts of the case. Seven of the decisions also discuss whether there is a reasonable suspicion against the defendants, which is the first criterion [*reasonable suspicion criterion*] which needs to be fulfilled in order to detain someone on remand. When it comes to the second group of criteria [*specific criteria*] under the Constitution and the CPC, only three (nos. 3, 5 and 8) out of the nine decisions confirming the arrest, refer to any of those criteria. Those three decisions also refer to some of the further criteria specified in articles 229 and 230 of the CPC [*proportionality and necessity criteria*]. Only one decision (no. 5) refers to all the criteria necessary to detain someone on remand. While Decisions no. 1, 4 and 6, refer only to the *necessity criteria*, Decision no. 2 refers only to it being a grave offence, which is a *proportionality criterion*.

Three decisions (no. 1, 2 and 6) argue that the need for further evidence or investigation is a reason to detain the person on remand, while one decision (no. 8) argues that the tense situation between the families and the commonness of the crime are reasons for detention. None of these are legitimate reasons to deprive anyone of their freedom.

In Decision no. 9, concerning the high-profile arrest of Leonard Koka, the brother of the

⁹⁴ CPC art. 261

⁹⁵ CPC art. 262

⁹⁶ CPC art. 245

⁹⁷ CPC art. 259, section 3

⁹⁸ CPC art. 115, see also the CPC Commentary, p. 337

⁹⁹ CPC art. 349, section 1

¹⁰⁰ For a table providing basic information from the decisions, see Pre-trial detention - Annex 3

Socialist Party (SP) Mayor of Durrës, Lefter Koka, it is noteworthy that, apart from the reasonable suspicion, *no other reasons for the arrest* are cited in the decision. In Decision no. 10, concerning two defendants, one of them a 16-year-old minor, the facts related to the sequestration of some cannabis are explained, but not how the arrest came about. In this decision *there is a discussion neither about the reasonable suspicion nor about other reasons for the arrest*; articles 228 and 229 of the CPC are just mentioned without any further explanation.

Only one of the three decisions that do refer to the *specific criteria* explains why the individual circumstances of the case were such that one or more of the *specific criteria* were fulfilled. Thus in Decision no. 3, against a defendant who was suspected of trafficking and threatening a woman who subsequently reported him to the police, the fact that he had been abroad several times before was taken as an argument that he might abscond. The judge also reasoned that there was a risk that the defendant would commit further crimes against the complainant/victim. This decision also discusses the *proportionality criteria*. The other two Decisions (nos. 5 and 8) do not give any explanation as to why the individual circumstances indicate that the defendants might escape or destroy the evidence.¹⁰¹

Detention of more than one defendant

In Decisions 1, 2, 4, 6, 7 and 10, several defendants are suspected of having taken part in the same criminal act. While Decisions 1 and 2 are – correctly – given separately, the other decisions cover several defendants; Decision 6 includes five defendants. In none of the decisions including more than one defendant are the circumstances specific to each defendant explained; instead all are treated as one. The right not to be arbitrarily deprived of one's liberty is an individual right. As a consequence, the court has to be satisfied that the individual circumstances of each person deprived of her/his liberty are such that there are grounds for detention on remand. Therefore it is not an acceptable practice to treat several defendants as one.

Arrests in flagrancy

As has been explained at the beginning of this chapter a *flagrancy* situation is when someone is caught committing a crime, caught after an uninterrupted chase from the crime scene or caught with items that show he/she has committed a crime.¹⁰² If the other conditions are in place *and* the crime can be punished by up to at least two years of imprisonment, the judicial police have the right to arrest on their own initiative.¹⁰³ From the examples below, however, it appears that these procedural requirements are not always met and that judicial police carry out arrests at their own initiative even when there is not a *flagrancy* situation.

Decisions 1 and 2 concern the same offence: trafficking of women for prostitution. From

¹⁰¹ For further reading about the reasoning of decisions to detain on remand, please see the Commentary pp. 323 *et seq.*

¹⁰² CPC art. 252

¹⁰³ CPC art. 251

the explanation of facts, it appears that the defendant in Decision no. 1 (defendant 1) was caught together with a trafficked woman on 30 January 2003. The woman testified that she had been “taken” by defendant 1 from defendant 2 (Decision no. 2). She then traveled together with defendant 1 to Durrës, Tirana and Kosovo, after which they returned to Albania and were caught. While it seems clear that defendant 1, who was caught together with the woman, was caught in *flagrancy*, this does not seem to be the case regarding defendant 2.

In Decision no. 3, it appears that the crime and the arrest did not happen the same day, which means that it was probably not a *flagrancy* situation. In the explanation of facts in Decision no. 5, which concerns a drug offence, it is stated that some cannabis was found during a house inspection on 18 February 2003. Some witnesses later testified that they had bought cannabis from the defendant. The defendant was arrested on 2 April 2003. Why this is considered a *flagrancy* situation is not explained. In Decision no. 7, the judicial police arrested two persons after the police had video recorded a television show where one or both of these persons were seen taking bribes. This was obviously not a *flagrancy* situation. Decision no. 10 also refers to an arrest in *flagrancy*. It concerns two defendants, an adult and a minor. The decision explains that some cannabis had been sequestered in a shop owned by the adult defendant, who identified the minor as the owner of the drugs. From the decision it is not clear when the minor had left the drugs in the shop or where he was arrested. It is therefore not clear that the arrest of the minor was in fact an arrest in *flagrancy*.

The death of Sokol Halili (Decision no. 8)

On 22 June 2005, Sokol Halili, 36, was arrested on the spot after a fight where he stabbed the victim in the stomach and shoulder with a knife. During the detention hearing on 24 June, Sokol Halili suffered from an epileptic seizure.¹⁰⁴ Regardless of this, he was detained on remand. As the detention facility was unable to deal with his continued epileptic seizures, the prosecutor submitted a request to replace the detention on remand with house arrest. On 27 June, the court decided to accept the request and to release Sokol Halili to house arrest. Before the court had time to act, however, Sokol Halili died in the pre-trial detention centre.

In the decision to detain Sokol Halili on remand, after establishing that there was a reasonable suspicion, the court found that due to the severe punishment foreseen (3 – 10 years) there was a high risk that Sokol Halili would hide from the investigation and the trial.¹⁰⁵ The court did not explain, however, what concrete and specific circumstances in Sokol Halili’s case substantiated this alleged risk of flight. The decision then argues that the seriousness of the fact, the age of the arrested, the commonness of the crime, the sanctions provided and the tense situation between the families makes detention the only

¹⁰⁴ This was confirmed by both the Durrës police and the judge dealing with the case

¹⁰⁵ While this is not a very high sentence in the Albanian context, this kind reasoning would result in an “automatic” detention on remand in any case where the crime carries a high sentence, thus raising the question why the CPC does not simply state this as a rule.

suitable security measure. Concerning Sokol Halili's claim that he was sick, for which reason house arrest would be more suitable, the court found that he had not brought any evidence to support this. Therefore the court did not find the argument well-founded. The epileptic seizure during the detention hearing was not mentioned.

Considering the court's argument that Sokol Halili had not supported his statement about his health with evidence, it should be borne in mind that a defendant has *no burden of proof* at a detention hearing. *It is the court that is obliged to ensure* that all the criteria to deprive a person of her/his liberty are fulfilled. The law also expressly states that detention on remand cannot be ordered against *a person under particularly grave health conditions*, and this should further be taken into account when evaluating whether the measure is proportionate.¹⁰⁶ Moreover, the epileptic seizure Sokol Halili suffered during the detention hearing should have been enough to indicate that this was a person with grave health problems. Therefore the possibilities to treat Halili while detained on remand should have been taken into consideration.

The released defendants (Decision no. 7)

Decision no. 7 concerns two customs officers suspected of *receiving bribes*, i.e., **a corruption case**. The arrest of the officers came after the *Fiks Fare* television programme showed one of the customs officers agreeing, in exchange for some money, to allow a person (the journalist) to cross the border to Greece with a load of cigarettes and without paying any customs duties. In the show, the journalist is seen handing over something, which the customs officer puts into his pocket. The police recorded the television show on a videotape and the prosecutor presented the tape at the detention hearing as evidence to support the "reasonable suspicion".

The court, however, rejected the evidence and released the suspects, reasoning that the videotape *did not constitute evidence*, as it had not been collected in accordance with articles 198 - 226 of the CPC, and since the prosecutor had not requested any authorization or other evaluation of the recording. While the Court of Appeals upheld this line of reasoning, it was rejected by the High Court.

Under Albanian law, evidence is information about facts and circumstances relevant to a criminal offence that has been obtained from sources provided in the law and in accordance with the rules therein.¹⁰⁷ Under the section titled "documents", article 191 of the CPC expressly specifies that documents representing facts, persons or items through photographing, *filming*, audio-recording or any other means is permitted. The following chapter, in articles 198 – 226 specifies the "means of searching for evidence". Articles 221 *et seq.* deal with surveillances and specify that interception of communications by a person is permitted only under particular circumstances, which are not relevant here. The rationale behind these provisions is to protect individuals against unjustified

¹⁰⁶ CPC art. 230, section 2 and 229, section 2

¹⁰⁷ CPC art. 149

interferences by the state into their private sphere. These provisions have nothing to say about the recording of crimes under other circumstances, such a shopkeeper's camera recording shopliftings, a private filming of a street fight, a bank robbery or, as in this case, a journalist (provoking and) filming a crime.

Comment: With the rapid increase in the numbers of mobile telephones with cameras and audio-recording facilities, it can be expected that this kind of evidence may become increasingly common and thus come to play an important role in fighting and revealing crime.¹⁰⁸ While the possibility of manipulating recordings should not be overlooked, a filmed, photographed or audio-taped record of an event is normally the best possible source of evidence, as it simply shows the facts as they were at a particular moment in time. The discussion to be had, however, is whether this is desirable, and therefore whether it should be permissible, to bring as evidence recordings or photographs taken of persons who were not aware of the fact that they were being recorded. At present, there is no legislation regulating this matter. The other discussion to be had is whether the crime in this particular case was provoked or only simulated.¹⁰⁹ Finally, if it is concluded that secret recordings, such as those commonly used by the *Fiks Fare* television programme, are infringing on the right to privacy, legislation to regulate the matter should be adopted and instances of abuse should be prosecuted.

For the case discussed here therefore, it could be argued that the videotape should have been sufficient evidence to show – at least – a *reasonable suspicion*. Then it is of course an open question whether any of the other criteria to detain the two suspects were at hand.

As mentioned above, the decision in this case was appealed all the way to the High Court, which came to the conclusion that while the reasoning by the lower courts was incorrect, the videotape was not enough to prove a reasonable suspicion! The court states that “it is true that the videocassette serves as grounds for starting a criminal case, but it cannot serve as evidence for substantiating a reasonable suspicion against the accused. This means that the accusatory body, based on this, should have introduced other evidence in accordance with the procedural law.”¹¹⁰ In line with what has been stated above, this ruling is problematic since it in effect serves to undermine the use of any recordings, e.g., intercepted telephone calls or films from surveillance as evidence, without discussing the main problems, i.e., how to deal with private recordings and whether this was a provoked crime which would not have happened otherwise.

After charges were dropped against one of the customs officers, the case was brought to court. At trial before the district court, *the journalist was heard as a witness*. The court, however, referred to the High Court decision and found that since the prosecutor had

¹⁰⁸ Consider for example the effect of the video filmed sequences of the Srebrenica massacre, that were revealed on 2 June 2005, http://en.wikipedia.org/wiki/Srebrenica_massacre [Accessed 27 April 2006]

¹⁰⁹ Compare with CPC article 294/a

¹¹⁰ High Court decision no. 37, 8 April 2004

not brought any other evidence [i.e., *apart from the tape and the journalist*] the guilt of the defendant was not established. Moreover, the court reasoned that since there was no connection between the cause and the effect [no cigarettes were smuggled across the border], the officer should be declared not guilty.

Although not surprising considering the High Court decision, the reasoning regarding the evaluation of the evidence presented is questionable, not least considering that the tape apparently was supported by the witness statement by the journalist. Notwithstanding the lack of regulation on how to deal with private recordings, it should be noted that apart from DNA *and* a witness, it is hard to imagine any combination of evidence more sound than what was presented in this case, i.e., *a filmed sequence revealing a set of facts and a witness confirming what is shown*. With regard to the second line of reasoning, i.e., that the “crime” had no consequences [since no cigarettes crossed the border without duties being paid], it is also questionable. Article 260 of the Criminal Code defines the crime of “receiving a bribe” as:

[r]eceiving remuneration, gifts or other benefits by a person holding state functions or public service and during their exercise, in order to carry out or to avoid carrying out an act related to the function or service, or to exercise his influence toward different authorities in order to provide to any person favours, gratuities, jobs and other benefits,...

The crime of bribery is thus completed with the reception of the bribe and regardless of whether the official actually performed the promised action or not. If the reasoning of the court is accepted, it would render the whole criminal corruption legislation null and void, as *any official would be free to accept any bribes, as long as the official did not fulfill her/his part of the corruption deal*! Now, if the crime brought before the court was a smuggling case, the end result would of course be different. Smuggling is an *effect crime*, and penalizes persons who bring, or attempt to bring, goods across borders without paying duties or without proper permissions. Therefore, if no cigarettes were crossing, or were about to cross, a border, there would be no crime. But, again, it could be argued that the corruption crime in this case was provoked, in which case at least the *outcome* of the case would be correct.

Finally, the above decision by the High Court and the decisions of the first instance court reveal a need to discuss the *standard of proof* in the Albanian legal context. The standard of proof is the level of proof required in a legal action to convince the court that a given proposition is true. The degree of proof required depends on the circumstances of the proposition.¹¹¹ What is the standard of proof needed to substantiate, for example, that a person is under a reasonable suspicion or that he/she is guilty of a criminal offence? The Albanian Criminal Procedure Code seems to identify six levels of suspicions, each

¹¹¹ See, e.g., http://en.wikipedia.org/wiki/Burden_of_proof [Accessed 27 May 2006] or *Black's Law Dictionary*, Bryan A. Garner, Editor in Chief (eighth edition)

of which should have a matching level of proof needed to convince the court that the proposition or allegation is likely to be true. In other words, how much evidence is needed to prove each level? The levels are:

- | | |
|----|--|
| 1) | a person to whom a crime is attributed, ¹¹² |
| 2) | a person under investigation, ¹¹³ |
| 3) | a defendant, ¹¹⁴ |
| 4) | a reasonable suspicion, ¹¹⁵ |
| 5) | a request for trial ¹¹⁶ and finally |
| 6) | a guilty verdict ¹¹⁷ |

While a scrutiny of the CPC reveals these levels, there is no mention of how much evidence is needed to substantiate each level. The standard of proof generally accepted internationally for a guilty verdict is that guilt has to be *proved beyond a reasonable doubt*. In the Albanian context neither the CPC nor the CPC Commentary defines the standard of proof for a guilty verdict. For an acquittal, however, the CPC Commentary explains that “there is no evidence proving without doubt that the offence was committed by the defendant.”¹¹⁸ Failure to provide more guidance may make it difficult for the justice system to apply the correct standard.

9. Continued scrutiny over the legality of detention on remand

Where a person is detained on remand, the CPC requires the prosecutor to inform the judge *every two months starting from the execution of the decision of detention on remand* regarding the detained person. The information is to be submitted in writing and to contain information on the status of the proceedings, the questioning of the defendant and other persons, together with a summary of the information received and copies of documents in the file. Upon receipt of the information, the judge may revoke or replace the precautionary measure.¹¹⁹ *The purpose of this provision is to ensure – through the continued control by the courts over cases where a person is detained on remand – that the investigation be conducted with special diligence and the trial be held within a reasonable amount of time.*¹²⁰ This is also in line with the requirement under the ECHR periodically to examine the lawfulness of an arrest in view of the fact

¹¹² CPC art. 287, see also the High Court Unifying Decision no. 3, 27 September 2005

¹¹³ CPC art. 293 section 1, 295 section 1, 296 section 1 and 2, 302, 303, section 3, and 308

¹¹⁴ CPC art. 34

¹¹⁵ CPC art. 228, section 1

¹¹⁶ CPC art. 327 and 331

¹¹⁷ CPC art. 390

¹¹⁸ CPC Commentary, p. 511

¹¹⁹ CPC art. 246, section 6

¹²⁰ See also the CPC Commentary pp. 364-365

that, with the passing of time, an initially lawful arrest may become unlawful.¹²¹ In the Guide to the Implementation of Article 5 of the European Convention on Human Rights, it is expressed as follows:

A final point on this aspect of judicial supervision is the periodical review where the judge decides that continued detention is justified. This necessarily follows from the point already made that circumstances can change and, while grounds for detention may exist in the early stages of an investigation, these may no longer be compelling at a later stage. It is incumbent on the detaining authorities, therefore, to submit the case for detention to judicial supervision at regular intervals and these ought not to exceed a month or two. Without this continuing supervision – which must be as rigorous as that at the initial examination – a person could be kept in detention when this is not compatible with the Convention.¹²²

Note: The study of a number of case files and discussions with prosecutors and judges at various courts in Albania show that this rule is not adhered to. One explanation forwarded is that since the failure to inform has no consequences, the prosecutors see no need to respect the rule. Thus one of the control functions provided by the CPC to ensure that investigations be carried out with special diligence is put out of play. Although the main responsibility lies with the prosecutors, it should be noted that where the prosecutors fail to inform the court, the judge in charge should make inquiries and thus re-enable the control function.

10. Alternatives to detention on remand

As has been discussed in this chapter, deprivation of liberty is an infringement of a basic human right and should be used only as a last resort and in accordance with strict procedures.¹²³ This also means that most persons suspected of a criminal contravention or a criminal offence should be tried without any security measure being imposed on them. Furthermore, when there is a need to take measures to secure the presence of the defendants, there are other security measures available which should be considered before deciding to detain a person suspected of a crime on remand. The Albanian CPC provides for the following security measures (*personal remand orders*):¹²⁴

- a) prohibition to leave the country;
- b) obligation to appear before the judicial police;
- c) prohibition or obligation to reside in a certain place;
- ç) property security (bail);
- d) house arrest;
- dh) remand in custody (detention on remand);
- e) temporary hospitalisation in a psychiatric hospital.

¹²¹ See for example the European Court case of *Herczegfalvy v. Austria*, 24 September 1992, p. 75

¹²² CoE Handbook No. 5, pp. 58-59

¹²³ CPC art. 230 section 1

¹²⁴ CPC art. 232

According to the statistical figures posted on the Prosecutor General's webpage in 2004, there were 13,143 new proceedings against 8,419 defendants, out of whom 2,753 or **30.5 per cent were detained on remand**.¹²⁵ According to the Office of the Prosecutor General, they do not collect statistics indicating the use of other security measures. As a comparison, in Sweden, 104,157 persons were notified that criminal proceedings had been initiated against them in 2004. Of these 11,237 persons, or just under 11 per cent were detained on remand, whereas 203 persons, or approximately 0.2 per cent were under other security measures.¹²⁶ Of course the better infrastructure in Sweden, such as the civil registry, the address system, the telephone directory and better border control, may explain part of the discrepancy, but the difference is still significant and in comparison the use of detention on remand in Albania seems very high.

11. Time periods of pre-trial detention

The Albanian Criminal Procedure Code sets out the maximum duration of pre-trial detention, with several possible maximal limits depending on how serious the crime in question is. If these time periods are exceeded, the pre-trial detention "loses effect" and the court shall decide the immediate release of the defendant.¹²⁷ Even if the defendant is released, the investigation may continue.

Legal framework

- Both the Constitution and the ECHR grant a person in detention on remand the right to a trial within a reasonable time or release pending trial.¹²⁸
 - Whereas the ECHR states that the release may be conditioned by guarantees to appear at trial, the Constitution makes bail a condition for release. This can be questioned, since it may exclude a person without financial means from this right.
- According to the European Court, the reasonable time-guarantee in the context of article 5 means that the authorities must display "special diligence" in the conduct of proceedings in cases where the defendant is in detention on remand.¹²⁹
- This means that any periods of inactivity must be objectively justifiable. Examples of objective justifications are obtaining expert statements, hearing witnesses abroad, and evaluating the mental condition of the defendant. The workload of the prosecutors or the police, judges being on holiday, etc. are not objective justifications.

¹²⁵ www.pp.gov.al/alb/raporte/rap05.html [Accessed 14 June 2006].

¹²⁶ As for other security measures, 102 persons were under an obligation to report to the police, 23 persons were under a travel restriction, whereas 78 persons were under the obligation to report to the police *and* a travel restriction. The rest were tried on their own recognizance. Statistics received from the Swedish Prosecution Office, <http://www.aklagare.se/nywebb3/Filarkiv/AR2005slutligLaguppl.pdf> [Accessed 27 May 2006]; *see also* http://www.bra.se/extra/pod/?action=pod_show&id=21&module_instance=11 [Accessed 27 May 2006].

¹²⁷ CPC articles 263 and 262

¹²⁸ Constitution art. 28, section 3, ECHR art. 5, section 3

¹²⁹ *See, e.g., Labita v. Italy*, 6 April 2000, *Contrada v. Italy*, 24 August 1998 and *I.A. v. France* judgment, 23 September 1998

Comment: According to the law on the organization of judicial power, judges are entitled to 30 days of annual leave which is to be taken in July and August.¹³⁰ The law further states that judges who perform urgent duties during this period have their annual leave during another period and are given five additional days.¹³¹ Based on this, all courts in Albania basically close down from some time in the second half of July until the first week of September. For example, in 2005, the court holiday lasted almost seven weeks, starting on 21 July and ending on 4 September. During the court holidays, detention hearings are held but, apart from that, *no trial sessions* are conducted. This violates the principle of the uninterrupted trial in article 342 of the Criminal Procedure Code, which provides that, for good reasons, trials can be postponed *up* to fifteen days. It also violates the right of defendants who are detained on remand to have their proceedings carried out with “special diligence”. When asked whether the summer holidays suspend time periods for pre-trial detention, judges have given varying and vague answers, indicating that there may not be a uniform practice in this respect. When discussing the issue of judges’ holidays, reference is frequently made to the Italian system. In Italy, as in Sweden, trials in cases where defendants are detained on remand do, however, continue throughout the holiday season.¹³² This means that, in Italy as well as in Sweden, during the holiday period the only trial sessions that are *not* conducted are those where defendants are tried on their own recognizance and those in civil cases.

Albanian legislation provides for maximum time periods of detention on remand for each stage of the proceedings. The maximum time periods vary depending on the severity of the crime. While this does not *per se* create a conflict with the ECHR, it should be kept in mind that the reasonable time period is evaluated in light of the particular circumstances of a case and does not exempt the authorities from their obligation to limit any deprivation of liberty to the shortest possible time and to proceed with particular diligence. Thus a three year pre-trial detention may be reasonable if there are *no periods of inactivity* and the time has been absolutely and objectively necessary to conclude the trial.

In determining what is “reasonable”, the Court has never accepted the idea that there is a maximum length of pre-trial detention which must never be exceeded since this would involve an assessment *in abstracto* and a judgment must always take into account all the special features of each case. Any period, no matter how short, will always have to be justified. The Court’s jurisprudence has proved the significance of the particular circumstances of a case. While periods in excess of a year were considered excessive, periods between two and three years were found both acceptable and objectionable. A similar difference in the view can also be seen of periods between three and four years. Periods beyond five years have not been found to be justified.¹³³

¹³³ Council of Europe, Handbook No. 5: The right to liberty and security of the person. A guide to the implementation of Article 5 of the European Convention on Human Rights, (Strasbourg: Council of Europe, 2002) [CoE Handbook No. 5], p. 35

¹³⁰ Law no. 8436, dated 28 December 1998, “On the Organization of the Judicial Power in the Republic of Albania” [Judicial Power Law], art. 39, section 1

¹³¹ *Ibid.*, article 39, section 2

¹³² For Italy: (Regio Decreto) no. 12/1941, article 91 states that during the holiday season, first instance courts and appellate courts continue hearing criminal cases where defendants are detained on remand as well as other urgent criminal cases. In Sweden, the time-periods set for hearing criminal cases where a person is detained on remand, ensure that these cases are continuing even during the holiday season

Detention <i>loses effect</i> when the following time periods have expired ¹³⁴				
STAGE	MINOR OFFENCE	MAXIMUM UP TO 10 YEARS IMPRISONMENT	GAP*	MINIMUM AT LEAST 10 YEARS, OR LIFETIME
Period between arrest and indictment/acts submitted to court	3 months	6 months		12 months
Period between indictment and sentence in first instance	2 months	9 months		12 months
Period between first instance and appellate court sentence	2 months	6 months		9 months
If the case is sent for retrial by the High Court or the Court of Appeal, the various time periods start running again from the date of the decision. ¹³⁵				
Maximum duration of pre-trial detention, including prolongations ¹³⁶	10 months	2 years		3 years
The pre-trial detention time may not exceed half of the maximum punishment provided for the crime. ¹³⁷				

NOTE: There is a gap here. Some crimes are punishable by five to fifteen years¹³⁸ or seven to fifteen years¹³⁹ of imprisonment, in which case there is neither a maximum of up to ten years nor a minimum of at least ten years. In this case – not least considering the obligation to proceed with *special diligence* when defendants are detained on remand – the solution most favourable for the defendant should be chosen. That is, the time periods provided for crimes punishable with a maximum of up to ten years of imprisonment should be used. This gap is confusing and leaves room for abuse and needs to be revised. This once more indicates an urgent need for a revision of the CPC.¹⁴⁰

¹³⁴ CPC art. 263. In the versions of the CPC published in 2002 and 2004 by the Centre for State Publications, article 263 sections 6 b incorrectly stated “minimum” instead of “maximum”, whereas section 6 c incorrectly stated “maximum” instead of “minimum”, which made these sections inconsistent with sections 1, 2 and 3 (b) and (c). See Official Journal no. 2, February 2000

¹³⁵ See the High Court Unifying Decision no. 6, 11 November 2003

¹³⁶ CPC art. 264

¹³⁷ CPC art. 264 section 3, see also High Court Unifying Decision no. 6, 11 November 2003

¹³⁸ Art. 88, section 2; art. 101, section 1; art. 102, section 2; art. 104; art. 110/a, section 1; art. 138/a, section 2; art. 139; art. 141/a, section 2; art. 151, section 3; art. 153, section 3; art. 154, section 3; art. 155, section 3; art. 183, section 2; art. 202, section 2; art. 203, section 2; art. 215; art. 220; art. 234; art. 278, section 3; art. 284/c, section 3; art. 323, section 2; and art. 333

¹³⁹ Art. 100, section 1; art. 103, section 2; art. 114/b, section 1; art. 278/a, section 1; art. 282/a, section 1; art. 283, section 2; art. 284, section 3; art. 284/c, section 2; art. 287/a, section 2

¹⁴⁰ See also the discussion below about the High Court Unifying Decision no. 6, 11 November 2003, attempting to clarify how these provisions should be interpreted

- The time periods may be prolonged by at most half of the maximum period provided for the various types of offences. The prolongation is decided by the court upon the request of the prosecutor and after having heard defence counsel, in the following cases:¹⁴¹
 - o When, anytime during the proceedings, expertise has been requested regarding the defendant's mental condition
 - o When, during the *preliminary investigation*, the time limit is about to expire in a particularly complex case and it is absolutely necessary from a security perspective, the prolongation may be done only once and may not exceed three months.
- The time periods may be suspended by the court:¹⁴²
 - o Because of **unjust** acts or requests by the **defendant or her/his defence lawyer**, except when the request is made to provide evidence or
 - o When the judicial examination is postponed as a result of **defence lawyers' failure to appear** or when the defendant has been **abandoned** by her/his defence lawyer.¹⁴³
- The period of pre-trial detention shall be considered when deciding the sentence. One day of pre-trial detention is counted as one day and a half of imprisonment.¹⁴⁴

12. Suspension of time-periods for pre-trial detention

As has been stated above, when presenting the legal framework, time periods for detention on remand may be suspended because of unjust acts or requests by the defendant or her/his defence lawyer or when the judicial examination is postponed as a result of defence lawyers' failure to appear or when the defendant has been abandoned by her/his defence lawyer.¹⁴⁵

The purpose of this provision is to stop the practice of some defendants and defence attorneys to stall the proceedings in order for the time period of detention on remand to expire and the defendant to be released.¹⁴⁶ In some cases, the fact that a day of pre-trial detention is calculated as a day and a half of the imprisonment may also be an incitement to prolong the trial, although the appalling conditions of some of the pre-trial detention centres should be an effective bar against this.¹⁴⁷

¹⁴¹ CPC article 264

¹⁴² CPC art. 265

¹⁴³ See the discussion further on regarding the practice of suspending pre-trial detention time periods

¹⁴⁴ CPC art. 238, section 2 and Penal Code art. 57

¹⁴⁵ CPC art. 265

¹⁴⁶ CPC Commentary p. 372

¹⁴⁷ See further the chapter regarding conditions at detention centres

The time periods provided for pre-trial investigation and detention on remand should be seen as instructions to the prosecution and the courts to complete their respective part of a *trial*¹⁴⁸ within a limited amount of time. These provisions are construed so as to treat cases implicating more than one defendant as *one case* where the same time periods and rules apply. When the maximum time period of pre-trial detention for one defendant, but not all defendants, expires, the coherence of the case is broken and that defendant has to be released regardless of the situation for the other defendants. This is, of course, inconvenient for the courts. While it is not possible completely to avoid defendants having to suffer from delays caused by co-defendants or their defence counsel, there is a possibility, as a last resort, of separating proceedings for multiple defendants when the time period for one or more defendants has been suspended.¹⁴⁹

In practice, however, cases are not separated but pre-trial detention periods are suspended for *all* defendants involved in the proceedings, regardless of which defendant or defence lawyer has acted *unjustly* or been absent. As has repeatedly been noted by the High Court, this practice is unlawful and serves to punish defendants for acts *not* attributable to them.¹⁵⁰ It has also been noticed that the practice of suspending detention time is used – improperly – in cases where defence lawyers are absent *for good reasons*. Suspensions should be limited to the shortest possible duration, meaning they must last only until the cause for the suspension has ceased to exist.¹⁵¹ In practice, suspensions are ordered until the next court session, which normally is not scheduled until two weeks later.¹⁵² This is a clear violation of this obligation. When discussing these practises with some judges, prosecutors and lawyers, they have indicated that they are aware of (and accept) this abuse of the law.

¹⁴⁸ Here “trial” is used in the meaning given by the European Court when calculating the relevant time period; see *Deweert v. Belgium*, 27 February 1980, paras. 42, 44 and 46

¹⁴⁹ High Court Unifying Decision no. 365, 7 November 2000, High Court Unifying Decision no. 6, 11 November 2003; see also CPC Commentary p. 371

¹⁵⁰ High Court Unifying Decision no. 6, 11 November 2003

¹⁵¹ According to CPC art. 342, section 1, a trial should be uninterrupted and can only be postponed under particular circumstances – and only up to 15 days. See the also the chapter regarding efficient trials

¹⁵² According to CPC art. 342, section 1, a trial should be uninterrupted and can only be postponed under particular circumstances – and only up to 15 days. See the also the chapter regarding efficient trials

Some examples

Hearings at First Instance Court for Serious Crimes (CSC) - 13 May, 7 July and 29 September 2005

The case concerned eight defendants: four *in absentia* and four detained on remand. At the hearings on 13 May and 7 July, four defendants as well as the defence lawyer representing one of them were present while the defence lawyer representing the other three was absent. The court decided to suspend the pre-trial detention period *for all four* defendants. At the hearing on 29 September, the defence lawyer of a defendant tried *in absentia* was missing. The court decided to suspend the pre-trial detention times for the four defendants detained on remand and whose lawyers were present.

Hearings at CSC, 12 July and 15 July 2005

Two of the four defendants were tried *in absentia*. At the hearing, the defence counsel of the two defendants being tried *in absentia* was missing. The prosecutor requested that the pre-trial detention period be suspended. The defence lawyer of the other two defendants contested the request, arguing that, as he was present, there were no grounds to suspend the pre-trial detention period for his clients. Regardless, the court decided to suspend the pre-trial detention period for the two defendants detained on remand until the next session. At the next session, on 15 July, the defence lawyer of the two persons detained on remand was missing. He had, however, submitted a document stating he was very ill. Regardless, the court decided to suspend the pre-trial detention period for the two defendants until the following session, which would be held after the summer break, on 12 September, i.e., *the suspension lasted two full months and not, as it should have, only until the cause of the suspension had been removed*.¹⁵³

Hearing at CSC 18 July 2005

One defendant was detained on remand, one was tried on his own recognizance and the third was tried *in absentia*. At this session, the lawyer of the defendant being tried *in absentia* was missing. The prosecutor requested the suspension of the pre-trial detention period for the defendant detained on remand. The defence lawyer of the detained defendant agreed with the request! The court decided to suspend the pre-trial detention period for the defendant detained on remand although his defence lawyer was present.

¹⁵³ See High Court Unifying Decision no. 6, 11 November 2003

13. Expiry of time periods for pre-trial detention

As stated above, detention orders lose their effect when the maximum time period come to an end and this means that the concerned defendant must be released. The wording *lose their effect* also is a clear indication that that this is something that the courts and the prosecution have to act upon on their own initiative and regardless of any request for release from a defendant. In practice, however, it seems that these rules are not always respected and that judges will not act on their own initiative, but only upon a request to be released submitted by the defendant. Concerning how the different maximum periods in articles 263, paragraph 6, and 264, paragraph 3, relate to each other and how the time is calculated for periods of suspension, note should be taken of the *High Court Unifying Decision no. 6* from 11 November 2003.

The case concerns three defendants charged with armed robbery and various other offences. One of the defendants was also charged with desertion from military service. The three defendants were arrested on the spot in November 1999 and the arrest was considered legal by Saranda District Court. Considering that one of the defendants was charged with a military offence, the Saranda Prosecution Office found that it was incompetent to prosecute the case and forwarded it to the Military Court in Gjirokastra for continued investigation. The request for trial was submitted in June 2000 and in May 2001, the Military Court in Gjirokastra found the three defendants guilty as charged. The Military Court of Appeals quashed the decision and sent the case for retrial in front of a new panel at the Military Court in Gjirokastra. Before the High Council of Justice had assigned a new panel, in June 2002, the defence submitted a request to the Military Court in Gjirokastra to revoke the pre-cautionary (detention on remand) measure for the defendants. The Military Court in Gjirokastra found that since the pre-cautionary measure initially had been decided by Saranda District Court, the Military Court was not competent to decide on the issue. In July 2002 Saranda District Court requested the High Court to solve the competency conflict. The High Court found that the Military Court in Gjirokastra was competent and returned the case to this court. In September the Military Court in Gjirokastra rejected the defendant's requests to be released. The decision was upheld on appeal in January 2003. In May 2003, a new panel at the Military Court in Gjirokastra confirmed the guilty verdicts against the three defendants. Two of them appealed and, in September 2003, the Military Court of Appeals upheld the guilty verdicts. All defendants were sentenced to lengthy imprisonments. During the course of the proceedings, the pre-trial detention times were suspended for a total of 53 days in order to solve the conflict of competency and due to the fact that the Military Court in Gjirokastra was unable to form a trial panel and was waiting for a decision by the High Council of Justice.

Majority ruling – In its decision on 11 November 2003, the High Court found that the maximum time periods¹⁵⁴ for each stage of the proceedings had been exceeded. The

¹⁵⁴ Which were different at the time

High Court did not, however, order the defendants to be released since they had already (i.e., in September 2003) been sentenced by final decisions to imprisonment, which were therefore being executed.

Concerning the interpretation and application of “detention time periods, their restarting, suspension and the relation between the entire duration of detention and half of the maximum punishment provided for the criminal offence etc.” the majority of the High Court concluded that:

1. Suspensions are not included when calculating the total time period, i.e., they are deducted from the total period;
2. The courts had unfairly suspended the detention time periods for reasons relating to the courts and not the defendants;
3. An appeal of a decision to suspend the detention time does not suspend the *trial* [i.e. the trial at first instance level continues while the appeal is being reviewed];
4. Suspensions should last only until the cause of the suspension has ceased to exist and the principle of the uninterrupted trial¹⁵⁵ should be respected, in particular where persons are deprived of their freedom;
5. ***In a retrial*** (when a decision has been quashed by the High Court or an appellate court and sent back for retrial) ***detention time periods cannot restart if the entire duration is completely consumed***, while for other cases, the detention time periods provided in CPC article 263, restart for each level of the proceedings while taking into account that the entire duration of detention should not be exceeded. Instead of looking at what the law provides for each stage, the courts thus have to consider how much time remains. ***That is, when the maximum period is spent for investigation and trial, the restarting of detention time periods at retrial is worthless***;
6. The time periods provided in CPC art. 263 are maximum time periods, at the expiry of which detention loses its effect. This does not mean, however, that these time periods should always be consumed. Instead, and considering the principle of the uninterrupted trial and the obligation to conduct investigations with diligence, the courts and the prosecution are obliged to ensure that cases are concluded within the shortest time possible;
7. Article 263, section 6, of the CPC is a general provision that specifies, according to categories, the entire duration of detention. Article 264, section 3, represents a limitation to this provision in relation to the specific crime with which a person is charged and for which that person is detained. This means that although the maximum time period (in article 263, section 6) may allow it, the duration of detention cannot exceed half of the maximum punishment provided for the crime in question.

¹⁵⁵ See further the chapter on Efficient Trials

Minority opinion – In a dissenting opinion, two panel members concluded that the majority’s reasoning [under paragraph 5 above] was contrary to the wording of article 263 section 4 of the CPC, which specifically states that in the case of a retrial the “time limits provided for at each stage of the proceedings start to run again from the decision of the High Court or the Appeals Court.” According to the minority the relevant provisions (263 section 6 and 264 section 3) cannot be understood otherwise than that the time periods start running again [from the beginning] after a case has been brought back for retrial and that the time periods consumed during the first *and* the second trial cannot exceed half the maximum provided for the crime being tried.

Comment – Although it is commendable that the majority attempts to limit the time a person can spend in pre-trial detention and although there are many good points expressed in the ruling, this decision causes problems. As the minority points out, the interpretation the majority gives to article 263, section 4 (under paragraph 5 above), seems to run counter to the wording of the article. Moreover article 263, section 6, provides that pre-trial detention cannot exceed:

- ten months when proceeding for criminal contraventions,
- two years for crimes punishable with a maximum of up to ten years of imprisonment and
- three years for crimes punishable with a minimum of at least ten years, or life imprisonment.

Considering that 264, section 3, states that pre-trial detention may not exceed half the maximum provided for the crime being tried, the ruling of the majority (under paragraph 7 above) is relevant for criminal contraventions¹⁵⁶ punishable by imprisonments of up to a year, which means that ten months would exceed half the maximum, or 6 months. For offences in the second category it would be relevant for offences punishable with a maximum of four years, but *never* for offences in the third category, for which the minimum punishment is at least 10 years of imprisonment.

While it is troubling that a High Court unifying decision makes part of the law obsolete, the incoherence of the Criminal Procedure Code is of even more concern, as it leaves plenty of room for different interpretations and for abuse. One possible way of understanding article 264, section 3, would be to see it as having relevance only for situations provided in the article, that is, where pre-trial detention time limits have been *extended*:

- to conduct an examination of the defendants mental status *or*
- when the prosecutor during the preliminary investigation has requested an extension due to important security needs *and* especially complex verifications.

Where the extension is requested for important security reasons and complex verifications, the extension can be granted only once and cannot exceed three months. No time limit is set for mental examinations, but it is hard to imagine that an examination would last more than a few months. Therefore this provision would still be relevant only for a limited number of crimes. There is thus an urgent need for the legislator to clarify these issues.

¹⁵⁶ A criminal contravention is punishable with a fine or imprisonment between 5 days and 2 years, CC art. 29 and 32

Some examples

Revenge for Justice Case at the CSC

On 23 November 2005, defendant Gëzim Gjoni was released from pre-trial detention after he had been unlawfully detained since (at least) 13 September 2005. Gëzim Gjoni has been charged with kidnapping and bank robbery in the ongoing “Revenge for Justice”¹⁵⁷ trial. The trial started initially in late 1998 and was dismissed in February 2003 after the prosecutor requested the acts be transferred back to the prosecution for further investigation. The dismissal was overturned on appeal and on 4 September 2003, the case was returned for further investigation. The new request for trial was submitted on 14 September 2004.

Gëzim Gjoni was arrested on 19 May 2003, i.e., after the dismissal but before the case was returned for further investigation. Considering that Gjoni is charged with crimes punishable with a minimum of ten years of imprisonment, his maximum period of pre-trial detention at the investigative stage was one year, with an additional year for the first instance proceedings. While it can be discussed whether Gjoni should have been released a year from 19 May 2003, it is clear that his pre-trial detention lost effect when the new indictment was not filed by 3 September 2004. In spite of this, he was not released. On 13 September 2005 the pre-trial detention lost effect *again*, as no decision had been rendered by the CSC. In spite of a request from the defence, Gjoni was not released. Another request for his release was submitted in mid-November but rejected with the reasoning that it had been submitted “in the wrong form”! After deliberating over yet another request, the court finally decided to replace the pre-trial detention for Gjoni with house arrest and release him on 23 November 2005.

Retrial of the Kanun case at Durrës District Court

In the Kanun case, five defendants were charged with kidnapping, with the creation of an armed gang and criminal organization and with other crimes. Kidnapping is punishable by a minimum of ten years of imprisonment, for which reason the maximum pre-trial detention periods apply to all defendants. Four of the defendants were arrested on 17 July 2002, while one remains at large.¹⁵⁸ The request for trial was submitted on 15 October 2003 (the case was not registered in court until nine days later, on 24 October!), i.e., after the expiry of maximum period of pre-trial detention during the investigation period.¹⁵⁹ The decision by Durrës District Court was rendered on 14 December 2004, i.e., more than one year after the request for trial was submitted. Without any suspensions, the three-year maximum would have expired on 16 July 2005, but it is known that the *pre-trial detention periods have repeatedly been suspended for all four defendants detained on remand*. On 20 June 2005, the Durrës Court of Appeals

¹⁵⁷ See further the Case Studies Chapter; Revenge for Justice

¹⁵⁸ This information is collected from the court file and from the first instance and appellate decisions.

According to the first instance decision, the four were arrested on 19 July, not on 17 July.

Considering

the Letter Rogatory on 17 July and the detention hearing on 20 July, it seems more plausible that the arrest took place on 17 July

¹⁵⁹ The investigation started in Italy; after the defendants had been arrested in Albania, the Prosecutor General in a Letter Rogatory requested the transfer of the investigation file, including the evidence, from Italy. The request was not fulfilled until 15 October 2004, that is more than a year later.

returned the case for retrial. The retrial started on 18 January 2006. The defence has twice submitted requests to the court to release the detained defendants because of the expiry of the maximum pre-trial detention periods. The court, while referring to the High Court decision discussed above, has rejected the requests, arguing that a) the pre-trial detention time is renewed for each stage of the proceedings when a case is sent for retrial after a decision has been quashed by a higher instance court and b) the pre-trial detention time limits may not exceed half of the maximum sentence provided for a criminal offence for which proceedings are ongoing. One panel member presented a dissenting opinion and argued that since the defendants had been detained more than 3 years, they should be released.

Comment: The majority thus reasoned in contradiction with the High Court decision and refused to release the defendants, while the minority reasoned in accordance with the High Court decision and wanted to release the defendants. This again points to the urgent need for clarification by the legislator.

CSC, Decision no. 57, 1 November 2005

The case concerns four defendants, two men, GH and KX, and two women, ML and TL. The two men were charged for having, in collaboration, trafficked a woman, SK, for prostitution under aggravated circumstances which led to the death of SK. KX was further charged with exploitation for prostitution under aggravated circumstances as well as with having collaborated with ML and TL in trafficking women for prostitution. GH and KX were detained on remand, while ML and TL were tried in absentia. GH was arrested on 19 August 2002, while KX was arrested on 6 December 2003 (the decision to detain him on remand is, however, dated 16 December 2003!). The request for trial was submitted on 10 May 2004 and the final decision was rendered on 1 November 2005. The length of the trial was to a large extent due to delays on the part of the Italian authorities to respond to a *Letter Rogatory* dated 16 September 2004 requesting the Italian judicial authorities to allow the Albanian trial panel to hear 31 witnesses in Italy.

Considering the severe charges, maximum time periods for pre-trial detention applied to both GH and KX. Taking into account that GH was arrested on 19 August 2002, the request for trial in his case should have been submitted a year, or with a 3-month prolongation, a year and 3 months later, i.e., on 19 August or on 19 November 2003. This did not happen, but GH was not released. As for KX, the request for trial was submitted within a year (5 months) of his arrest. As the request for trial was submitted on 10 May 2004, both GH and KX should have been released when the final decision had not been rendered on that day or a few days later, if legitimate suspensions of the pre-trial detention period had been ordered during the trial. GH and KX were not released, however, and the trial at the first instance level continued until the decision was rendered on 1 November 2005. In the final decision, all defendants were found guilty as charged. GH was sentenced to life imprisonment, whereas KX was sentenced to 25 years of imprisonment. The final decision does not mention that the time-periods for pre-

-trial detention for GH and KX had expired or that the calculation of the sentence for KX should start from the day of arrest. The final decision has been appealed and the trial is ongoing at the Court of Appeals for Serious Crimes. While it is regrettable that the request in the *Letter Rogatory* caused such a delay in the proceedings and that it was not handled in a more diligent manner, this is nothing for which GH or KX can be blamed and they should therefore have been released when the time periods provided in the CPC expired.

14. Pre-trial investigation and time periods of pre-trial detention

According to article 6 of the ECHR and article 42, section 2, of the Constitution, everyone has the right to a trial within a reasonable time. The European Court has stated that the reasonable-time guarantee starts running from the moment a person is charged¹⁶⁰ or substantially affected¹⁶¹ by a criminal investigation. In an attempt to fulfil this requirement, the Albanian CPC also provides time periods within which a criminal investigation should be completed. Under certain conditions, these periods can be extended. When a person is detained on remand, article 5 of ECHR and article 28 of the Constitution further state that a person who is deprived of liberty has the right to a trial within a reasonable amount of time or to release pending trial. The interpretation of what constitutes a *reasonable period of time* when a person is detained on remand must be restricted, considering that the decision on deprivation of liberty must be taken and the investigation must be conducted with *special diligence*.¹⁶²

Legal framework

The following time-periods are to be considered and respected during the pre-trial investigation.

- 3 months – Within three months after the notification of a person of criminal charges against her/him, the prosecutor decides whether to bring the case to court, to dismiss the charges or to suspend the case.¹⁶³
 - The time period is suspended when the prosecutor needs authorization to proceed, when the offender is unknown or when the defendant's serious illness obstructs the investigation.¹⁶⁴
- 6 months – The prosecutor may prolong the time period of investigation by up to three months.¹⁶⁵

¹⁶⁰ *Imbroscia v. Switzerland*, 24 November 1993, para. 36

¹⁶¹ *Deweer v. Belgium*, 27 February 1980, paras. 42, 44 and 46

¹⁶² *See, e.g., Labita v. Italy*, 6 April 2000, *Contrada v. Italy*, 24 August 1998 and *I.A. v. France* judgment, 23 September 1998

¹⁶³ CPC art. 323, section 1

¹⁶⁴ CPC art. 323, section 2, and 326

¹⁶⁵ CPC art. 324, section 1

- 9 months up to 2 years – Further prolongations, each no more than three months, may be made by the prosecutor in case of complex investigations or when it is *objectively impossible* to terminate them within the prolonged time period.¹⁶⁶
- 3 years – Beyond the time period of two years, *in extraordinary cases*, the term of investigations may be prolonged only with the approval of the Prosecutor General up to one year, *not more than three months for every prolongation*, without affecting the terms of the prolongation of the pre-trial detention time periods.¹⁶⁷
- The prosecutor's decision to prolong the investigation can be appealed, within ten days from the notification, to the district court by the defendant and the injured party.¹⁶⁸

14. 1 Consultation of prosecution files

In order to get a picture of how pre-trial investigations are carried out in Albania, a request to consult a number of prosecution files in cases that had been sent for trial was submitted to the prosecution offices in Gjirokastra, Vlora, Fier, Lushnja, Tirana, Durrës, Shkodra and Kukës as well as to the First Instance Serious Crimes Prosecution office. A copy of the request was sent to the Prosecutor General with an explanation specifying that the purpose of the survey was not to get access to classified information, but to consult the copy of the court file kept at the prosecution office¹⁶⁹ in order to have a better understanding of how pre-trial investigations are carried out. To evaluate whether cases where defendants are detained on remand are treated with priority, a number of files where defendants were not detained was also consulted.

A total of 59 files were consulted. In 36 cases, one or more of the defendants were detained on remand, while in 23 cases the defendants were not detained on remand. The average period of inactivity was 3 ½ months in cases where the defendant was detained on remand and 2 ½ months in cases where the defendant was not detained on remand. Cases where defendants are not detained on remand are, as a rule, not the most serious cases. As a result they would in many cases require less complicated and therefore shorter investigations. That this would be the case is not, however, supported by the survey. The average number of investigative actions undertaken was 12 for all files.¹⁷⁰ For files where defendants were detained on remand, the average was 11, while it was 13 for files where there was no remand measures. Interestingly enough, the 10 files consulted from Tirana prosecution office showed a significantly higher number of investigative actions. The

¹⁶⁶ CPC art. 324, section 2

¹⁶⁷ See also the Case Studies Chapter; Revenge for Justice

¹⁶⁸ CPC art. 325

¹⁶⁹ CPC art. 332, section 2

¹⁷⁰ Any investigative actions, such as arrest of the defendant, interrogation of witnesses, house searches, sequestration of evidence, requests for expertise or for information from other authorities or decisions by the prosecution office.

average for the Tirana files was 25, while the average for the rest of the files, excluding Tirana, was 9. One possible explanation would be that the Tirana prosecution office does more thorough investigations. Another would be that different prosecution offices have different views on what goes into the court file. Based on the survey, however, it is not possible to draw any conclusions as to this discrepancy.

In only 8 of the files were there *no* longer period of inactivity, which means that there were no periods of inactivity longer than two weeks. In three of the cases, there were periods of inactivity of more than one year. In two of these cases (nos. 12 and 19) the defendants were detained on remand but in one of the cases (no. 12), the longest period of inactivity (9 months) happened before the defendant was arrested. In the other case (no. 19), however, there were four defendants who were detained on remand, while one defendant remained at large. Here there were two periods of 5 ½ and 9 months of inactivity, which were broken only by one investigative action. In 24 of the cases where defendants were detained on remand (67%), there were periods of inactivity that lasted from two weeks up to six months. While this study is in no way comprehensive, it is an indication that cases where the defendant is detained on remand are not treated with the “special diligence” required by the ECHR and the Constitution, but that they are treated just like any other case (or perhaps there are even more delays) and that extended periods of inactivity are a rule rather than an exception.¹⁷¹

Some cases tried by the First Instance Court for Serious Crimes

Below follows a description of some cases concerning persons detained on remand, where it appears that the investigation was not conducted with the necessary *special diligence*. It should be noted, however, that the First Instance Court for Serious Crimes, the Court of Appeals for Serious Crimes (CASC), and the Serious Crimes Prosecution Office all started functioning on 1 January 2004. Therefore the cases mentioned below were – initially – investigated by the district prosecution offices. In the cases discussed, a strict adherence to the obligation of the prosecutor to report every two months on how the investigation was proceeding might have served to avoid some of the delays.

¹⁷¹ For further information about the prosecution file survey, see Pre-trial detention - Annex 5

Case 1 – CSC, Decision no. 1, 10 March 2004

(The information is based on the final decision/judgment)

The case concerns two males, one 16-year-old minor and another born in 1980, charged with armed robbery in collusion.¹⁷² The maximum punishment possible is 10 to 20 years of imprisonment.

26 September 2003 – Around 11.00 [p.m.] the defendants arrived by vehicle in Plyg village, where they stopped. After masking themselves and arming themselves with guns, they stopped a vehicle carrying two passengers and robbed them of their mobile telephones and ALL 8,000 ALL [ca. EUR 65] in cash.

- Based on the charges filed by the two victims/witnesses, the two suspects were arrested in a bar.
- A crime scene investigation was carried out and the guns and cartridges used by the suspects were found in the vehicle used by the suspects and were sequestered. Fingerprints were secured. Two sets of car plates used by the defendants were also found and sequestered. The masks used by the defendants were also found and sequestered.
- A witness recognized the suspects as the persons who had sold the two stolen mobile telephones.
- A second witness recognized one of the defendants.

14 October 2003 – Technical expertise confirmed that the secured fingerprints belonged to one of the defendants.

28 October 2003 – Technical expertise confirmed that the sequestered guns were in working order.

10 December 2003 – Expertise evaluated the value of the stolen mobile telephones at ALL 7,000 [ca. EUR 57] each.

10 February 2004 – The request for trial was submitted to court **4 months and 15 days** after the investigation was opened.

10 March 2004 – The case was resolved through an *accelerated trial*¹⁷³ during which both defendants pleaded guilty.

Analysis – The case is straightforward. The suspects were arrested and the evidence was collected on the day of the event. The technical expertise on the fingerprints and the guns was completed within one month, while the evaluation of the value of the stolen mobiles took two and a half months. The time it took to confirm the value of the mobiles seems unacceptably lengthy considering that an evaluation of this sort can be done by consulting the internet or any mobile telephone retailer. Moreover, the request for trial could have been submitted even without this report and well before the expiry of the three-month period. This did not happen; instead the initial three month period was prolonged and the

¹⁷² CC art. 140 and 25

¹⁷³ CPC 403

request for trial was not submitted until four months and 16 days after the investigation had been initiated. The reason for this prolongation is unclear.

Case 2 – CSC, decision no. 2, 7 April 2004

(The information is based on the final decision/judgment)

The case concerns two males, born in 1977 and 1981, charged with armed robbery in collusion¹⁷⁴ and holding of military ammunition without authorization.¹⁷⁵ The maximum possible punishment is 10 to 20 years of imprisonment.

22 September 2003 – During the early morning hours on 22 September, a person traveling on the road from Vlora to Fier and heading to Tirana, was stopped and robbed at gunpoint by two masked men of his money and mobile telephone. He reported the crime to the police, who started an investigation at 9.00 on the same morning.

- The two defendants were arrested later the same day and a crime scene investigation and a house search were also conducted. During the house search, the mobile telephone, some money and some ammunition were sequestered. They were identified by the victim/witness the same day. A *second witness*, who saw the robbery, was also heard.

11 November 2003 – The victim/witness was heard by the judicial police.

23 February 2004 – The case was submitted to court *5 months and 1 day* after the investigation was opened.

7 April 2004 – The case was resolved through an *accelerated trial* during which both defendants pleaded guilty.

Analysis – This case is as simple as a case can be. This is not least shown by the guilty pleas and repentant stands of the defendants at trial. The two suspects were arrested following the report of the crime by the victim/witness and, apart from a second hearing of the victim/witness on 11 November, all evidence presented in the request for trial was collected on the day of the event, 22 September 2003. It is not clear from the decision why the victim/witness was heard again in November, and whether his statement was taken when he reported the crime. Taken on its face, the investigation into this crime was completed on the day of the event and any further statements, such as the second statement of the victim/witness should have been obtained within the next few days. After that, the request for trial should have been submitted promptly. The request for trial was not submitted, however, until 5 months and 2 days after the arrest of the defendants, which means that the initial three-month time period for the preliminary investigation was prolonged by the prosecutor. The reason for the prolongation is unclear.

¹⁷⁴ CC art. 140 and 25

¹⁷⁵ CC art. 278 section 3

Case 3 – CSC, decision no. 9, 24 May 2004

(The information is based on the final decision/judgment)

The case concerns a defendant, born in 1981, charged with robbery with the use of weapons in collusion¹⁷⁶ and the holding of military weapons without authorization.¹⁷⁷ The maximum possible punishment is 10 to 20 years of imprisonment.

17 January 2004 – Two persons traveling by vehicle towards Tirana were stopped at “Unazat e Rubikut” by a person with an automatic weapon. They were told to turn off the lights and hand over their money and mobile telephones, which they did.

18 January 2004 – After the victims/witnesses reported the crime, the suspect was arrested and the pre-trial investigation was opened.

- A crime scene investigation was undertaken.
- The suspect was searched and the mobile telephone was found.
- The gun and the mobile telephone were sequestered.¹⁷⁸

19 January 2004 – The stolen objects were recognised.

- The victims/witnesses were heard.¹⁷⁹

27 April 2004 – The request for trial was submitted to court **3 months and 9 days** after the investigation had been opened.

24 May 2004 – The case was resolved during an *accelerated trial* during which the defendants pleaded guilty and showed deep remorse.

Analysis – The situation in this case is similar to the two previous cases discussed. The investigation seems to have been completed the day after the event and yet it took more than three months before the case was submitted to court for trial.

¹⁷⁶ CC art. 140

¹⁷⁷ CC art. 278, section 3

¹⁷⁸ It is not clear from the decision on which day the gun and the mobile telephones were sequestered, but considering that the suspect was arrested and searched, it is assumed that the sequestration happened the same day

¹⁷⁹ It is not clear from the decision that they were heard on this particular day, but considering that this was the day they recognized the stolen objects, it is assumed that they were heard this day or the day before, when they reported the crime

Case 4 – CSC, decision no. 10, 7 June 2004

(The information is based on the court file, the request for trial and the final decision/judgment)

The case concerns a person charged with participating and organizing a criminal organization and with narcotics trafficking.¹⁸⁰ The maximum possible punishment is 5-15 years of imprisonment.

20 September 2002 – The Court of Appeals in Rome authorized the interception of calls on telephones used by the suspects.

October – December 2002 – Telephone interceptions were carried out.

10 March 2003 – The investigation was completed by the Teramo (Italy) Prosecution Office and a request for transfer of the prosecution to Albania was submitted.

13 March 2003 – The Italian decision to arrest the suspects was reached (*in absentia*).

7 July 2003 – The suspect was arrested in Vlora.

9 July 2003 – The detention evaluation hearing was held.

10 July 2003 – The Italian Ministry of Foreign Affairs requested the file to be transferred to Albania.

7 August 2003 – The Vlora Prosecution office submitted a *Letter Rogatory* to the judicial authorities in Italy, requesting the transfer of the file.

13 August 2003 – The file was transferred from Italy to Albania.

8 October 2003 – The Albanian prosecution decides to change the charge **and** to extend the investigation by 3 months, until 9 January 2004.

8 January 2004 – The investigation was extended by another 3 months, until 8 April 2004. The reasons cited are: to complete the investigation, to notify the defendant about the amended charge and to interrogate the defendant.

- Nothing in the file indicates that any of these actions were undertaken.

8 April 2004 – The investigation was extended for another 2 months, until 8 June 2004. Reasons: To add new charges (new charge CC art. 333), to interrogate the defendant about new criminal acts, to conduct further investigation and to conclude the investigation.

- Nothing in the file indicates that any of these actions were undertaken.

23 April 2004 – The request for trial was filed **9 months and 16 days** after the suspect was arrested.¹⁸¹

7 June 2004 – The case was resolved through an accelerated trial.

¹⁸⁰ CC art. 333 and 284/a

¹⁸¹ The maximum punishment provided in this case was 5 to 15 years of imprisonment, which falls right into the gap discussed above, i.e., the punishment provided is neither a maximum of 10 years (15 is more than 10) nor a minimum of 10 years (5 is less than 10). In line with the reasoning above, the defendant should have been released when six months had elapsed after his arrest and the case had not been submitted to court

Analysis – The investigation was carried out mainly in Italy by means of intercepting telephone calls prior to the transfer of the case to Albania. It is unclear what, if any, investigative actions were undertaken after the defendant was arrested in Albania on 9 July 2003 and the case was registered by the Albanian prosecution. *Neither the indictment nor the judgment indicates that any investigative actions were undertaken after the file was transferred. The time period to conclude the “investigation” in Albania was prolonged three times, however, for a total period of 8 months.* The indictment was then filed on 23 April 2004 and, after an accelerated trial, the court pronounced the judgment on 7 June 2004.

15. Concluding observations

As noted in the introduction to this chapter, deprivation of a person’s liberty puts the individual in an extremely vulnerable position. It is therefore important that any deprivation of liberty be kept to an absolute minimum and follow the strict procedures set out in international documents, the Albanian Constitution and the Criminal Procedure Code. All actors involved, i.e., the police, the prosecutor, the judge and the defence lawyer also have a crucial role to play in upholding those standards, and in taking action against any abuse against the individual or of those procedures. In this respect, there is room for substantial improvement within the Albanian context. Thus, it has been noted that persons deprived of their liberty are in most cases not informed about the reasons for their arrest or about their rights; they are regularly maltreated by the police; they do not get timely access to a defence lawyer and they are not brought in front of a judge within the time period set by the Constitution. Decisions are poorly reasoned and give an impression that detention on remand is often ordered without legal grounds. Lawyers do little to challenge decisions or to bring into light incidents of abuse or other malpractice. Preliminary investigations are many times characterised by extended periods of inactivity but, at present, the one mechanism to come to terms with this, provided by the Criminal Procedure Code, is systematically ignored. Time periods for pre-trial detention are suspended without legal cause and for extended periods; they are also frequently exceeded without this leading to the release of the defendant.

To come to terms with these problems, the legislative framework needs to be revised in order to harmonize the Criminal Procedure Code with the Constitution; the Criminal Procedure Code further needs to be revised and improved so that it gives clear instructions to all actors involved about their role and their obligations in relation to deprivations of liberty. Mechanisms need to be put in place to ensure that any systemic malpractices are swiftly discovered and corrected and to ensure that officials who abuse the procedures or who fail to take action to correct wrongs be disciplined. The police, prosecutors, judges and lawyers need to be trained on the underlying human rights standards, on the legislative framework and on their roles in dealing with a case where a person has been deprived of her/his liberty. Measures to deal with problems related to security measures in criminal cases need to be neither costly nor time consuming and would certainly bring Albania a significant step further on its way to European integration and standards of justice.

Recommendations

Arrest and apprehension

1. The CPC, in particular art. 251, should be amended to make it clear that the Constitutional conditions for arresting/apprehending a person suspected of having committed a crime apply for any arrest/apprehension carried out by the police.
2. Article 251 CPC should be amended to ensure that the police promptly inform an arrested person *orally and in writing* of the reasons for the arrest as well as of all her/his rights; i.e., the rights to remain silent, to defence counsel – free of charge if necessary – and to contact family.
3. The police should, e.g., through internal regulations, set up clear routines on
 - o how to inform arrested persons of their rights in a manner that ensures that the persons understand their rights,
 - o how to ensure that the person can contact family and defence counsel,
 - o how to ensure that a person does not sign anything he/she has not read, he/she does not seem to understand or with which he/she does not agree,
 - o how to document actions concerning persons deprived of their liberty.
4. The police should be trained on the legal framework on deprivation of liberty and in particular on ECHR article 5 and the case law of the European Court on this provision.
 - o Particular attention should be given to the concept of arrest in *flagrancy* to ensure that the police do not overstep their competencies when apprehending persons.
5. The rights of persons deprived of their liberty should be displayed in every room or location where persons are held arrested or detained on remand.
6. The general public should be informed about the rights of persons deprived of their liberty.
7. Any inspection or oversight of police activities should scrutinize the routines of arrests and apprehensions, in particular with a view to ensuring the respect of the rights under the Constitution and the ECHR.

Access to defence counsel

1. The Chamber of Advocates of Albania should, on an annual basis, publish lists with names, what kind of cases each member handles and contact details, including telephone numbers of all of their members, divided under the local Chamber of Advocates (Member Directory).
2. For contacts outside office hours the Chamber of Advocates should create a system of “stand-by” defence lawyers.
3. Each police commissariat and detention centre should have a copy of the Membership Directory of the Chamber of Advocates.
4. The police should inform every person in writing of her/his rights immediately upon arrest; this information should also contain reference to the Membership Directory of the Chamber of Advocates and to the arrested person being given an opportunity to contact a lawyer.
5. Every arrested person should be given an immediate opportunity to consult the Membership Directory of the Chamber of Advocates and to contact a lawyer.
6. A defence lawyer should not have to seek authorization from the prosecution to visit clients. It should be enough to have the decision to appoint or a power of attorney (from the family or the arrested person) together with a licence from the Chamber of Advocates.
7. Defence lawyers should ensure that they always meet and consult with their clients in private prior to a detention hearing.
8. Regarding the system of state-appointed lawyers for persons with insufficient financial means, the whole system in Albania needs to be revised.¹⁸²

Initial interrogation

1. In the absence of specific instructions from the prosecutor in charge of the investigation, the police should *not* interrogate an arrested person.
2. Before any interrogation is carried out, the arrested persons should to be given information about the right to defence counsel and a real opportunity to contact counsel.
 - o Any waiver of this right by the defendant should to be made voluntarily and without any pressure. A waiver should be done in writing.

¹⁸² See further the chapter on the Right to an effective defence

- o A minor or a person with limited capabilities of understanding (temporary or permanent) should not be allowed to waive her/his right to defence counsel and should never be interrogated without defence counsel being present.
- 3. If the defendant has requested counsel to be present during interrogation, no interrogation should be carried out until the request has been met. If the requested counsel is not available within a short period of time, arrangements should be made to have other counsel acceptable to the defendant present.
- 4. During interrogation, the defendant should not be asked to sign anything without ensuring that the defendant has read (or has had someone read to her/him) and understood what he/she is signing.

Physical maltreatment

1. Every report of physical maltreatment by the police during arrest should be investigated and those responsible should be disciplined and brought to justice.
2. Prosecutors, judges and lawyers, should take notice of any signs of maltreatment of an arrested person. When there are signs of maltreatment, they should take immediate action to verify the maltreatment and submit a report regarding the maltreatment to the relevant authority.

Timing of the detention hearing

1. Articles 248 and 258 of the CPC should be amended to bring them into accordance with the Constitution, which provides that every person deprived of her/his liberty shall be brought before a judge within 48 hours after the arrest.
2. Any failure to meet a time limit should result in the release of the suspect.
3. Internal and external control mechanisms should be set up to ensure that time limits are respected and that the detainee is released whenever there is a failure to meet a dead-line. Failure to do so should lead to disciplinary action or charges for abuse of duty.

Detention hearings and decisions to detain on remand

1. Judges, prosecutors and lawyers should receive training on issues related to pre-trial detention, i.e.:
 - o Under what circumstances can a person be deprived of her/his liberty?

- What is the standard of proof to substantiate a:
 - Reasonable suspicion (in the individual case);
 - Risk for escape (in the individual case);
 - Risk to destroy or obstruct the collection of evidence (in the individual case)
 - Risk for further criminality (in the individual case)?
- How to take the proportionality criterion into account.
 - Which party has the burden of proof for each element?
 - How to conduct a detention hearing so as to ensure that the detainee is given a real chance to challenge the remand order;
 - How to draft a decision to detain on remand and the importance of treating each detainee/defendant separately and on her/his own merits.
- 2. The National Chamber of Advocates should offer training to their members on issues related to detention on remand and in particular on how successfully to challenge remand orders.
- 3. The People's Advocate as well as the Inspectorates under the High Council of Justice and under the Ministry of Justice should carry out regular inspections on how issues related to deprivation of liberty are handled by the police, the prosecution and the courts.

Time periods and preliminary investigation

1. The practise of suspending/postponing trials in cases where the defendant is detained on remand due to the court holiday period should be stopped.
2. Considering the principle of the "uninterrupted trial" as expressed in article 342 of the CPC, there is a need for clarification about how this provision relates to article 39 in the Judicial Power Law regarding the timing of annual leave for judges.
3. CPC article 263 needs to be amended so as to eliminate the gap covering crimes punishable by five to fifteen or seven to fifteen years of imprisonment.
4. The next publication of the CPC should be amended so as to correct the mistaken displacement of the words "minimum" and "maximum" in article 263, sections (c) and (d).
5. The obligation of the prosecution to inform the court in writing about the proceeding in cases where a person is detained on remand should be strictly adhered to.

- o Where no information under CPC article 246 is forthcoming, courts as well as defence counsel should inquire about how the proceedings are developing.
 - o Both judges and prosecutors should be inspected regularly to ensure compliance.
6. The practice of suspending pre-trial detention times for all defendants to a case, regardless of which defendant or defence lawyer was the cause of the suspension, should be stopped.
- o The inspectorates of the Ministry of Justice and of the High Council of Justice should make a comprehensive review regarding the use of suspensions.

Where persons are detained on remand, preliminary investigations should be completed within the shortest possible time period and no periods of inactivity should be accepted. Inspections of the activities of prosecutors should focus in particular on this issue. No prolongations should be granted without a good and objectively justifiable cause.

II. THE RIGHT TO AN EFFECTIVE DEFENCE

1. Introduction

The right to defend oneself is an essential part of the right to a fair trial in criminal proceedings and serves, among other purposes, to ensure that the principle of *equality of arms* is upheld. The principle of *equality of arms* means that all parties to a trial must be given a reasonable opportunity to present their cases in conditions that do not place them at a substantial disadvantage *vis-à-vis* their opponents.¹⁸³ In a well-functioning and well-balanced justice system, the various actors also have a “watchdog” effect on each other, thus ensuring swift reactions against any tendencies towards maladministration of justice, whether intentional or not. Regarding the principle of *equality of arms*, it should be noted that, while in many civil cases the parties are on a more or less equal footing, this is rarely the case in a criminal trial where the individual is confronted with the whole apparatus of state power. Furthermore, the fact that courts and prosecution offices are both state institutions may create an impression, internally as well as externally, that they are working together. In the context of politically charged issues, such as the fight against organized crime, the courts and the prosecution offices may also be perceived as having a common goal and there may be political pressure to have an increased number of convictions for these sorts of crimes.

In this chapter the legal framework guiding the work of defence attorneys in Albania will be scrutinized and the conduct of defence counsel during trials will be discussed. Considering that defence counsel have been found to be a frequent cause for delays of trials, the possibility of undertaking disciplinary measures against lawyers will be analyzed in some detail. This will be followed by a discussion regarding the right to free legal defence and fees for both state and privately appointed defence counsel.

2. Legal framework

The ECHR, Article 6, paragraph 3 (a-c) provides that:

3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which [he/she] understands and in detail, of the nature and cause of the accusation against [her/him];
 - b. to have adequate time and facilities for the preparation of [her/his] defence;
 - c. to defend himself in person or through legal assistance of [her/his] own choosing or, if [he/she] has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

In Albania, the right to defend oneself in *criminal proceedings* is protected by the

¹⁸³ See, e.g., *Krcmár and others v. Czech Republic*, 3 March 2000, para. 39

Constitution in article 31, sections b and ç, which give the defendant the right to:

- sufficient time and facilities to prepare her/his defence and
- to defend [himself/herself] or with the assistance of a legal defender chosen by [her/him]; to communicate freely and privately with [her/him], as well as to be provided free defense when [he/she] does not have sufficient means.

The CPC in articles 6 and 48 to 57 gives the general framework for defence counsel in criminal proceedings. Apart from some rights, such as the right to plead guilty or the right not to be present, defence counsel enjoy the same rights as the defendant they are representing.¹⁸⁴

Within the particular Albanian context it should be noted that under the communist regime, defence counsel were not allowed, for which reason the adversarial trial concept is of a fairly recent date.¹⁸⁵ The educational background of lawyers in Albania varies from a six-month course to four years at a law faculty and an additional three years at the School of Magistrates (or post-graduate education at the law faculty).¹⁸⁶ While the quality of the education at the law faculties may not yet be up to European standards, the School of Magistrates is broadly considered to represent a step forward in providing adequate training for future judges and prosecutors. For Albanian defence lawyers, there is at present no specific or continuous training offered, and the defence lawyer is thus frequently the person with the least academic preparation in the courtroom. These are factors that may negatively affect the right to an efficient defence.

Meetings with lawyers, not least the National Chamber of Advocates, confirm that Albanian defence lawyers many times have the impression that they are in disadvantaged positions compared with the prosecution. Although this is hard to pinpoint, the trial observations carried out within the framework of the FTDP also indicate that this may indeed be the case. For example, motions from the prosecution are often accepted, while those submitted by the defence are frequently rejected. While one reason for this might be poorly drafted and reasoned submissions from the defence, there may also be reasons that are not objectively justifiable in line with what was stated above.

¹⁸⁴ CPC article 50

¹⁸⁵ After having been banned in 1967, the profession of lawyers was reestablished in 1990; see further *Sector Report for Albania* (Tirana: OSCE Presence in Albania, 2004), chapter VI

¹⁸⁶ For an overview of the legal education, see *ibid.*, chapters X and XI

Some examples of differential treatment towards the prosecution and the defence

Case heard by Gjirokastra District Court: Any time the defence lawyer addressed the court the judges were talking and laughing among themselves.

Case heard by Tirana District Court: The presiding judge consistently acted in a very rude manner against the defence, while responding politely towards the prosecution. This upset one of the defendants who tried to intervene but was interrupted in a very brusque manner. After the session, one of the other judges on the panel explained to the defendants that they could not address the court without first receiving permission.

Defence counsel in Kukës: According to an internal regulation from 2004, defence counsel are not allowed to have access to the court to study files or submit documents before 13.00.

Case heard by Tirana District Court: While the hearings were heard in a separate courtroom, the presiding judge regularly received the prosecutor in his office between five and fifteen minutes before the trial began. These discussions were not attended by defence attorneys. At trial, the judges were very polite with the prosecutor, telling him to relax and take his time when he was clearly very disorganized in presenting his evidence. At the same time, the presiding judge sternly admonished defendants wanting to speak not to waste time saying things that had been said before. Finally, the judges accepted as evidence a cassette the validity of which had been challenged by the defense on the grounds that they had not had access to it as required by CPC article 223. Neither the trial court nor the appellate court provided any reasoning in its decision for accepting this cassette, nor was the prosecutor required to provide arguments for its validity. In addition to all this, the judges were seen on numerous occasions laughing at the lawyers and at the defendants.

Case heard by Tirana District Court: The hearings were mostly held in the judge's office and the prosecutor of the case would be found sitting in the judge's office prior to most sessions. The judge and the prosecutor seemed to be on very friendly terms.

(These kinds of informal contacts between judges and prosecutors are frequently observed.)

2.2 The Law on Advocates¹⁸⁷

Regarding an overview of the profession of advocates in Albania, please see the *Legal Sector Report* published by the OSCE PiA in 2004. In the Legal Sector Report it is noted that the integrity of the legal profession is a major issue and that while judges and prosecutors are often blamed for dishonest practices, the root cause many times lies with lawyers and notaries.¹⁸⁸ Comments on the draft law on Advocates were provided by the ABA Central European and Eurasian Law Initiative (ABA/CEELI).¹⁸⁹

There are approximately 2,400 lawyers in Albania, but only around 1,000 of these are active and out of these, 70% practise in Tirana.¹⁹⁰

The profession of lawyers in Albania is regulated by the Law on Advocates, which was adopted in 2003.¹⁹¹ According to the law, there is a National Chamber of Advocates, which is responsible for regulating and controlling the exercise of the profession of advocates. The law states that the profession of advocates is a free profession which is independent, self-regulated and self-managed.¹⁹² The law then defines the ways in which an advocate provides *legal assistance*¹⁹³ and goes on to enumerate the rights and duties of an advocate.¹⁹⁴ In chapter IV, criteria for exercising the profession of an advocate are provided. These are a law degree, a one-year internship as an assistant advocate, a score of more than 50 % on the examination for admission to the Chamber and membership in one of the regional Chambers of Advocates. The highest representative bodies of the National Chamber of Advocates are the General Council and the Steering Council. Under the National Chamber of Advocates there are regional Chambers of Advocates, which are organized in the same way as the National Chamber of Advocates.¹⁹⁵ The General Council of the National Chamber of Advocates is, among other things, responsible for approving the Statutes and the Code of Ethics for Advocates, as well as for assisting and co-ordinating the activities of the regional chambers. The Steering Council of the National Chamber of Advocates is responsible for drafting the Statutes and the Code of Ethics. It also revokes permission to exercise the profession for a limited or indefinite period and represents the National Chamber of Advocates in relationships with third parties according to rules defined in the statutes.¹⁹⁶ According to the Statutes of the National Chamber of Advocates, the chair of the National Chamber of Advocates is

¹⁸⁷ The term advocate is here used to denominate a lawyer who acts and pleads on behalf others, e.g., as a defence lawyer or counsel for the plaintiff in civil proceedings

¹⁸⁸ *Legal Sector Report for Albania*, p. 162

¹⁸⁹ <http://www.abanet.org/ceeli/publications/assessments/home.html#albania> [Accessed 31 May 2006]

¹⁹⁰ Interview, Maksim Haxhia, Chair of the National Chamber of Advocates [Meeting 27 April 2005]

¹⁹¹ Law no. 9109, dated 17 July 2003, "On the Profession of Advocates in the Republic of Albania" [Law on Advocates]

¹⁹² Law on Advocates, article 1

¹⁹³ Law on Advocates, articles 2-5

¹⁹⁴ Law on Advocates, chapter II, articles 6-16

¹⁹⁵ Law on Advocates, chapter III

¹⁹⁶ Law on Advocates, article 20

also the chair of both the General Council and the Steering Council and represents the National Chamber of Advocates in relations with third parties.¹⁹⁷

Comment: It can be questioned whether the described accumulation of power in one person is healthy for any organisation and in particular for an organisation the function of which is to represent its members and to control and regulate their activities. It would be preferable at least to make these functions subject to election.

The Albanian Code of Ethics for Advocates

As stated above, the Albanian Law on Advocates requires the National Chamber of Advocates to adopt a Code of Ethics for Advocates, while the General Councils of the Regional Chambers of Advocates are responsible for promoting among their members respect for, *inter alia*, the Code of Ethics for Advocates.

The present Code of Ethics for Advocates was adopted in November 2005. It is modelled partly after the Code of Conduct for Lawyers in the European Union (CCBE Code of Conduct), which governs cross-border activities of lawyers within the European Economic Area.¹⁹⁸ According to the final provision of the Ethics Code, the code enters into force on the date it has been discussed by the General Council of the National Chamber of Advocates and the previous Ethics Code will be abrogated on the same date. Nevertheless, according to information from the National Chamber of Advocates, the Statutes and the Code of Ethics for Advocates would be published together in the Official Journal, and only upon publication will these documents enter into force.¹⁹⁹ Considering that the Statutes were adopted on 10 April 2005 and the Ethics Code on 12 November 2005, it is of concern that none of these documents are yet in force and the previous statutes and ethics code therefore still apply.

3. Conduct of defence counsel

In the Artico Judgment, the European Court emphasised the importance of effective legal assistance in criminal cases.

The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive (see the Airey judgment of 9 October 1979, Series A no. 32, pp. 12-13, par. 24, and paragraph 32 above). As the Commission's Delegates correctly emphasised, Article 6 par. 3 (c) (art. 6-3-c) speaks of "assistance" and

¹⁹⁷ Statutes of the National Chamber of Advocates, articles 43 and 44

¹⁹⁸ Code of Conduct for Lawyers in the European Union, adopted at the CCBE plenary session on 28 October 1988 article 3.4. See http://www.ccbe.org/doc/En/code2002_en.pdf [Accessed 15 June 2006]

¹⁹⁹ Telephone interview on 21 April 2006

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not of “nomination”. Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations. Adoption of the Government’s restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) (art. 6-3-c) and the structure of Article 6 (art. 6) taken as a whole; in many instances free legal assistance might prove to be worthless.²⁰⁰

Court/prosecutor appointed counsel – The impression gained through the court observation carried out in the context of the Fair Trial Development Project is that court-appointed counsel often play a passive and formalistic role. The detention survey indicated that it is not unusual for court-appointed counsel to accompany the prosecutor to the first interrogation and participate passively during the interrogation without having had any previous consultation with the defendant - and then never be seen again. Court-appointed counsel also *generally* tend to meet less frequently with their clients and merely show up for court hearings without any previous consultations. From Kukës, for example, it is reported that it is not uncommon that defence counsel be appointed only at the outset of the first court session and that the lawyer then participate passively in the hearing without any preparation. Reports from Kukës also indicate that the conduct of court-appointed defence counsel is rarely the cause of delays. While it is obviously a good thing that defence counsel do not cause delays, this, together with their passive performance, indicates that they are acting more on behalf of the courts than of the defendants, possibly in order to secure future appointments.

*Conduct of counsel in general*²⁰¹ – The surveys carried out among both detainees and defence counsel indicate that defence counsel take a very passive role during the preliminary investigation. Thus most defence counsel reported that they *never* or *rarely* participated in any actions during the preliminary investigation. Thus only 19 defence lawyers (27%) stated that they always or mostly participate in investigative actions, while 18 (26%) stated that they sometime participate in investigative actions. Thirty-two (47%) of the lawyers stated that they rarely or never participate in investigative actions.²⁰² One reason for this might be that defence counsel are rarely notified of these actions. On the other hand, defence counsel should also take initiative to participate. While the majority of defence counsel state that they mostly or always consult with their clients prior to the detention hearing, some state that they rarely do this. Of those who state that they mostly or always consult with their clients before the detention hearing, many state that the consultation takes place in court. Here the survey carried out with detainees indicates that the consultation is carried out in an open courtroom and in the presence of the police and anyone else who happens to be present, and rarely goes beyond an introduction.

²⁰⁰ *Artico v. Italy*, 3 May 1980, para. 33

²⁰¹ See Right to an efficient defence – Annexes 1, 2 and 3

²⁰² See CPC art. 302, 310 and 321

Referring to the problematic practice of the prosecutors not to inform the court regarding the conduct of preliminary investigation where the defendant is detained on remand,²⁰³ it also must be concluded that defence counsel are not asking for this information. If they were to do so, it would be an incentive for the courts and the prosecution to respect this provision and speed up the proceedings. One of the *watchdog* functions would thus be restored.

*Conflicts of interest*²⁰⁴

It is not unusual that a defence lawyer represents several defendants in one case. This is generally of no concern in a case where several co-defendants plead guilty and reveal all relevant facts. In a case where two or more co-defendants represented by the same defence counsel plead not guilty, however, the situation is more complicated. In spite of having the same basic attitude there may be other factors that result in the defendants having different interests to protect. Considering that a lawyer's main duty is to act in the best interest of her/his client, it is of utmost importance that a defence lawyer not take on the representation of several defendants without ensuring that this will not create a conflict of interest. A defence lawyer generally should be cautious when taking on the defence of several defendants and should always inform defendants regarding potential conflicts of interests. The courts also have an obligation to ensure on their own initiative that there is no conflict of interest among defendants represented by the same counsel.²⁰⁵ While in some cases observed, representation of co-defendants by the same lawyer was questionable, there are also some good examples of cases where the court undertook measures to avoid or solve a situation of conflict of interest.

Example – Conflict of interest

Case 50/14, registered 10 May 2004 at the First Instance Court for Serious Crimes

In this case, two men and two women were charged with various crimes related to trafficking of women for prostitution. One of the men was married to one of the women and consequently the other woman was his sister-in-law. The men were present during the trial, while the two women were tried *in absentia*. All four were defended by the same counsel. Well into the trial, one of the men was additionally charged with having exploited his wife and sister-in-law for prostitution under aggravated circumstances.²⁰⁶ After having notified the defendant of the new charges, the prosecutor requested that new counsel be appointed for the two women, considering the apparent conflict of interest. The defence counsel, however, contested this request, arguing that considering the family relations, there could be no conflict of interest. The court, nevertheless, appropriately appointed new counsel for the two women.

²⁰³ See Right to an efficient defence – Annex 2, and CPC art. 246, section 6

²⁰⁴ See also the discussion on conflicts of interest in the CPC-Commentary, pp. 137-140, and the Constitutional Court Decision no. 222, dated 4 November 2002

²⁰⁵ CPC art. 54

²⁰⁶ CC art. 114/a

Non-appearance of defence counsel

The obligation of a lawyer not to cause unnecessary delays in judicial proceedings is expressly mentioned in the Code of Ethics for Advocates.²⁰⁷ In practice, however, one of the most frequent causes of postponements of criminal trials in Albania is the unjustified failure of defence lawyers to appear.²⁰⁸ This is also reflected in the discussions conducted with the chief judges and chief prosecutors around Albania. Although all interlocutors were of the opinion that defence counsel use postponement deliberately and as a defence strategy, different explanations to why this would eventually benefit the defendants were offered. One frequently forwarded explanation in cases tried by the SCC is that defendants want the maximum three-year time period of pre-trial detention to expire in order for them to be released pending the completion of the trial.²⁰⁹ Another explanation forwarded is that when calculating the sentence, one day of pre-trial detention is counted as a day and a half of prison.²¹⁰ A further explanation given by some interlocutors is that postponements are used in order to reach corruptive agreements related to the case in question. The obligation of a lawyer not to cause unnecessary delays in judicial proceedings is expressly mentioned in the Code of Ethics for Advocates.²¹¹

An example – Defence counsel delaying trials

During the trial of case no. 22/68 at the First Instance Court for Serious Crimes, defence counsel MP was initially defending two of the three defendants, one detained on remand and the other being tried on his own recognizance (the third was being tried *in absentia* and was defended by different counsel). After MP failed to appear for a session, the court appointed new counsel for the defendant in pre-trial detention, while the other insisted on keeping MP. The trial was then postponed 14 days to give the new counsel time to familiarize himself with the case. For the next session, MP again failed to appear. Therefore, the court decided to appoint counsel for the second defendant as well, to inform the Chamber of Advocates, and to suspend the time period for pre-trial detention for the first defendant (whose defence counsel was not absent) and to postpone the case for 12 days to give the new lawyer time to become familiar with the case. During the following session, the defendant in pre-trial detention criticized the court for replacing MP and after a while requested to change his court-appointed counsel, a request which after some deliberations was granted. The case was postponed another 6 days. The court also suspended the pre-trial detention period. Finally, after a number of postponements, MP appeared and was reinstalled as counsel for both defendants discussed here. This pattern was repeated throughout the trial, sometimes with the defendants and sometimes with MP absent or refusing to appear at trial. In spite of several reports to the Chamber of Advocates, no action was taken against MP.

²⁰⁷ Code of Ethics for Advocates, article 25, section 3

²⁰⁸ See also the Interim Report, p. 19

²⁰⁹ CPC art. 263, para. 6

²¹⁰ CPC art. 238, para. 2 and Criminal Code art. 57

²¹¹ Code of Ethics for Advocates, article 25, section 3

In light of the above, there is an urgent need for the adoption of provisions and procedures to ensure that lawyers fulfil their duties in a professional manner and do not cause unnecessary delays in the proceedings.

3. 1 Balliu v. Albania²¹²

The second judgment by the European Court for Human Rights in a case concerning Albania can be read as addressing the use of procrastination as a defence strategy.

The Balliu case

In its judgment, the European Court found that the Albanian State had *not* violated Mr. Balliu's right to a fair trial under article 6, paragraphs 1 and 3 (c) and (d) of the ECHR.

In criminal proceedings against armed gangs operating during the 1997 turmoil, Durrës District Court in February 2000 sentenced Mr. Balliu to life imprisonment for five counts of murder, two counts of attempted murder, one count of possession of military weapons and one count of creating and participating in an armed gang. The judgment was upheld on appeal. During the proceedings, Mr. Balliu's defence lawyer failed to attend most of the court hearings and did not give any reasons for his absences. The court subsequently appointed counsel for Mr. Balliu, but after he refused to be defended by a lawyer not chosen by him, the court-appointed lawyer was dismissed and the hearings went on without Mr. Balliu being represented by defence counsel. Mr. Balliu complained to the European Court that he had been denied a fair hearing under article 6 §§ 1 and 3 (c) and (d) as he had not been duly defended through legal assistance and that he had not been able to question certain witnesses or obtain the appearance of witnesses on his behalf.

The Court found that the Albanian authorities had fulfilled their obligation to provide legal assistance, both by adjourning the hearings in order to give the applicant's counsel an opportunity to fulfil his duty and by providing a court-appointed lawyer. Bearing in mind also the authorities' obligation to conduct the proceedings "within a reasonable time", the circumstances of the applicant's representation during his trial did not disclose a failure to provide legal assistance or a denial of a fair hearing under article 6 §§ 1 and 3 (c). Moreover, at the hearings, both the applicant and his counsel, when confronted with the witnesses for the prosecution, had had the opportunity to put questions to them, though they had chosen not to do so, the applicant's lawyer by being absent and the applicant by remaining silent.

²¹² Balliu v. Albania, 16 June 2005

4. Disciplinary measures

It is a generally recognized principle that the professional conduct of lawyers is governed by codes of conduct (ethics codes) established and adopted by the legal profession.²¹³ Another generally recognized principle is that, where lawyers fail to act in accordance with their professional standards, disciplinary proceedings should be brought before a disciplinary committee established by the legal profession, a statutory authority or a court, and be subject to independent judicial review.²¹⁴

Under Albanian legislation, it is only the Chambers of Advocates that can undertake disciplinary measures against lawyers. Thus, the CPC provides that the proceeding authority, i.e., the courts or the prosecution, refers to the Steering Council of Chambers of Advocates (where the lawyer is a member), in cases:

1. when defence counsel abandons a client,
2. when defence counsel refuses to defend a client and
3. when defence counsel breaches her/his duty to be faithful and honest.²¹⁵

Nevertheless, the Steering Council has the right to take disciplinary measures *only* when a *court appointed* defence lawyer has abandoned or refused to defend her/his clients. If the reason for this was the infringement of defence rights, no action shall be taken.²¹⁶

Regarding who or what bodies can complain against lawyers, article 37 of the Law on Advocates provides that complaints can be presented by:

- a. any person who is being legally defended, represented or assisted by the advocate;
- b. any third person who claims to have been harmed by the conduct or the actions of the advocate.²¹⁷

Comment: While the CPC empowers the courts to complain against defence counsel only in a very limited number of situations, the Law on Advocates does not provide for *complaints* by courts or prosecutors at all.²¹⁸ In the chapter regulating “[c]riteria for exercising the advocate’s profession”, however, it does provide that courts or prosecution offices can propose that a lawyer be disbarred.²¹⁹ Taken the fact that disbarment of a lawyer is the most severe disciplinary measure that can be

²¹³ UN Basic Principles on the Role of Lawyers [UN Lawyers Principles], article 26, Council of Europe Recommendation No. R(2000)21 [CoE recommendation (2000)21], principles V (4) (g) and VI 1 and CCBE Code of Conduct, article 1.2.1 and 1.2.2

²¹⁴ UN Lawyers Principles, article 28 and 29, CoE Recommendation (2000)21, principle VI (1) and (2)

²¹⁵ CPC article 56, section 1

²¹⁶ CPC article 56, sections 2 and 3

²¹⁷ Law on Advocates article 37, section 2 (a) and (b). Please note that article 40 wrongly refers to article 38, section 2

²¹⁸ That is, it can hardly be argued that a court could be considered to be a “third person who claims to have been harmed by the conduct or actions of the advocate”.

²¹⁹ Law on Advocates, article 33

taken against a lawyer,²²⁰ it seems that the prosecution and courts are empowered to take action against lawyers only in the most severe cases. The CPC further limits the possibilities to discipline lawyers to state appointed defence counsel and only to actions related to the client, not e.g., for actions that might severely hinder the conduct of the proceedings.²²¹ This means that that courts are not empowered to take action against privately appointed defence counsel. It further means that for *other* violations of the Code of Ethics for Advocates, such as of the provision not to cause unnecessary delays in judicial proceedings,²²² courts are not empowered to complain to the Chamber of Advocates but can only propose that the lawyer be disbarred. This seems rather inadequate and yet again indicates the need to review the CPC, and also the Law on Advocates.

Complaints against lawyers are filed with the chair of the respective Regional Chamber of Advocates. Within 30 days from the complaint, the Steering Council of the Regional Chamber should review and resolve the complaint with a written reply. Decisions by the Steering Council can be appealed within 10 days to a Disciplinary Committee of the Regional Chamber of Advocates.²²³ Disciplinary proceedings are conducted by a Disciplinary Committee of the regional Chamber of Advocates. The committee is composed of the chair, the deputy chair, the secretary and not more than five advocates elected by the General Council. The Disciplinary Committee reviews and tries cases through a Disciplinary Commission composed of three to five members, as defined by the Steering Council of the Regional Chamber of Advocates.²²⁴

An advocate will be subject to disciplinary measures if it is established that he/she:

1. has violated legal provisions regulating the activity of advocates,
2. has acted in contradiction with the Statute or the Ethics Code, or
3. has violated other rules established by the National Chamber of Advocates.²²⁵

According to the chair of the National Chamber of Advocates, a national disciplinary committee was about to be set up in May 2005. Despite numerous complaints by courts around the country as well as by the Ministry of Justice, however, no disciplinary proceedings had been initiated as of 7 April 2006. Considering that neither the Statutes nor the Code of Ethics for Advocates have entered into force, any pending disciplinary proceedings would also have to be resolved based on the previous Ethics Code. Thus, for the time being, there are no effective mechanisms to ensure that lawyers fulfil their duties based on the principles of the rule of law, humanism and human dignity as well with

²²⁰ Law on Advocates, article 43

²²¹ While the CPC provisions mentioned here are identical to those in the Italian Criminal Procedure Code (Codice di Procedura Penale, art. 105), there seems to be a general understanding in Italy that courts as well as anyone else can inform the Chamber of Advocates on the behaviour of lawyers

²²² Code of Ethics for Advocates, article 25, section 3

²²³ Law on Advocates, article 37

²²⁴ Law on Advocates, article 39

²²⁵ Law on Advocates, article 38

respect for truth and justice, as is proudly stated in the preamble to the Code of Ethics for Advocates. This is of serious concern and indicates that the Albanian National Chamber of Advocates still has a long way to go before becoming the active, independent, self-regulated and self-managed body foreseen in the Law on Advocates.

5. Free legal defence²²⁶

Regarding the right to free legal defence in criminal cases, the CPC provides:

Article 6 – Right to defence

1. The defendant has the right to present his own defense or be assisted by defense counsel. When he does not have sufficient means, he is provided with the services of a defense counsel free of charge.
2. The defense counsel shall assist the defendant in order to guarantee his procedural rights and protect his legitimate interests.

Article 49 – Appointed defense counsel

1. A defendant who has not selected his own defense counsel or who has remained without one is to be assisted by a defense counsel appointed by the proceeding authority if he requests this.
2. When the defendant is less than eighteen years old or has a physical or mental impairment that hinders him from exercising his right to defend himself in person, the assistance of defense counsel is mandatory.
3. The Steering Council of the Chamber of Advocates makes available to the proceeding authorities a list of the defense attorneys and determines the criteria for their appointment.
4. When the court, prosecutor or the judicial police must carry out an action that requires the assistance of defense counsel, and when the defendant is without defense counsel, they serve notice of the action to the appointed defense counsel.
5. When the presence of the defense counsel is required and the selected or assigned defense counsel has not been secured, does not appear or has withdrawn from the defense, the court or prosecutor assigns another defense counsel as a substitute, who exercises the rights and undertakes the obligations of the defense counsel.
6. The appointed defense counsel may be substituted only for legitimate reasons. He shall stop [exercising] his functions when the defendant selects his defense counsel.
7. When the defendant does not have sufficient means, the defense expenses shall be covered by the state.

When the defendant is arrested or detained on remand, defence counsel may be chosen/appointed by the relatives of the defendant.²²⁷ The survey carried out among persons

²²⁶ See also Albanian Helsinki Committee, *E Drejta e Mbrojtjes Falas në Shqipëri/The Right of Free Legal Defence in Albania* (2005)

²²⁷ CPC art. 48, section 3

arrested or detained on remand confirms that this is how defence counsel is chosen in most cases.

Analysis

The wording of the ECHR seems to indicate that when a defendant does not have sufficient means to pay for defence counsel of her/his own choosing, the state will provide defence counsel of the defendant's choosing for free. In the interpretation of this principle, however, the European Court has held that state-paid defence counsel can be appointed by others, for example, the Chamber of Advocates.²²⁸

In the Albanian context, the wording of the Constitution also seems to indicate that the defendant has the right to legal counsel of her/his own choosing regardless of whether the defence is free (paid by the state). The CPC is less clear on the issue. Thus, article 49 provides that when needed, for example because the defendant is a minor or mentally ill, or has simply not chosen a lawyer, the prosecution or the court, *appoints* counsel. Section three gives the Chamber of Advocates the *right to determine criteria* for the appointment of counsel, and section seven provides for paid legal assistance when the defendant lacks means. The CPC Commentary is also unclear on the issue of choosing defence counsel as it first points out that:

- legal assistance is “*chosen* by [the defendant] *or by the proceeding body* on its own initiative”²²⁹, and then goes on to state that
- “the right of choice that the defendant and [her/his] relatives have when the defendant has no means to realise the right should not be confused with the appointment of a legal representative, which is a duty of the proceeding body.”²³⁰

In practice, however, where the defendant does not have sufficient means to pay for counsel, the prosecution or the court appoints counsel without consulting the defendant.

While different countries have different legal aid schemes and for economic or other reasons, not every practicing [and qualified] criminal defence lawyer will be willing to take on free legal defence cases, it can be argued that to the extent possible a defendant with insufficient means should be provided defence counsel of her/his own choosing. This would serve both to treat all defendants equally and to hinder courts, prosecution offices and/or Chambers of Advocates from appointing counsel that they for one reason or other may want to favour. The examples below taken from interviews with lawyers show that this does happen in fact.

²²⁸ Kamasinski v. Austria, 23 November 1989, para. 45

²²⁹ CPC Commentary, p. 135

²³⁰ CPC-Commentary p. 137

Some examples – Appointment of defence counsel²³¹

Defence Counsel (DC) 1: Judges and prosecutors are not always following the rules when they appoint counsel.

DC 2: Appointments are made based on the personal preferences of the judge or the prosecutor.

DC 3: The police often call me in juvenile cases and I am present at the police hearing, but then the prosecutor appoints someone else and I am not paid. Or I am appointed by the prosecutor but then I am not notified of the detention hearing, although I am registered as defence counsel in the file, and the judge appoints someone else, a friend. Sometimes the judge decides to change counsel during the trial. If the judge does not know you, you don't get any cases; the list provided by the Chamber of Advocates depends completely on friendships.

The above examples show a lack of respect for the defendant and indicate that defence counsel is seen as a mere formality rather than as someone who will effectively ensure the defendant's right to a fair trial. Moreover, change of counsel for reasons of personal preference is also in violation of the provision that appointed counsel can be substituted only for lawful reasons.²³² It is also of concern that lawyers take on the representation of a defendant who has previously been represented by different counsel, without consulting the latter.²³³ To put an end to this practice,, defendants should be given a possibility to select counsel from the list provided by the Chamber of Advocates. Once counsel has been appointed, changes should be dependent on the consent of the defendant unless the unjustified absence or other actions by the defence counsel severely hinder the proceedings.

6. Fees for state appointed defence lawyers

Under the previous law on advocacy,²³⁴ fees for legal assistance were established in a 1996 regulation.²³⁵ The regulation defines *maximum* fees in civil and criminal cases and covers both privately and state appointed lawyers. The regulation does not, however, exclude agreements between the parties.²³⁶ While the previous law on advocacy was abrogated with the adoption of the present law on advocates,²³⁷ the fees for state appointed lawyers, i.e., for free legal defence, in the regulation issued under the old law are still applied. The

²³¹ Statements by DC 1 and 2 are citations from the defence counsel survey, while the statement of DC 3 is from an interview on 29 March 2006

²³² CPC art. 49 section 6

²³³ This is also in violation of the Code of Ethics for Advocates, adopted 12 November 2005, article 33

²³⁴ Law no. 7827, dated 31 May 1994, On Advocacy in the Republic of Albania, article 4

²³⁵ Ministry of Justice Regulation no. 2, dated 21 March 1996, "On the Establishment of Maximum Fees for Legal Assistance Provided by Advocates" [the 1996 regulation]

²³⁶ Regulation, article 5

²³⁷ Law on Advocates art. 51

regulation is applied despite the adoption of a joint order detailing substantially higher fees in May 2005 [the 2005 joint order].²³⁸

In 2004 the Ministry of Finance, in an effort to reduce costs, issued an instruction to the courts according to which fees for state-appointed defence counsel are to be debited as operational costs and not, as previously, as salaries. At the same time, funds allocated for operational costs in courts were reduced. As a result, state-appointed lawyers are paid only if there are funds left after paying other operational costs such as water, electricity, stationery, and office equipment. Moreover, on 9 February 2006, the Office of the Administration of the Judicial Budget issued an instruction “On detailing the current budget funds for the year 2006” to all courts.²³⁹ With the purpose of “a more efficient administration of funds”, the courts are instructed to:

[u]nify payment of advocates that are appointed by the court, based on regulation no. 2, dated 21 May 1996, by the Ministry of Justice: “On establishing maximum payment fees for legal assistance, provided by advocates”. In accordance with articles 2 and 3 of this regulation, payment fees for advocates who are appointed by the court to represent a defendant cannot exceed the amount of **3,000 ALL per hearing**. For trials conducted in more than 2 judicial hearings the payment will be of **600 ALL for each hearing**.²⁴⁰

²³⁸ See further below regarding fees for privately appointed lawyers

²³⁹ Office of Administration of the Judicial Budget Protocol no. 23, dated 9 February 2006, “On Detailing Budget Funds for 2006”

²⁴⁰ On the face of it, this would mean that a trial of three sessions would amount to 3 x 600 or 1,800 ALL and not 3,000+3,000+600 or 6,600 ALL. This is probably not intended

For criminal cases, the 1996 regulation provides the following:

Article 2

Payment for the legal assistance provided by advocates in the criminal area differs for crimes and for criminal contraventions

a) for defending the defendant during the investigation phase and the trial

- for crimes 10,000 ALL

- for criminal contraventions 5,000 ALL

When the case concerns a **detained** defendant the payment increases by **50%** (emphasis added).

b) in case investigation time periods are prolonged, an additional payment is received for each month

- for crimes 2,000 ALL

- for criminal contraventions 1,000 ALL

c) when the trial lasts more than 2 hearings, for crimes as well as for criminal contraventions, the payment increases by 1,000 ALL for each hearing

ç) to continue defending these cases at the Appeals Court as well, 50% of the aforementioned fees are received, whereas to continue representation at the Cassation Court²⁴¹ another payment of 60% of the main fee is received.

d) to defend criminal cases only at the Appeals Court, 50% of the first instance fee is received, whereas to defend only at the Cassation Court, 60% of this fee is received.

e) The drafting of appellate requests via the study of files against first instance decision is to be compensated by 40% of the rate specified for first instance trials, whereas the drafting of appellate requests against final court decisions of the Court of Appeals is to be compensated by 50% of the respective rate.

f) to compile requests for criminal prosecution a payment of 1,500 ALL is received.

Article 3

When the lawyer is state appointed, the court establishes the payment, which cannot be higher than 60% of the aforementioned fees (emphasis added).

Article 6

The advocate is obliged to publish these fees in a visible place at his permanent working place.

An example - Based on the regulation, a state-appointed defence lawyer representing a detained defendant suspected of a crime during a first-instance trial lasting 10 sessions would be paid [a maximum of] 13,800 ALL (ca 113 EUR).²⁴² For the continued defence at the Appeals Court, the fee would be 19,800 ALL (ca 162 EUR), while for defending a client all the way up to the High Court, the fee would be 23,400 ALL (ca 192 EUR). This should be compared with the salary of a district court judge in Albania, which is

²⁴¹ Now the High Court

²⁴² $60\% \times [(1,5 \times 10,000) + (8 \times 1,000)]$

75,000 ALL (ca 615 EUR) per month, for 40 working hours per week or, on an average, 176 hours per month.

To receive payment, the lawyer approaches the judge or prosecutor in charge of the case and the judge certifies the number of sessions, or that the lawyer has represented a defendant during the pre-trial investigation, and makes a calculation of the fee to be paid by the court's finance office.

Interviews conducted in April 2006 with court officials and lawyers in Tirana, Vlora, Durrës, Shkodra, Gjirokastra, Korça and Kukës also confirm that the 1996 regulation is still applied. Moreover, the interviews confirm that state-appointed defence lawyers frequently are not paid at all and, as a result, that lawyers are increasingly refusing to take on state-appointed cases.²⁴³

Thus, while one first gets the impression that the fee of 13,800 ALL for a case concluded in ten sessions at a first instance trial simply appears low, in fact the situation is much worse. The lack of payment coupled with fees that are even lower is absolutely unacceptable and may to some extent explain, though not excuse, the lack of engagement frequently reported regarding state-appointed counsel. Based on the above it has to be concluded that Albania does not live up to its obligation under the ECHR to provide free and efficient legal defence to persons with insufficient financial means.

At a Roundtable on free legal aid in December 2005, the Minister of Justice also expressed his concern over the low level of pay (mentioning 3,000 ALL per case) to state-appointed defence counsel. To improve the situation, the Minister suggested the creation of a special fund for free legal aid, based on contributions from the Ministry of Justice, the National Chamber of Advocates and international donors.²⁴⁴

7. Fees of privately appointed defence lawyers

The issue of lawyers' fees is important. On the one hand, the fees of a lawyer may determine whether a person in need will be able to solicit the services of a lawyer and, on the other hand, it reflects on the prestige of the profession. These interests need to be properly balanced against each other. The CCBE Code of Conduct expresses this as follows: "A fee charged by a lawyer shall be fully disclosed to [her/his] client and shall be *fair and reasonable*."²⁴⁵ This is also reflected in article 28, section 5, of the Albanian Code of Ethics for Advocates.

²⁴³ See Right to an efficient defence – Annex 4

²⁴⁴ The roundtable on free legal aid for juveniles was organized in Tirana on 7 December 2005 by the Legal Clinic for Minors and the National Chamber of Advocates

²⁴⁵ CCBE Code of Conduct article 3.4

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The incomes of trial lawyers are obviously also dependent on how much time they have to spend on each case and this issue is therefore closely linked to how efficient a particular justice system is. If trials are concluded quickly and no time is lost for delays and unnecessary travel, lawyers can take on more cases, which means that they can charge less for each case and still make a higher profit. For those who are in need of legal services, in particular in criminal cases where the defendant is deprived of her/his liberty, it is crucial that affordable legal services be available. The defendant should also be given the possibility to make an informed choice, which would include considering the requested fee, when deciding on a lawyer. For those with insufficient financial means, there must be a system for free legal defence which is such that the principle of *equality of arms*, discussed at the beginning of this chapter, can be upheld in relation to the prosecution. Furthermore, a legal aid system should be such that it does not place persons from poor economic conditions in a substantially disadvantaged position *vis-à-vis* those with financial means to pay for a lawyer. This means that while it may not be possible to ensure equal pay to lawyers providing free legal defence, the discrepancy should not be too vast, as it may result in A and B teams of lawyers, where the group of lawyers providing free legal defence are those who are not “good enough” to make it on their own.

Legal framework

According to article 11 of the Law on Advocates, fees for lawyers’ services are defined through:

1. an agreement between the lawyer and her/his client,
2. by the court or the prosecution office when the lawyer
 - a. is appointed or
 - b. when the defendant is given free legal assistance.

For these cases the Minister of Justice and the Steering Council of the National Chamber of Advocates, determine the fees in a joint decision (see the discussion about fees for state appointed lawyers above).²⁴⁶

3. by law.²⁴⁷

Article 48, section 3 also provide that the Ministry of Justice and the Steering Council of the National Chamber of Advocates, after consulting the Ministry of Finance, define fees for advocates providing *legal assistance*. It is unclear whether this is a reiteration of what is provided in article 11 or a separate obligation.²⁴⁸

²⁴⁶ Law on Advocates article 11, section 1 b. See also the discussion about fees for state appointed lawyers above

²⁴⁷ Law on Advocates article 11

²⁴⁸ See further below

According to article 12, contingency fees, or fees depending on the outcome of the case, cannot be requested during the proceedings, but have to be agreed beforehand.²⁴⁹

Joint order on fees

Fees for *both civil and criminal cases* have been determined by a joint order by the Ministry of Justice and the National Chamber of Advocates, adopted in May 2005. The joint order refers to article 48, section 3, of the Law on Advocates.²⁵⁰

For criminal cases, the joint order determines the fees as follows.

Representing criminal cases

ALL

Legal defence after the person is arrested
or detained until the detention hearing is set up
15,000

Legal assistance during the preliminary investigations
phase until the case is sent to trial

a) criminal contravention
20,000

b) first instance trial
50,000

Legal assistance in the first instance

a) for crimes punishable by up to 5 years of imprisonment 30,000
b) for crimes punishable by more than 5 years of imprisonment 80,000

Legal services (representation) at the appeals court
40,000

Legal services (representation) at the High Court
and Constitutional Court
50,000

Preparing other appellant complaints
10,000

Legal counseling per hour
500-1,500

Services provided for minors are calculated
to be half of the aforementioned fees

....

Payment regarding services provided to persons in need will be 80% lower than the
aforementioned fees

The aforementioned fees are applied only in cases when parties have not reached
an agreement for compensating the service provided by the lawyer.

²⁴⁹ Law on Advocates article 12

²⁵⁰ Ministry of Justice Order no. 284/3, Prot. 6/03/2005 (the dating is hard to decipher and could also be no. 1284, Prot. 16/05/2005) and National Chamber of Advocates, no. 212, Prot. 16/05/2005

Comment: In light of the joint order, the relationship between articles 11 and 48 of the Law on Advocates seems unclear. As stated above, article 11 of the Law on Advocates regulates how fees for legal services are defined, i.e., through an agreement, in a joint order by the Minister of Justice and the National Chamber of Advocates for state-appointed counsel, or by law. Article 48 of the Law on Advocates, however, refers to fees for lawyers providing “legal assistance”, i.e., not specifically to court-appointed lawyers. The term “legal assistance” again is the term used in article 2, defining legal services provided by advocates. There is nothing in article 48, section 3, that indicates that the fees mentioned there would apply *only* in the absence of an agreement as required in article 11, or that *minimum* fees should be determined. Thus, while article 11 seems exhaustively to enumerate how fees for legal services are determined, article 48 could be read as authorizing the listed bodies to determine fees for *any* legal assistance. If this is the case, there is a contradiction between the two provisions as a joint order is not a *law*, as required in article 11, section 3. It is also unclear whether the joint order even *intended* to regulate fees for state-appointed defence lawyers. Thus, according to the head of the Directorate of Free Legal Professions, the joint order is applicable for both private and state-appointed counsel. According to the chair of the National Chamber of Advocates, on the other hand, the joint order defines *minimum* fees only for privately appointed defence counsel, whereas a second joint order will be drafted in the future for state-appointed counsel. Finally, according to the Secretary General of the National Chamber of Advocates, the joint order defines fixed fees for state-appointed lawyers and minimum fees for privately appointed lawyers.²⁵¹ While the determination of default fees is recommendable, the status and purpose of the joint order thus remains unclear. *If* the joint order does not cover fees for state-appointed counsel, the Chamber of Advocates and the Minister of Justice have failed to fulfil their obligation under article 11 of the law. *If*, on the other hand, the joint order does indeed cover fees for state-appointed counsel, it is alarming that the Office of the Administration of the Judicial Budget is not adhering to it.²⁵²

The order and the list of fees attached to it are drafted in a rather unclear manner. There is no indication as to how the suggested fees have been calculated. As will be discussed shortly, the way the fees are set do not reveal any clear logic. The division into various categories of crimes, in particular for the investigative phase, is confusing as they are described as criminal contraventions and “first instance trial”. Considering that both crimes and criminal contraventions are tried by the district courts in first instance, it is unclear what is intended here, but a good guess would be “crimes”.²⁵³ The “fee-part” of the order covers two pages and the second page lists some general instructions. The second page, first paragraph, refers to “persons in need”, but there is no indication as to what determines whether a person is in need, nor is there any reference to legislation

²⁵¹ Meeting with Maksim Haxhia, Chair of the National Chamber of Advocates on 8 April 2006, meeting with Gjin Niklekaj, head of Directorate of the Free Legal Professions on 11 April 2006 and meeting with Virgil Karaja, Secretary General of the National Chamber of Advocates, 13 April 2006

²⁵² The letter of 2 February 2006, discussed above, is a clear indication that the regulation is not applied

regarding social welfare or some other external basis for determination.

It is not clear from the order whether the fees are cumulative. According to the National Bar Association and the Directorate of the Free Legal Professions, however, the fees mentioned under the heading “Representing criminal cases” *are not* cumulative, whereas the fees under the heading “Legal assistance in the first instance” *are* cumulative.

Partly cumulative fees – an example: The fee for representation of a client *only* until the detention hearing is 15,000 ALL (ca 122 EUR), whereas the fee for representation during the preliminary investigation (presumably including the detention hearing) until the request for trial is submitted is 20,000 ALL (ca 164 EUR) for criminal contravention and 50,000 ALL (ca 410 EUR) for “first instance trials” (presumably for crimes). This means that a lawyer representing a client through a detention hearing, a preliminary investigation and a trial at the first instance level would get 30,000 ALL (ca 246 EUR) if the client is charged with a crime punishable by up to five years of imprisonment, and 80,000 ALL (ca 656 EUR) if the crime is punishable by more than five years of imprisonment. For the continued representation at the Court of Appeals, the lawyer would receive an additional 40,000 ALL (ca 328 EUR) and for representation at the High Court, an additional 50,000 ALL (ca 410 EUR). Representation of a client charged with a crime punishable by more than five years of imprisonment all the way up to the High Court would thus amount to a fee of 170,000 ALL (80,000+40,000+50,000/ca 1,393 EUR).

According to the Secretary General of the National Chamber of Advocates, on the other hand, the fees are cumulative throughout.

Cumulative fees – an example: The fee for representing a client who is arrested and detained on remand and charged with a crime, through the detention hearing, the preliminary investigation and the trial at first instance level would in this case amount to 145,000 ALL (15,000+50,000+80,000/ca 1,189 EUR). The continued representation all the way up to the High Court would result in a total fee of 235,000 ALL (145,000+40,000+50,000/ca 1,926 EUR).

These figures should be compared with the fee of 23,400 ALL (ca 192 EUR) for state-appointed counsel in the example presented above when discussing the 1996 regulation and fees for state-appointed counsel, and again with the 75,000 ALL (ca 615 EUR) salary of a district court judge. As previously discussed, lawyers tend not to spend much time with their clients, while prosecution files are rarely extensive.²⁵⁴

The survey conducted among defence counsel indicates that the above tariffs are widely known by defence lawyers. Many lawyers state that they apply the tariffs set in the Order; some cite fees between 30,000 and 50,000 ALL. Some cite lower fees, e.g., 15,000 or 20,000 ALL, but some also cite fees up to 100,000 ALL. As the cited figures do not

²⁵³ CPC art. 13 and CC art. 1

²⁵⁴ See Rights during pre-trial detention; Consultation of prosecution files

II. THE RIGHT TO AN EFFECTIVE DEFENCE

correspond exactly to the Order, and since none of the lawyers have specified different fees for different stages of the procedure, it is impossible to draw any definite conclusions about exactly how and what lawyers charge. Nevertheless, the replies indicate lower levels of pay than the Order allows. As the order is said to set minimum fees, the fact that privately appointed lawyers charge less indicates that the fees are set too high.

The above figures might also be compared with other countries, for example Sweden or Lithuania. According to statistics provided by the World Bank, the gross national income (GNI) per capita in Sweden 2004 was USD 35,840, whereas the purchasing power parity (PPP) was USD 29,880, ranking Sweden as 10th and 17th among the 208 countries listed. For Lithuania, the GNI per capita was USD 5,740, whereas the PPP was USD 12,530 for the same period, ranking Lithuania as 74th and 65th among the countries listed. For Albania the GNI per capita was USD 2,060, whereas the PPP was USD 5,070 for the same period, ranking Albania as 119th and 121st among the listed countries.²⁵⁵

In Sweden, all persons detained on remand have the right to be represented by public defence counsel, and private counsel in criminal cases is a rare exception.²⁵⁶ Public defence counsel are paid by the state, but if the defendant is found guilty, he/she will be ordered to reimburse the state for the costs of the defence. The level of reimbursement varies depending on the income and economic situation of the defendant. If the defendant has insufficient financial means, no reimbursement is ordered.²⁵⁷ Public defence counsel are paid according to tariffs determined by the Swedish National Court Administration, and are calculated based on an hourly fee of 1,029 SEK²⁵⁸ (ca. 108 EUR), which is tied to the general price index. The tariffs vary depending on the effective hearing time, regardless of the number of sessions held.²⁵⁹

Thus, in a case concerning one defendant, where there has been one detention hearing and the effective hearing time during the main hearing is 0-15 minutes, the tariff is 2,645 SEK (ca. 277 EUR), based on an assumption that the public defender has worked a total of two and a half hours on the case. Where the effective hearing time is 45-59 min, the tariff is 3,650 SEK (ca. 382 EUR), based on the assumption that the public defender spent 3.5 hours on the case, and where the effective hearing time is 3 hours and 45 minutes, the fee of the public defender is 7,350 SEK (ca. 767 EUR), based on the assumption of seven

²⁵⁵ <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf> [Accessed 12 June 2006]

²⁵⁶ Swedish Code of Judicial Procedure, Chapter 21, Section 3a, see <http://www.sweden.gov.se/content/1/c4/15/40/472970fc.pdf> [Accessed 1 June 2006]

²⁵⁷ Swedish Code of Judicial Procedure, Chapter 31, Section 1

²⁵⁸ All Swedish figures are excluding VAT, which is 25%

²⁵⁹ As shall be seen in the chapter on Efficient Trials, the average effective hearing time is 1.72 hours, only 4.8% of the cases have an effective hearing time exceeding 6 hours, and 1.3% have effective hearing times exceeding 12 hours. Given that less than 5% of the cases have an effective hearing time exceeding 6 hours, it would be difficult to reach an average of 1.72 hours unless there is a very large number of cases solved in less than an hour http://www.dom.se/Publikationer/Statistik/domstolsstatistik_2004.pdf [Accessed 1 June 2006]

hours of work.²⁶⁰ Apart from the tariff fee, a public defender is entitled to additional payment for time spent travelling and waiting (98 EUR/hour) as well as for costs.²⁶¹ In the bulk of criminal cases, the public defender is paid around 500 EUR for the trial at first instance level. This should also be compared with the salary of judges in Sweden, which for a district court judge is 47,000 SEK (ca 4,922 EUR) per month.

In Lithuania, there are at present two parallel systems of state-paid defence counsel. It is expected that the first (new) system will replace the second (old) system. The salary for a district court judge in Lithuania starts from approximately 850 EUR and on average, a district court judge is paid around 1000-1100 EUR/month.

The new system.²⁶² Defence lawyers or public defenders deal only with criminal cases where the defendant has requested free legal defence. These defence lawyers work exclusively with free legal defence cases and are under law forbidden to do anything else. They receive a monthly salary of around 1200 EUR from the state. Apart from their salaries, they are reimbursed for some of their expenses such as travel or fees for copying documents.

The old system.²⁶³ Defence lawyers work with free legal defence cases only on a voluntary case-by-case basis at the request by the state, i.e., the investigator or prosecutor. For these defence lawyers, the state pays around 8 EUR per hour²⁶⁴ for the work that has actually been done. The law, however, limits the number of payable hours, depending on the case. For example, in cases of very serious crimes, a defence lawyer cannot be paid for more than 45 working hours, for serious crimes no more than 40 working hours and for crimes of negligence, no more than 30 working hours. As a result of the low levels of pay, defence lawyers who take on free legal defence cases are frequently old or less qualified and do not give the necessary time and attention to their cases. If a person is found guilty he/she has to reimburse the state for the defence costs, but a certain number of persons have the right to receive legal assistance free of charge in criminal cases.²⁶⁵

²⁶⁵ Those are: minors, persons who due to a functional disability are unable to defend themselves, persons who do not know Lithuanian, persons who are among several co-defendants with competing interests and one of them has an defence lawyer, persons who risk life imprisonment, persons tried in absentia, persons in extradition cases, persons receiving social welfare, persons under state guardianship, persons who are unable to perform a job as well as persons with insufficient income and property (in this case, it may be free of charge or subject to 50% reimbursement, depending on the level of income or property)

²⁶⁰ Of course there are a number of cases requiring much more efficient hearing time and much more work by the public defender. See the previous footnote.

²⁶¹ See further http://www.dom.se/Publikationer/Rattshjalp_och_taxor/Rattshjalp_och_taxor.pdf [Accessed 1 June 2006]

²⁶² Lithuanian Republic Government decision no. 69, dated 22 January 2001, "Concerning rules of payment for secondary legal assistance in Lithuania" (amended by LR Gov. decision no. 469, dated 26 April 2005) www.lrs.lt [Accessed 14 June 2006]

²⁶³ Lithuanian Law No. VIII-1591, dated 28 March 2000, "On State-Guaranteed Legal Assistance in Lithuania"; see also Lithuanian CPC, art. 51 at www.lrs.lt [Accessed 14 June 2006]

²⁶⁴ 8 EUR/hour is calculated based on the minimum monthly salary multiplied by 0.05; the minimum salary in Lithuania is around 160 Euro per month

A privately-appointed defence lawyer charges approximately 150-250 Euros for a simple case where the main hearing does not last more than one hour.²⁶⁶

Considering the above, it seems that legal services in Albanian are comparatively expensive for the average person, whereas the earnings of an Albanian privately-appointed lawyer are comparatively high.

7.1 Minimum fees and the Ethics Code

As has been discussed above, the Law on Advocates regulates how fees for lawyers are defined, i.e., in an agreement or in a joint order. The law contains no provisions regarding minimum or maximum fees, nor does it authorize minimum or maximum fees to be defined in secondary legislation. In line with this, the 2005 joint order provides that the fees in the order are applied in the absence of an agreement between the lawyer and the client; i.e., *there is no mention of minimum or maximum fees*. Nevertheless, the Code of Ethics for Advocates forbids members from charging fees lower than those mentioned in the 2005 joint order. Article 28, sections 1, 2, 5 and 6 provide:²⁶⁷

1. A lawyer shall be entitled to a fee for his services. The fee shall be determined in a written agreement between the lawyer and his client. In the absence of a written agreement, the fee shall be defined in accordance with the fees provided by the Joint Order of the Ministry of Justice and the National Chamber of Advocates. *In both cases, fees shall not be lower than the minimum specified for this kind of service.*
2. The fee for a lawyer shall be *reasonable and fair*. Elements that shall be considered to define how high a fee is reasonable are:
 - a) time and work required, novelty and difficulty that the case presents, as well as skills required to provide legal services;
 - b) time limits imposed by circumstances;
 - c) nature and length of professional relationships with the client;
 - d) experience, reputation and skills that the lawyer or lawyers have when performing their services.
-
5. A lawyer shall render free legal aid to:
 - a) persons who are in financial difficulties;
 - b) persons who are supported by financial assistance;
6. A lawyer may offer free services for his close friends, his relatives or other lawyers.

Considering that the law on Advocates gives lawyers an unlimited right to agree on fees for their services, it can be questioned whether the limitation introduced in the Ethics Code, which is neither a law nor secondary legislation, is lawful. This is of concern not least considering that breaches of the Ethics Code can lead to disciplinary proceedings.

²⁶⁶ Meeting with Tomas Stravinskas, Lithuanian defence lawyer, 15 June 2006

²⁶⁷ Code of Ethics for Advocates, article 28

On the other hand, the Ethics Code obliges lawyers to offer free legal services to persons in financial difficulties and to persons who receive social assistance. It also allows lawyers to offer free legal services to close friends, relatives and other lawyers.²⁶⁸ If this means that whoever cannot pay the rather high *minimum* fees shall be given legal assistance for free, it seems to put a rather heavy burden on the legal community. Thus, it would be preferable to set any minimum fees at a low or moderate level so as to make legal services widely available. In order to set either minimum or maximum fees, however, the Law on Advocates needs to provide for this, as an Ethics Code cannot introduce restrictions in the absence of power delegated by law.

Contingency fees

As has been stated above, the Albanian Law on Advocates allows contingency fees in general if it is provided in the agreement prior to the trial.²⁶⁹ The Albanian Ethics Code, however, forbids *pactum de quota litis* agreements but allows “result fees”, *except in criminal and family cases*.²⁷⁰

A contingency or contingent fee is normally understood as a “fee charged for a lawyer’s services only if the lawsuit is successful or is favourably settled out of court. Contingent fees are usually calculated as a percentage of the client’s net recovery (such as 25% of the recovery if the case is settled, and 33% if the case is won at trial).”²⁷¹ The phrase *pactum de quota litis*, used in the Ethics Code, is a Latin phrase which translates as an “agreement about a portion of the amount in issue”. That is, a contingency fee could be described as a *pactum de quota litis* and both could be described as result fees. This is also how the phrase is used in the CCBE Code of Conduct which describes *pactum de quota litis* as “an agreement between a lawyer and [her/his] client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of the money or any other benefit achieved by the client upon the conclusion of the matter.”²⁷² Pure contingency fee or *pactum de quota litis* agreements are not allowed under the CCBE Code of Conduct. Nevertheless, an agreement that fees be charged in proportion to the value of a matter handled by the lawyer, if this is in accordance with an officially approved fee scale or under the control of competent authority having jurisdiction over the lawyer, will not be considered as a *pactum de quota litis*.²⁷³

Considering that the above concepts are synonymous, the various and contradictory provisions in the Law on Advocates and the Ethics Code raise concern. The result fees provided in the Ethics Code are also construed as additions to the *minimum fees*, thus extending on the prohibition to charge below the fees provided in the joint order.²⁷⁴ It

²⁶⁸ Code of Ethics for Advocates, article 28, section 5

²⁶⁹ Law on Advocates, article 12

²⁷⁰ Code of Ethics for Advocates, sections 3 and 4

²⁷¹ Black’s Law Dictionary, s.v. “contingent fee”

²⁷² CCBE Code of Conduct article 3.3.2

²⁷³ CCBE Code of Conduct article 3.3.3

²⁷⁴ Ethics Code, article 28, sections 2 and 3

therefore seems that the main purpose of the joint order on fees for lawyers is not to protect clients in need of legal services, but to limit competition among lawyers.

Comment: It can be questioned whether contingency fees are appropriate in a society where the lawyers' profession is as recent as it is in Albania, where the Chamber of Advocates is weak and where confidence in the legal profession and the justice system is low. If contingency fees are used, it should be clearly specified in law or secondary legislation how they are set and what percentages may be used.

7. 2 Publication of fees

The Law on Protection of Consumers provide that anyone *advertising* goods or services is obliged to give the consumer complete information, including on the costs, regarding the service, and that for all services offered to a consumer, the final cost shall be indicated.²⁷⁵ While the Ethics Code obliges lawyers to display the minimum fees defined in the 2005 joint order,²⁷⁶ it prohibits lawyers from advertising their "specific" fees.²⁷⁷ The rationale behind this is unclear but it may further serve to undermine a healthy competition among lawyers and deprives persons in need of legal services the possibility to make a reasonably informed choice among available lawyers. The Albanian Ethics Code could be compared with the Bar Code of the United Kingdom, for example, which provide that "advertising and promotion may include: ... statements of rates and methods of charging;...".²⁷⁸

Comment: The survey conducted among persons detained on remand indicates that defendants have very vague ideas of the fees they are expected to pay and that the fees vary substantially. Thus *most* detainees were unaware of the fee their lawyer was requesting; some stated that court-appointed lawyers had asked for fees and some stated that they had been asked for money to be released or have reduced sentences.

²⁷⁵ Law no. 9135, dated 11 September 2003, "On the Protection of Consumers", articles 8 and 14

²⁷⁶ Code of Ethics for Advocates, article 4, paragraph 2

²⁷⁷ Code of Ethics for Advocates, article 40

²⁷⁸ Code of Conduct, section 710.2 (b) <http://www.barcouncil.org.uk> [Accessed 1 June 2006]

Some examples – Defendants on fees to defence counsel²⁷⁹

Male charged with trafficking in narcotics: *I pay 5,000 ALL per session and then there will be an additional payment to be determined based on the outcome.*

Male charged with murder: *I have paid 17-18 thousand EUR to my private attorneys and 50,000 ALL for the court-appointed counsels. I have had to sell my house.*

Male charged with murder: *Until today (6 weeks after the arrest) my family has paid 50,000 ALL.*

Male charged with exploitation of a minor for prostitution: *Until today my family has paid my defence lawyer 40,000 ALL.*

Minor charged with unlawful detention: *The defence lawyer asked my family for 5,000 EUR to get me released.*

Male charged with murder: *50,000 ALL is normal for a criminal case but some pay more than 1000 EUR.*

Male charged with murder: *There are no fixed fees. I paid 30,000 ALL just for the power of attorney. I have been offered a lower sentence for 7,000 EUR.*

8. Concluding observations

While the introduction of the right to defence counsel in criminal proceedings in Albania represented a quantum leap forward, it must be concluded that much remains to be done in this area of the Albanian criminal justice system. Defence counsel are often seen to take a rather passive role during court proceedings and they are a frequent cause of postponements of trial sessions. Courts also seem to have a tendency to listen more to the prosecution than to the defence, thus creating a disadvantaged position for defence counsel and creating imbalances in the principle of equality of arms. The legislative and regulatory framework guiding the profession on lawyers is inadequate and the National Chamber of Advocates has so far not shown itself to be the strong and independent body for self-regulation of lawyers, as provided in the Law on Advocates. Of particular concern are the fees for legal services in general and fees for state-appointed defence counsel in particular. There is, therefore, an urgent need to review the system for free legal defence so as to uphold the principle of *equality of arms* as well as to fulfill the obligation under the ECHR to guarantee *effective* free legal defence where defendants lack means to pay for this service.

²⁷⁹ These figures reflect only the opinions of the defendants interviewed. As indicated by the answers, defendants are also asked for money for corruptive purposes, such as a release or a lower sentence

Recommendations

1. Based on the principle that *justice not only has to be done, but also has to be seen to be done*, courts should make efforts to ensure that the prosecution and the defence are treated equally and with respect.
 - To improve the co-operation between lawyers and the judiciary, and to come to terms with issues related to *equality of arms* as well as unjustified absences of lawyers and related issues, a working group of court chairs and members of the Chambers of Advocates might be convened.
2. Judges should avoid any informal contacts, in court or otherwise, with either of the parties to a case; i.e., the prosecution or the defence. The same applies to prosecutors and defence lawyers. This would also diminish the possibilities for corruptive agreements.
3. The CPC and the Law on Advocates should be amended so as to make clear that the courts are welcome to report any violations of the Code of Ethics for Advocates to the Chamber of Advocates.
4. Disciplinary measures against defence lawyers who fail to fulfil their professional duties, or who hinder the proceedings, should be introduced in the CPC. The possibility to undertake measures *could* be made dependent on lack of action by the respective Chamber of Advocates.
 - Disciplinary measures that might be considered include the obligation to pay (part or all) procedural expenses, fines and a prohibition to act as counsel in the particular case or before the court in general.
5. In order to restore and strengthen the trust and respect for the profession of advocates in Albania, the National Chamber of Advocates should:
 - Make sure that the Statute and the Ethics Code are published in the *Official Journal* without any further delay.
 - Make sure that the contents of the Statute and the Ethics Code are made known among their members through seminars or otherwise.
 - Immediately set up disciplinary committees and ensure that any complaints are handled with expedience and in a fair and transparent manner.
 - Decisions should be made public and be compiled as case law and similar cases should be decided in a coherent manner.
 - Set up and offer continual training programmes for their members to ensure a high quality of legal representation. Particular attention should be given human rights issues and the Code of Ethics for Advocates.
 - It should be considered whether the continued membership should be dependent on participation in the continued training programs offered.

- Review the Law on Advocates, the Statute of the National Chamber of Advocates and the Code of Ethics for Advocates so as ensure that the legal framework is coherent and follows European standards.
 - Ensure that the Code of Ethics for Advocates is known and adhered to by all its members.
 - This could be done for example through an Ethics Committee or through regular seminars on various issues..
6. The whole system of free legal defence and mandatory defence (e.g., in cases concerning juveniles or mentally handicapped persons) should be revised by the National Chamber of Advocates and the Ministry of Justice.
- A revised system of free legal defence should be based on the following:
 - I. A system that ensures that defendants who lack financial means are provided efficient legal defence under circumstances that does not put them at a substantial disadvantage *vis-à-vis* the prosecution and other defendants;
 - II. A system that either distinguishes between cases of free legal defence and cases of mandatory defence, or provides free legal defence for both categories. If mandatory defence is not free, a method of reimbursement by the defendants should be created.
 - III. Reasonable fees to lawyers providing free legal defence;
 - IV. Clear criteria for providing free legal defence;
 - V. A system to evaluate the financial situation of a defendant/suspect allegedly in need of free legal defence;
 - VI. A reasonable possibility for the defendant to choose among lawyers participating in the system of free legal defence;
 - VII. Clear criteria for substitution of lawyers providing free legal defence;
 - VIII. A clear and concise method of calculating fees for state appointed counsel providing free legal defence; either based on the hours spent on the case, with additional compensation for expenses (e.g., the Swedish system as described above) or based on set ranges of fees for various activities (e.g., the Italian system);
 - IX. Payment should be dependent on an invoice specifying actions undertaken, time spent and any costs related to the case;
 - X. A coherent application of the system of free legal defence throughout the country. This could be achieved either through a centralized authority (e.g., the Office of Administration of the Judicial Budget) handling all payments or at least reviewing all payments with a possibility to appeal on this particular matter.
7. The joint order on fees by the National Chamber of Advocates and the Minister of Justice should be revised.

- I. Any default fees should be based either on the hours spent on the case, with additional compensation for expenses (e.g., the Swedish system as described above) or on set ranges of fees for various activities (e.g., the Italian system).
 - II. Fees should be *fair and reasonable* compared with the level of costs in Albania and general salary levels (which may be indicated by salaries of judges).
 - III. Clear criteria on how contingency fees are calculated and what percentages are allowed should be adopted in law or secondary legislation.
 - IV. In accordance with the Law on Advocates, (reasonable) fees for state-appointed lawyers should be adopted. The fees should be calculated in the same manner as fees for privately appointed lawyers and state-appointed lawyers should be paid only against a specified invoice.
8. The Law on Advocates should be amended so as to require lawyers to post the fees they apply and how they are calculated.

III. TWO CASE STUDIES

In this chapter, two criminal cases will be analysed. One is the Revenge for Albanian Justice case, concerning some of the most spectacular crimes in Albanian recent history. After an initial trial at Tirana District Court this case was returned to the prosecution for further investigation and a “second trial” is at present ongoing at the First Instance Court for Serious Crimes. The other case, here referred to as the Lawyer’s case, is a corruption case against a lawyer who practiced at Tirana District Court. The purpose of these case studies is to highlight in some detail how two specific cases have been dealt with by the Albanian criminal justice system, and to point out some problems and deficiencies that are of general concern. While these two cases and how they have been handled by the prosecution and the courts are very different, both cases raise serious concerns and indicate that rules of law and basic legal principles are treated rather lightly or sometimes simply ignored.

1. Revenge for Albanian Justice Case

Note: The following analysis concerns an ongoing trial at the First Instance Court for Serious Crime. This analysis does not, however, discuss the ongoing trial but only decisions and facts leading up to the present trial. Furthermore, the OSCE Presence does not have any opinion on whether any of the defendants to this case participated in the crimes they are accused of having committed.

Background

In October 1996, investigations started regarding a large number of armed robberies, resulting in several killings, murder, kidnapping and the creation of a criminal organization known as “The Revenge for Albanian Justice”. The Revenge for Justice organization then allegedly exploded a car bomb outside the Vefasupermarket, resulting in four dead and many wounded. The crimes took place between 1992 and 1996. On 12 October 1996 five of the suspects, Leart Shyti, Kreshnik Spahiu, Enkeled Agaj, Pash Novruzaj and Nikolin Novruzaj, were arrested. During the civil unrest in March 1997, they all managed to escape. The indictment covering 19 charges against 11 defendants was filed at Tirana District Court on 13 October 1998²⁸⁰. The trial started on 24 December 1998. All defendants were tried *in absentia*. Defendant Gëzim Gjoni was arrested on 19 May 2003 and was held in detention on remand until 23 November 2005, when the detention on remand was changed to house arrest pending a final decision. He has chosen not to be present during the trial. During the proceedings, Enkeled Agaj died under unclear circumstances.

²⁸⁰ Enkeled Agaj, Altin Arapi, Gentian Çaka, Gëzim Gjoni, Driton Hate, Nikolin Novruzaj, Pash Novruzaj, Leart Shyti, Orik Shyti, Roland Shyti and Kreshnik Spahiu

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On 12 February 2003, the case in its entirety was dismissed by the court in accordance with article 387 of the CPC, after the prosecution, referring to article 377 of CPC, had requested the acts to be transferred to the prosecutor for further investigation. During the trial, the two prosecutors who had brought the case to trial had abandoned the case and left the country. The request for the acts to be returned to the prosecution was therefore submitted by two new prosecutors. The request to withdraw the acts was submitted after four years and some 190 sessions of the main hearing and after the completion of the judicial examination²⁸¹. The request was thus submitted at a time when it must have been obvious that there was little admissible evidence binding the defendants to the crimes in question. During the trial, it also became clear that at least part of the investigation was tainted by serious irregularities.

In spite of the request for withdrawal, Tirana District Court decided to dismiss the case, reasoning that as the law only provides for the prosecutor to withdraw the *accusation*, not *the acts*, the request had to be seen as a withdrawal of the accusations²⁸². The court then went on to reason that as the charges had been withdrawn, the cause for the proceedings had ceased to exist; thus it dismissed the case under article 387 of the CPC. According to the Tirana District Court decision, the judicial examination showed that the criminal offences charged had occurred, but that little admissible evidence had been brought to link the defendants to the crimes they had been accused of having committed. The most important evidence in this regard was firstly ballistic expertise, showing that the same weapons had been used during the commission of several of the robberies, and secondly the alleged sequestration of these weapons in the house rented by one of the defendants, Enkeled Agaj. During the trial, however, the persons who were to have been present during the sequestration of the weapons and who had signed the written minutes denied having visited the house in question or having been present during the sequestration. Some of the witnesses further indicated that they may have signed the minutes after they saw the weapons at a police station in Tirana. As a result the minutes concerning the sequestration of the weapons were declared invalid.

During the pre-trial investigation, some of the defendants, in particular Nikolin Novruzaj, admitted that they had committed several of the crimes of which they had been accused. In this respect Tirana District Court concluded that statements made before the suspects had been informed about the charges against them and about their right to defence counsel could not be used²⁸³. Regarding statements by the defendants at later stages of the investigation, Tirana District Court found that they had not been obtained in contradiction with the law, and could not be declared invalid as such. As these statements were not corroborated by other evidence, they were not sufficient to

²⁸¹ Out of these, only approximately sessions 80 were held. The rest were postponed due to the failure to notify witnesses, incomplete trial panels (25 sessions), absent prosecutors (10 sessions) and absent defence counsel (4 sessions)

²⁸² CPC article 377

²⁸³ CPC article 37

²⁸⁴ CPC 151 para. 4 and 152 para. 3

substantiate the guilt of either the defendant giving the statement or his co-defendants²⁸⁴. Finally the testimony of one of the defence witnesses, a driver and observer for the intelligence service who testified about having taken part in the transfer of weapons to the house rented by one of the defendants, was found to be untrue.

The Tirana District Court decision to dismiss the case was appealed by both the prosecution and the defence. The Appeals Court quashed the decision of the district court and sent the case for retrial by a new panel at Tirana District Court²⁸⁵. As reason for reversing the first instance decision, the Appeals court argued that the district court had wrongly interpreted the request for withdrawal of *the acts* as a withdrawal of *the accusation* and then “mistakenly” considered this lack of an accusation as a reason to dismiss the case. The Appeals Court further argued that as long as the district court did not come to the conclusion that the defendants were not guilty, the district court should have decided to transfer the acts to the prosecutor. The Appeals Court then went on to state that they did not have the legal right to return the acts directly to the prosecutor, as article 428 of CPC clearly specified what to do if a first instance decision was quashed. The Appeals Court finally provided a reminder that the new panel at Tirana District Court was obliged to respect the prosecutor’s request for the transfer of the acts in accordance with article 377 of the CPC.

This decision seems not to be in accordance with the CPC. Article 428 provides:

1. The Court of Appeals, after examining the case decides:

- a. to leave the decision in force;
- b. to change the decision;
- c. to cancel the decision and dismiss the case, when this is provided in the legal provisions that do not permit the initiation and the continuation of the proceedings or when the guilt of the defendant has not been proved;
- ç. to cancel the decision and return the acts to the first instance court when the provisions regarding the requirements to be a judge in the concrete case, the number of the judges necessary for the constitution of the chambers defined in this Code, with the exercise of the prosecution by the prosecutor and his participation in the proceedings, with the participation of the attorney of the injured accuser and the defence lawyer of the defendant, the violation of the provisions for introduction of new accusations, are not observed and also in any case when special provisions specify the nullity of the sentence.

In its decision, however, the Appeals Court never examined whether any of the circumstances for cancelling the decision enumerated in paragraph (ç) – i.e., grave procedural violations – were present. Instead, and as mentioned above, the Appeals Court found that Tirana District Court had interpreted the prosecutor’s request wrongly and consequently *made the wrong decision*, which the Appeals Court *decided to reverse*. The fact that Tirana District Court according to the Appeals Court made the wrong decision *is not a grave procedural breach and consequently not a reason to cancel the decision as specified in article 428*. Instead the Appeals Court would have had the power simply to change the decision as provided in paragraph (b). This decision, albeit not highly relevant for the present discussion, highlights another frequent problem with Albanian court decisions, i.e., the inadequate and often incorrect legal reasoning.

²⁸⁵ See article 15 para. 1 of CPC

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The appeal of the defence was rejected as the defence lawyers submitting the appeal were not authorized to do so. The defence appealed the decision to the High Court, which upheld the decision of the Appeals Court. On 4 September 2003, a new panel at Tirana District Court decided to transfer the acts to the prosecutor (in accordance with the instruction by the Court of Appeals). On 23 March 2005, the trial started again, this time at the First Instance Serious Crimes Court (SCC) in Tirana.

Two of the defendants, Kreshnik Spahiu and Orik Shyti, have been granted asylum in Switzerland for reasons of political persecution by the state through the Revenge for Justice Case²⁸⁶. A request for extradition from Belgium of a third defendant, Altin Arapi, has also been rejected with reference to the Revenge case²⁸⁷.

Legal analysis

The handling of the Revenge for Justice Case raises serious concerns regarding the defendants' right to a fair trial. In particular it raises concerns in respect of their right to be presumed innocent and to a trial within a reasonable time.

As to the law – As a general rule, an indictment/request for trial is filed when the prosecutor conducting the pre-trial investigation finds that there is enough evidence for a guilty verdict against the defendant(s). This rule is reflected in article 331 of the CPC. As an attempt to ensure that trials are held within a reasonable time, the Albanian law provides different time periods that must be respected²⁸⁸. Thus the main rule is that within three months after a defendant is notified about charges against her/him, the prosecutor has to decide whether to bring the case to trial²⁸⁹. The time period may be prolonged by three months, or in case of a complex investigation, up to a maximum of two years²⁹⁰. After an amendment of the relevant article in February 1999, it was provided that beyond the two year period the Prosecutor General may, in extraordinary cases, approve to extend the period of preliminary investigation up to an additional year, thus extending the pre-trial investigation period to an absolute maximum of three years²⁹¹. Investigative actions performed after the expiry of this time period may not be used, i.e., evidence collected after this time has elapsed is inadmissible²⁹². Where defendants are detained on remand, there are additional time periods to take into consideration²⁹³.

²⁸⁶ Kreshnik Spahiu & Orik Shyti: Decision by the Swiss Federal Appellate Commission on Asylum, act II/N462 528BS, 13 September 2004

²⁸⁷ Decision by the Belgian Ministry of Justice on 17 September 2004. There is information that Altin Arapi later been granted asylum for the same reasons, but this has not been officially confirmed

²⁸⁸ These rules have been discussed in Part I on Pre-trial detention

²⁸⁹ CPC article 323, para. 1

²⁹⁰ CPC Article 324

²⁹¹ Law No. 8460, dated 11 February 1999, "On some additions to Law no. 7905, dated 21 March 1996, 'Criminal Procedure Code of the Republic of Albania'"

²⁹² CPC 324 para. 4

²⁹³ CPC article 263

Regarding the request for withdrawal, the relevant article 377 appears in a chapter called “[N]ew accusations”, indicating that a request for withdrawal would mainly be of use when there are new charges against the defendants. Thus, for example, article 374 states that when new facts emerge that are related to crimes not covered by the request for trial, the prosecutor *withdraws the file to continue the preliminary investigation*²⁹⁴. Article 377, under the caption, “[T]he transfer of the acts to the prosecutor” provides that:

- When the prosecutor withdraws the accusation and the evidence as it stands shows that the defendant is not guilty or if one of the conditions under which the court can decide to dismiss a case is fulfilled, the court decides for acquittal or dismissal. If neither decision can be rendered, the court transfers the acts to the prosecutor²⁹⁵.

Cases can be dismissed when:

- The prosecution of the case should not have been initiated or must not continue or when the charged offence no longer exists. If it is doubtful whether conditions to proceed exist or whether the criminal offence exists, the court also dismisses a case. A decision to dismiss a case has to be reasoned²⁹⁶.

The Commentary to the CPC on the one hand states that “when the prosecutor withdraws the accusation *and requests to be given the file in order to continue the investigation*”, according to article 377 of the CPC, as a rule the court decides to transfer the acts to the prosecutor.” It then goes on to cite a High Court Decision, ruling that the court may only refuse a request for withdrawal of the acts, when the innocence of the defendant is obvious. On the other hand the Commentary states that “it is necessary to understand that the transfer of the acts to the prosecutor should represent an exception, and be used rarely or possibly never, as it is a waste of time or a delay of the proceedings²⁹⁷...” No reference is made to the chapter heading, i.e., the relationship between the request for withdrawal and new charges. The meaning and interpretation of this article remains unclear, not least considering that the chapter covers new accusations, while the article caption seems to indicate the transfer of the acts to the prosecutor as the main option, the article itself seems to indicate this as the last option.

²⁹⁴ The article then goes on to state that upon request by the prosecutor and the approval of the defendants, the court may also - unless it has a negative impact on the momentum of the proceedings – decide to examine the new charge within the ongoing judicial examination

²⁹⁵ CPC article 377

²⁹⁶ CPC article 387 and High Court decision No. 157, dated 28.02.2002

²⁹⁷ Halim Islami, Artan Hoxha and Ilir Panda, Criminal Procedure – Commentary (Tirana: Morava, 2003) [CPC Commentary] p. 499

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This highlights yet another problem within the Albanian justice system, stemming from the fact that much of the legislation is imported and translated from other legal systems. For example, the CPC is a translation and adaptation of the Italian Criminal Procedure Code, while the Criminal Code (CC) is an adaptation from French criminal legislation. Through the translation existing ambiguities may be enhanced and the meaning of an article may sometimes be entirely lost. Language is by its design imprecise – in itself the biggest challenge to any lawmaker – and the interpretation of different concepts varies among different languages, making the translation of laws sometimes an almost insurmountable obstacle²⁹⁸. Another problem with importing and translating laws is the lack of preparatory work to help with the interpretation, or even with adequate commentaries. A way to tackle this would be through case law by the High Court, but this process is very slow as the High Court obviously has no power over what cases are appealed and what questions are put before it. The same goes for the Constitutional Court, which also has a role to play in this regard. In summary, there is an urgent need to revise both the CPC and the Criminal Code of Albania.

As to the facts – The Tirana District Court conclusion regarding the admissibility of the statements made by the defendants during the preliminary investigation can be questioned for good reasons. None of the defendants were represented by defence counsel during the interrogations and they were transferred among several locations not ordinarily used for pre-trial detention purposes; for example they were taken to Mount Dajti, to Vlora and to Durrës for interrogation and there are indications that the defendants were maltreated/tortured during these interrogations.

Considering the irregularities in relation to the sequestration of weapons and the statements of the defendants, together with the lack of other evidence linking the defendants to the crimes of which they are accused, it is questionable whether there was enough evidence to even bring the Revenge for Justice case to trial in 1998. As the indictment was filed on the day the then maximum two-year pre-trial investigation time expired, the only other option available to the prosecutor would have been to dismiss the charges against the defendants. Considering the volatile situation in Albania at the time as well as the scale of the criminality in question, it is understandable that this may not have appeared as a possible option or course of action. On the other hand, the presumption of innocence requires the prosecutor to prove – within a reasonable amount of time – the guilt of anyone charged with a criminal offence. A consequence of this principle is that the prosecution's failure during the pre-trial investigation should reflect on the prosecution, not on the defendants.

²⁹⁸ See, e.g., the discussion regarding the meaning of the French word “aussitôt” compared with the English word “promptly” in ECHR article 5, para. 3, in *Brogan and others v. United Kingdom*, 29 November 1988, para. 59

In Swedish legislation, for example, this principle is reflected in a provision stating that if charges under public prosecution are withdrawn because there are not sufficient reasons to believe that the defendant is guilty of the offence, the injured party may take over the prosecution. In case the injured party does not take over the prosecution, he/she may no longer bring charges against the defendant and *upon request, the defendant has the right to an acquittal*²⁹⁹.

Had the relevant article in CPC not been amended in 1999 to add another year of possible pre-trial investigation, the request for withdrawal would have been of no use to the prosecutor, as any evidence collected after this period would have been inadmissible. The prohibition to use criminal laws which are unfavourable to the defendant retroactively, applies directly only to crime and punishment³⁰⁰. The prohibition, however, also embodies a general principle of interpreting laws relating to crimes or criminal procedure in favour of defendants³⁰¹. Furthermore laws with procedural implications normally have an effect on procedures initiated only after the law was adopted, in order to ensure that the parties to the proceedings can predict what lies before them. Thus, for example, the CPC in its transitional article 525 states that the Code enters into force on 1 August 1995, but that for criminal cases already under investigation or pending in court, the old code will be applied until 1 March 1996³⁰².

Interestingly, this part of the article does not appear in the Albanian edition of the Criminal Procedure Code published by the Centre for Official Publications, but only in the English translation of the code. Further investigation shows that article 2 was added through law 7977, dated 26 July 1997, after the adoption of the CPC on 21 March 1995. Article 2 provided that the previous code would apply for investigations initiated or cases pending in court when the new code was adopted, but no longer than until 15 November 1995. Then law 8027, dated 15 November 1995, prolonged the applicability of the previous code for cases under investigation or pending in court until 1 March 1996. No abrogation of the paragraph has been adopted since, nor has the article been amended. Thus it is still in force, if obsolete, and should appear in the compilation³⁰³.

In the *Revenge for Justice* case, it can thus be argued on good grounds that as the legislation was amended *after the pre-trial investigation was completed and the maximum period*

²⁹⁹ Swedish Code of Judicial Procedure (Rättegångsbalk 1942:740), Chapter 20, section 9 <http://www.sweden.gov.se/content/1/c6/02/77/78/30607300.pdf> [Accessed 11 July 2006] See also the Finnish Code on Criminal Procedure (Lag om rättegången i brottmål 11.7.1997/689, article 15

³⁰⁰ ECHR article 7, Albanian Constitution article 29

³⁰¹ See, e.g., article 3 of the Criminal Code

³⁰² See also article 618 of the Civil Procedure Code and article 317 of the Family Code; both stating that for cases pending when the new law enters into force, the old codes shall apply

³⁰³ This information has been confirmed by the director of the Centre for Official Publications, Ms. Ardita Alsula, who also stated that the next edition would include the omitted paragraph. [Email 18 July 2005]

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of pre-trial investigation had already expired and even after the judicial examination was completed, it should not be possible to reopen the investigation. This argument is all the more pressing taking into account the defendants' *right to be presumed innocent*, and the fact that a total of seven years of pre-trial investigation and trial have not substantiated a guilty verdict against any of them. Furthermore the decision to continue the investigation thwarts the defendants' *right to trial within a reasonable amount of time*.

Given the context and time during which the crimes tried in the Revenge for Justice cases were committed, there is a strong public interest in the case and, not least due to this, there are also political implications. The handling of this case indicates, however, that the Albanian criminal justice system is still not strong and independent enough to deliver justice in a timely manner in a case such as this one and that much remains to be done before European standards are met in this respect.

2. The Lawyer's Case³⁰⁴

On 12 September 2005, the Tirana District Court rendered a decision in a case where a defence lawyer had been charged with “passive corruption by persons who exercise public functions” in accordance with article 259 of the Criminal Code³⁰⁵. The defence lawyer (hereafter the Lawyer) was found not guilty, with the reasoning that his client or rather the parents of his client had voluntarily given him a sum of approximately 6000 EUR and that he had later returned the money³⁰⁶. The investigation of the case was initiated after the television programme *Fiks Fare* had broadcast a conversation between the Lawyer and the mother of one of the Lawyer's clients, where the Lawyer appeared to have explained that he had offered the judge 6000 EUR. The decision raises several concerns.

The trial

Conduct of the hearings – The trial started in March 2005. Of some 20 sessions scheduled before the summer break in late July, only a few were held. The reason the other sessions were not held was mainly that the prosecutor either requested the session to be postponed in order to prepare for it or simply failed to appear. Thus, one session was postponed due to the absence of the defendant while the next two sessions were postponed for the prosecutor to present the preliminary requests and written evidence. After this, one session was postponed due to the absence of the defence attorney, four sessions were postponed due to the absence of witnesses and three sessions were postponed because the trial panel was not complete. Then on 28 June, after all evidence had been presented, the session was postponed in order for the parties to prepare their final conclusions. After that, an additional five sessions were postponed; three sessions were postponed as the prosecutor had failed to prepare his final conclusions, while two sessions were postponed due to the failure of the prosecutor to appear. No reasons for the prosecutor's conduct were forwarded and no measures were undertaken to solve the situation and ensure that the trial was completed within a reasonable amount of time. Indeed, on several occasions the prosecutor was found sitting in the presiding judge's office, where most hearings were held, before the start of a session. Considering the particulars of the case and the notion that “*justice not only has to be done, it also has to be seen to be done*”, this kind of conduct by both the court and the prosecution raises serious concerns regarding the handling of this particular case. Finally on 12 September 2005, the decision was rendered. The decision was upheld on appeal.

Other procedural aspects – As a criminal charge under CC article 259 could lead to a punishment of a fine or up to eight years of imprisonment, it has to be heard by a panel

³⁰⁴ Part of this chapter has previously been published, in an abridged version, in the semiannual *Studime juridike* (Universiteti i Tiranës, Fakulteti i Drejtësisë), no. 2, 2005

³⁰⁵ Asking for or receiving directly or indirectly, for herself/himself or for other persons, any kind of irregular benefit or of a promise of such, by a person who exercises public functions, or the acceptance of an offer or promise of an irregular profit, in order to carry out or avoid carrying out an action related to the duty of her/his position or function, is punishable by imprisonment from two to eight years and by a fine from five hundred thousand to three million ALL.

³⁰⁶ Tirana District Court, Act no. 719, decision no. 858

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of three judges³⁰⁷. Nevertheless, the hearing where the father of the client testified was conducted by a single judge, whereas the hearing where the colleagues of the Lawyer testified was indeed conducted by a three-judge panel. This is obviously not reflected in the final decision. Nevertheless, it is a grave procedural error that should render the decision void³⁰⁸.

The court decision

Apart from mentioning the legal qualification of the crime, i.e., passive corruption by persons holding a public function, the decision in the Lawyer's case does not explain the cause of the accusation or the facts that together constitute the criminal act³⁰⁹. Thus, one of the most basic aspects of the final decision is missing and it is not clear which "question" was put to the court. As a consequence, no conclusions can be drawn as to whether it would have been possible to give the facts a different legal qualification.

The television programme initiating the criminal investigation was neither brought as evidence nor mentioned in the judgment. The witness testimonies of the mother and the father of the client are not correctly represented in the court decision. In the decision it is stated that the parents of the client testified that the defendant had not asked them for any money but that they had given the money to him by their own will. While the OSCE Presence in Albania was not present at the hearing of the client's mother, the hearing of the father of the client was observed. Neither was he questioned regarding whether the Lawyer had asked for money nor did he address the issue. He did, however, state that the Lawyer on different occasions told the parents the following: *"the judge has raised 'his sword' a bit high", "I've offered the judge the amount of 6 000 EUR"* and *"in the late evening we [the lawyer and the judge] agreed; the next morning his decision was different."* The father of the client was not asked whether he had heard these things himself or from his wife. None of this is reflected in the decision. The judge hearing the case where the Lawyer's client was involved did not testify in court, but instead his testimony during the pre-trial investigation was read out as the judge claimed to be in ill health. This fact also is not reflected in the decision. Considering that the judge seems to have had a temporary health problem, it is questionable whether his statement during the investigation should have been admitted as evidence³¹⁰. Moreover, the judge's testimony during the pre-trial investigation, where he stated that he had not been offered money by the defendant or discussed this matter with him, is considered enough to prove that the defendant had not *told* the family of his client that the judge had asked for money! Even more importantly, there is no discussion regarding the judge in question having a very personal interest in not being implicated in this issue and that by telling otherwise the judge would have incriminated himself. Thus, the court

³⁰⁷ CPC article 13 para. 3

³⁰⁸ CPC article 128, para. 1 a

³⁰⁹ For example: On a particular date in his office in Tirana, Lawyer X, who exercises a public function, requested and received 6 000 € from Y in order to do or not do something related to his duty or function. See also the discussion regarding the formulation of criminal charges further on in the chapter

³¹⁰ CPC article 369, see also article 364 regarding the possibility to hear the witness in her/his home

concludes that 6,000 EUR were given to the lawyer without the lawyer's involvement and in exchange of his services as a defence counsel for their son.

Public function

It is also of concern that the lawyer was charged as a *person "exercising a public function"* for actions related to his role as a defence attorney and that the *decision does not discuss* whether charges could be brought against a lawyer under this particular article of the criminal code.

While there may be no universally agreed definition of the terms public function, public official or public office, there is some common understanding that the terms refers to activities related to the state or the sovereign. The delimitation of these terms is of crucial relevance when defining when the state or its officials can be held economically or criminally responsible.

An Albanian dictionary defines the term "public" as that "which belongs to the public; is open for everyone; is related to the lives, work or activity of everybody; which serves the people; which anybody can use; *which is administered by the state, of the state*³¹¹." An English online dictionary gives the following definition: "exposed to general view; of, relating to, or affecting all the people or the whole area of a nation or state; *of or relating to a government*; of or relating to, or being in the service of the community or nation; of or relating to people in general³¹²;" Regarding the more specific legal notion "public office" *Black's Law Dictionary* defines the essential characteristics as:

(1) authority conferred by law, (2) fixed tenure of office, and (3) power to exercise some portion of sovereign functions of government, key element of such test is that "officer" is carrying out sovereign function. Essential elements to establish public position as "public office" are: position must be created by constitution, legislature, or through authority conferred by legislature, portion of sovereign power of government must be delegated to position, duties and powers must be defined directly or immediately, by legislature or through legislative authority, duties must be performed independently without control of superior power other than law, and position must have some permanency and continuity."

A "public official" is then defined as "[a] person who, upon being issued a commission, taking required oath, enters upon, for a fixed tenure position called an office where he or she exercises in his or her own right some of the attributes of sovereign he or she serves for the benefit of the public. The holder of a public office, though not all persons in public employment are public officials, because public official's position requires the exercise of some portion of the sovereign power, whether great or small³¹³.

³¹¹ *Fjalor i gjuhës së sotme shqipe* (Tiranë: Academy of Sciences, 1998), s.v. "publik"

³¹² <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=public> [Accessed 14 July 2006]

³¹³ *Black's Law Dictionary*, Sixth Edition; s.v. "public office" and "public official"

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Albanian law does not define terms such as public function, public office, public duty or public service, but the Constitution does refer to the “organs of public power³¹⁴” and some guidance may be obtained from the Law on the Declaration and Audit of Assets³¹⁵ and the Law on Avoiding Conflict of Interests in the Exercise of Public Functions³¹⁶, that both apply to persons within the state structures. On the other hand, the law on the profession of advocates/lawyersexpressly states that “advocacy is a free profession, independent, self-regulated and self-managed³¹⁷.” No independent decision making power has been delegated by the sovereign to advocates³¹⁸. This should be compared with the notary public, who is a person authorized by the state to acknowledge signatures, administer oaths and affirmations, take depositions and issue subpoenas in lawsuits³¹⁹. A decision by the Constitutional Court also states that notaries, at least in some respects, exercise a public function. The decision further identifies delegated state authority as a basic element of a “public function” and further points out the differences in this respect between notaries and lawyers³²⁰.

Notice should also be taken of chapter VIII of the Criminal Code (CC), which deals with crimes against the state authority and more specifically of section I (art. 235 – 247) which deals with “Criminal acts against state activity committed *by citizens*” and section II (art. 248 – 260) which deals with “Criminal acts against state activity committed *by public officials or in public service*”, respectively. These crimes target *state activity* and under section I the perpetrators are *ordinary citizens*, while under section II the perpetrators are *public officials or in public service*³²¹. The article in question here, 259, belongs to section

³¹⁴ Article 15, section. 2

³¹⁵ Law no. 9049, dated 10 April 2003, “On the declaration and audit of assets, financial obligations of persons and certain public officials”, article 3 (“Subjects Who Have the Obligation to Make a Declaration:

..., The President of the Republic, the deputies of the Assembly, the Prime Minister, the deputy prime ministers, the ministers and deputy ministers; Civil servants of a high management and medium level, according to the definition of article 11 of Law no. 8549, dated 11 November 1999, ‘On the status of the civil servant’; Prefects, Chairmen of Regional Councils, mayors of Municipalities, municipal units and communes; Directors of directorates and commanders of the Armed Forces in the Ministry of Defense and in the State Information Service; Prosecutors, judges and enforcement officers of all levels; Directors of independent institutions; General directors, directors of directorates and chiefs of sectors, (police commissariats) in the center, districts and regions, of the General Directorate of Police, of the General Directorate of Taxation and that of Customs; Members of the low inspectorate of declaration and audit of assets; Directors of all levels of structures for the return of and compensation for property, of privatization and the registration of assets; Directors of all levels of Territorial Adjustment Councils (TACs); Officials who are elected and appointed by the Assembly, the President of the Republic, the Prime Minister, the Ministers or persons equivalent to them; Directors of joint-stock companies with the participation of state capital of more than 50 per cent and on the average more than 50 workers; authorities who order and authorize the use of public funds and who procure them; persons who are charged with collecting and gathering the revenues of the central and local budget; public employees who oversee the use of public funds and those who according to law examine and issue licenses”)

³¹⁶ Law no. 9367, dated 7 April 2005, article 3 & 4

³¹⁷ Law no. 9109, dated 17 July 2003, On the Profession of Advocates in the Republic of Albania, article 1

³¹⁸ Ibid. chapter II

³¹⁹ Law no. 7829, dated 1 June 1994, “On the Notary”, see part II, in particular articles 39 & 40

³²⁰ Constitutional Court Decision no. 3, 2005

II and, regardless of the wording of the article, should penalize the actions of *public officials or in public service*.

The examples cited above thus indicate that the Albanian notion of “public office and public function, etc.” do not deviate from what is commonly understood under these concepts; a key element of the notion is thus some independent decision making power delegated by the sovereign. To conclude, the notion that a defence counsel would exercise a public function does not have any support either within the Albanian legal framework or in an international context, for which reason the charges against the lawyer seem manifestly ill-founded. A more appropriate charge might have been under article 245/1 para. 2³²².

The second concern related to the notion of “public function” is that the decision neither mentions nor discusses whether or not a lawyer exercises a public function. In accordance with the principle of *jura novit curia* (the court knows the law), one could have expected this to be the first question to be considered before the court began to discuss whether the charges brought were supported by evidence.

Concerns with general relevance

Formulation of charges – According to CPC article 383, a final court decision shall contain the accusation and a summarized exposition of the circumstances of the fact and the evidence on which the decision is based, as well as the reasons why the court considers unacceptable the evidence presented for the opposing party. A request for trial should contain an explanation of the fact, indicating the respective article of the Criminal Code as well as the sources of evidence and the facts to which they relate³²³. An accusation or charge refers to the crime a person is accused of having committed, e.g., murder or theft. Apart from the legal qualification, a criminal charge consists of the facts, i.e., the *when, where, how, who, what*, ..that together constitute a criminal offence and can be subsumed under the elements of the crime provided in the relevant article of law³²⁴.

³²¹ It should be noted that different language is used to denominate “public officials”. They are related to as official acting in the execution of a state duty or public service (art. 239, 240), official holding a state duty or public service (art. 244), persons holding public office (art. 245/1), holding of a state function or public service (art. 248) and person who exercises a public function (art. 259)

³²² Requesting, taking or accepting, directly or indirectly, for one’s own use or for third persons, any irregular benefit while promising or ensuring one’s ability to exercise illegal influence on the carrying out of duties by Albanian or foreign persons who exercise public functions, regardless of whether the exercise of influence has been realized or whether or not the desired effects have come, are punishable by imprisonment of between six months and four years and by a fine of five hundred thousand to two million ALL.

³²³ CPC article 331

³²⁴ The European Commission has clarified the meaning of Article 6(3)(a) of the European Convention, which guarantees the right of a person charged with a criminal offence “to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”. The European Commission explained that the “nature” of the accusation refers to the legal character or classification of the facts, while the “cause of the accusation” refers to the facts that form the basis of the accusation. The information provided should contain the material needed to enable the accused to prepare a defence but does not have to contain the evidence on which the charge is based. [*X v. Belgium*, (7628/76), 9 DR 169, 9 May 1977; *Ofner v. Austria*, 3 Yearbook 322, 19 December 1960]

III. TWO CASE STUDIES

For example:

- On 3 November 2005, around 14:00, on Rruga e Durrësit, Tirana, XX intentionally deprived YY of his/her life, by stabbing him/her several times in the chest with a sharp object, causing fatal damage to the respiratory organs (CC art. 76).
- In the late afternoon on 7 June 2005, in the vicinity of Kamza, XX together with several unknown persons, used weapons in robbing 24 passengers and the driver of a bus travelling between Tirana and Shkodra of their belongings. Specifically, XX by threatening to shoot passengers a – g with a Kalashnikov that XX was holding, deprived them of their wallets and mobile telephones, while XX in the same manner deprived passengers j – x of their suitcases containing personal belongings such as clothes and toiletries (CC art. 140).
- In July 2004, XX, YY and ZZ, in collaboration and in order to gain material profit, convinced victims AA and BB to travel to Bari in Italy under promises to work as waitresses in a Bari. In Bari AA and BB were deprived of their travel documents and locked up in a bar called Amorina. After having been raped at gunpoint by XX and YY, AA and BB were forced to prostitute themselves in the bar each night except Mondays between July 2004 and March 2005, when they managed to escape. On an average, AA and BB were forced to receive and have sex with five customers each night. XX, YY or ZZ arranged for the customers and received the payment of 150 EUR per customer (CC art. 114/b).

That a criminal charge be properly delimited is of crucial importance as it provides the framework within which a trial has to be held. Thus, the prosecutor has to prove not only that *a* crime has been committed by the defendant, but that *the* particular crime, individualised in time, place and by other specific circumstances, has been committed by the defendant. For the defendant, on the other hand, the legal and *factual* basis of the charge against her/him is the basis on which to construct the defence of the case. For the court, the question that has to be answered is whether the charge (facts and legal qualification), as constructed by the prosecutor and considering the defence presented, has been proved. Knowledge of the factual grounds of the charge is also necessary for the court to be able to evaluate whether evidence requested is relevant or not³²⁵. Last but not least, the right not to be tried and punished twice depends on the possibility to establish exactly for which fact a person is being tried and punished³²⁶. Related to the above is again the notion of *jura novit curia*. Thus, according to article 375 CPC, the court in its final decision may give the fact a different qualification/definition from that given by the prosecutor³²⁷. However, in order for this provision to have any practical relevance, the facts of the charge have to be specified. Here it should be noted that, after an amendment of the provision in 2002, the court is not expressly required to notify the parties of the amendment. This may, however, be in breach of European Convention on Human Rights (ECHR), at least to the extent it has implications on the defendant's possibilities efficiently to defend her/himself³²⁸.

³²⁵ CPC article 357

³²⁶ Constitution article 34, CPC article 7, ECHR protocol No. 7, article 4. The doctrine of *res judicata* is related to this

³²⁷ See also Constitutional Court Decision no. 50, 30.07.1999

³²⁸ Chichlian and Ekindjian v. France. Report of the Commission, 16 March 1989, Appl. No. 10959/84

The problem with poorly drafted charges in criminal cases is a general problem reflected both in requests for trials and in final court decisions in Albania³²⁹. That is, the charge seems to be understood to relate only to the article specifying the crime in question. Whereas court decisions regularly specify only the crime in question, requests for trials consist of lengthy explanations regarding the proceedings during the investigation, point out the crimes and the corresponding articles with which the defendants are charged and then give another lengthy explanation, including an enumeration of the evidence, of why the prosecutor considers the guilt of the defendant to be established. From this explanation, it may or may not be possible to find out the facts that constitute the crime in question.

While there are many renowned scholars and highly qualified practitioners of law in different fields in Albania, and while the justice system has undergone improvements during the last few years, the issues discussed above are troubling. They indicate an insufficient general level of understanding of basic procedural and legal concepts and also an inadequate level of legal writing in both requests for trials and final decisions, reflecting in turn gaps in the legal education in Albania.

³²⁹ Under the Albanian CPC, an indictment is referred to as a “request for trial”, CPC article 331

IV. DOMESTIC VIOLENCE³³⁰ AND THE CRIMINAL JUSTICE SYSTEM³³¹

The average, *everyday domestic violence case* consists of a husband slapping or hitting his wife in the face and the upper parts of her body, pulling her hair, shaking her while grabbing the upper parts of her arms or her neck, and kicking her in the legs and lower parts of the body. The results are commonly redness and bruises in the face, a black eye, bleeding from the mouth, bruises indicating his hands and fingers on her upper arms or around her throat and sharper, more swollen bruises where his kicks have hit the lower parts of her body. Sometimes the beating is preceded by the husband pointing a weapon at his wife, while shouting that he will kill her. Sometimes there are just the threats. This may be a once in a lifetime incident, but it is also a daily or even hourly occurrence in the lives of millions of women around the world. And then there are all the other cases, the cases that are unimaginable, and infinitely worse... To live with violence in the home has correctly been equated with torture where the perpetrator switches back and forth between violent behavior and solicitude³³².

1. Introduction

- Violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms;
- Violence against women is a manifestation of historically unequal power relations between men and women;
- Violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men³³³.

Domestic violence is prevalent in all societies and affects women and girl children of all ages and regardless of their background, economic status and social situation.

³³⁰ The term domestic violence here is given a narrow definition indicating violence or threats of violence committed by a husband or former husband towards his wife or former wife. That is, other forms of intra-family violence such as child abuse or violence between members of same family other than the husband and wife are excluded, as are other violent acts such as violation of property or economic rights.

³³¹ See also the study on domestic violence prepared by the Centre for Civil Legal Initiatives, *Për një zbatim sa më të mirë të ligjit në mbrojtje të viktimave të dhunës në familje nga organet e drejtësisë* (Tiranë: Qendra për Nisma Ligjore Qytetare, 2005) and Trajtesa Juridike dhe Sociale për Mbrojtjen nga dhuna në Familje; Botim i posaçëm, përgatitur në bashkëpunim nga revista juridike “Ligji, mundësi zhvillimi për gratë” dhe revista juridiko/shkencore “Jeta juridike” (Tiranë 2005) (*Legal and Social Treatises on the Protection from Domestic Violence A special publication prepared by the Legal magazine “The law – a chance for women’s development” and scientific legal magazine “Juridical life”* (Tirana: 2005))

³³² The description is based on the author’s experience as a judge in Sweden of cases concerning domestic violence

³³³ Preamble to the Declaration on the Elimination of Violence Against Women, adopted by the UN General Assembly on 20 December 1993 [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.48.104.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.48.104.En?Opendocument) [Accessed 24 May 2006]

What varies among different countries is the efforts states are making to address and eliminate violence against women.

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted in 1979 and Albania ratified it on 11 May 1994³³⁴. The Convention defines discrimination against women as:

...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field³³⁵.

While the Convention entered into force faster than any previous convention adopted by the United Nations, it is also the convention against which most reservations have been entered; i.e., states party have reserved the right not to respect one or more of the provisions in the convention. Some states have even entered a reservation to article 2 (condemning discrimination), although their national constitutions or laws prohibit discrimination. This shows that the human rights of women and girl children are still not considered to be self-evident and equal to the rights of men. It is also noteworthy that the Convention itself does not mention gender-based violence or domestic violence, as this would not have been acceptable to many states. Even today, 27 years later, there is still no internationally binding document recognizing that domestic violence is an integral part of discrimination against women and a violation of some of the basic human rights such as the right to life and to human dignity and also of the right to freedom from torture and degrading treatment.

Declaration Against Violence – To address the issue of violence against women and referring to the CEDAW, among other documents, the UN General Assembly adopted the Declaration on the Elimination of Violence Against Women on 20 December 1993. The declaration defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”³³⁶

*The Declaration goes on to provide:*³³⁷

³³⁴ CEDAW was adopted by the UN General Assembly on 18 December 1979 and entered into force on 3 September 1981, see <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#intro> [Accessed 24 May 2006]

³³⁵ CEDAW article 1

³³⁶ Declaration on the Elimination of Violence Against Women, article 2

³³⁷ Emphasis added

Article 2

Violence against women shall be understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;**
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Article 3

Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, *inter alia*:

- (a) The right to life;**
- (b) The right to equality;
- (c) The right to liberty and security of person;**
- (d) The right to equal protection under the law;**
- (e) The right to be free from all forms of discrimination;
- (f) The right to the highest standard attainable of physical and mental health;**
- (g) The right to just and favourable conditions of work;
- (h) The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.**

Article 4

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

...

- (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;**
- (d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; **women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered;** States should also inform women of their rights in seeking redress through such mechanisms;
- (h) Include in government budgets adequate resources for their activities related to the elimination of violence against women;**
- (i) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women;**

(j) ...

(k) Promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on the causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; those statistics and findings of the research will be made public;

...

While the Declaration does not have the status of a convention and is therefore not binding as such on states, it is a strong statement and represents the views of many, if not all, of the member states of the United Nations. It also serves as a useful tool for any state that wishes to address domestic and other forms of violence against women. The definition of violence against women was also reiterated in the Platform for Action adopted by the Fourth World Conference on Women, held in Beijing from 4 to 15 September 1995³³⁸.

Model Strategies – In 1997, the UN Commission for Crime Prevention and Criminal Justice, at its sixth session in Vienna, took measures to implement the Beijing Platform for Action within its own field of competence and adopted Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice (Model Strategies). These strategies were later approved by the General Assembly as the “Resolution on Crime prevention and criminal justice measures to eliminate violence against women³³⁹”. The Model Strategies consist of a set of internationally recognized strategies and measures in the field of criminal justice to address violence against women in all its forms³⁴⁰. Based on these strategies, a number of international agencies in the area of criminal justice have created a Resource Manual, which offers concise information on the experiences of various countries in successfully implementing the Model Strategies³⁴¹. In February 2006, the European Parliament also adopted a resolution on the [C]urrent situation in combating violence against women and any future action³⁴². The resolution, among other things, recommends that states adopt a zero-tolerance policy toward all forms of violence against women, to gather comparable and compatible data concerning men’s violence against women, to ensure victims’ rights to safe access to justice and effective

³³⁸ Report of the Fourth World Conference on Women (A/CONF.177/20 and Add.1) chapter I, resolution 1, annex II

³³⁹ General Assembly Resolution 52/86, 12 December 1997, <http://www.un.org/ga/documents/gares52/res5286.htm> [Accessed 24 May 2006]

³⁴⁰ See www.icclr.law.ubc.ca [Accessed 24 May 2006]

³⁴¹ Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice – Resource Manual, March 1999, <http://www.icclr.law.ubc.ca/Publications/Reports/VAWMANUA.PDF>

³⁴² European Parliament resolution A6-0404/2005, 2 February 2006 [Accessed 24 May 2006]

enforcement, including the provision of compensation and the rejection of intoxication as a mitigating circumstance.

Council of Europe Task Force – Finally, in accordance with the Action Plan adopted during the Third Summit of Heads of State and Government of Council of Europe Member States in Warsaw on 16 to 17 May 2005, a Task Force to Combat Violence against Women, including Domestic Violence was set up in 2006. The Task Force, composed of eight international experts in the field of preventing and combating violence against women, will be in charge of evaluating progress at national level and establishing instruments for quantifying developments at pan-European level with a view to drawing up proposals for action. The Task Force will also prepare a blueprint for a Pan-European Campaign to Combat Violence against Women, including Domestic Violence, to be launched in 2006.

2. The Albanian context

On 30 March 2006, Amnesty International (AI) issued a report on domestic violence in Albania³⁴³. In the report, AI notes that thousands of women in Albania, like women across the world, are at risk of violence from their husbands or their intimate partners. They are hit, beaten, slapped and kicked; some are raped; some are killed. Many more endure psychological violence, physical and economic control. AI identifies the barriers that prevent women from gaining access to justice, including the justification of violence as part of “Albanian tradition”, the failure of law enforcement officers to respond appropriately to women seeking assistance, and the failure of the legal system and the courts to recognize violence against women in the family (domestic violence) as a criminal offence.

Albania and other countries in the Balkans are considered to have average levels of domestic violence, which means that some 30% of the women perceive that they are victims of domestic violence³⁴⁴. While the level of domestic violence in a particular country is obviously relevant, what is even more important is how the country in question addresses the problem. That is, what are the possibilities for a woman subjected to violence to find adequate protection and redress against domestic violence and to what extent are perpetrators brought to justice? In this respect, much remains to be done in Albania.

Criminal cases concerning domestic violence in Albania are few and far between. The reasons forwarded for this vary, but all seem to boil down to the perceived patriarchal

³⁴³ Amnesty International, *Albania: Violence against women in the family: “It’s not her shame”* (London, 30 March 2006) [AI Index: EUR 11/002/2006] <http://web.amnesty.org/library/Index/ENGEUR110022006?open&of=ENG-ALB> [Accessed 24 May 2006]

³⁴⁴ See, e.g., an article published in the British Medical Journal on 20 July 2005, “Spousal Violence Affects One in Three Albanian Wives”, <http://www.newswise.com/articles/view/513263/> [Accessed 24 May 2006]

mentality still prevailing in the Albanian society. One strategy for fighting this perceived mentality would be for the lawmaker and the Albanian authorities to take a clear stand against unwanted expressions of this mentality, of which domestic violence is one, by adopting strategies to deal with it. Nevertheless, apart from the police commissariat in Shkodra, which seems to have a real commitment to fighting domestic violence, none of the courts, prosecution offices or police directorates with which the FTDP has been in touch has had any particular strategy to deal with domestic violence, or even seen a need for such a strategy. Indeed, many have indicated that they do not consider domestic violence to be a significant problem which would need special attention.

The overriding principle for dealing with cases involving domestic violence in Albania seems to be to get the parties to reconcile³⁴⁵. During a meeting to discuss domestic violence and related issues with the NGO Women's Association with Social Problems (WASP) in Durrës, for example, concerns were raised regarding the practice of some judges to postpone cases in order to make the woman withdraw her charges. Such withdrawals then frequently occur³⁴⁶. Although in exceptional cases reconciliation may be a solution – in particular considering the social stigma and difficult economic circumstances that may result from a divorce in Albania – it may also force women back into abusive relationships and grants impunity to men guilty of violence towards their spouses, thus confirming the prevailing mentality.

In January 2003, the UN Committee for Elimination of Discrimination against Women (CEDAW Committee) urged Albania to prioritize comprehensive measures to address violence against women in the family and in society, and to recognize that such violence, including domestic violence, constitutes a violation of the human rights of women. It also called on Albania to adopt legislation on domestic violence and ensure that violence against women be prosecuted and punished with the required seriousness and speed. It further called on the authorities to ensure that women victims of violence have means of redress and protection, including protection orders and access to legal aid. The CEDAW Committee also recommended that Albania systematically collect data on violence against women, including domestic violence³⁴⁷. Little or no action has been taken by the Albanian authorities to implement these recommendations.

3. Domestic violence and Albanian criminal legislation

For the purposes of this report, the term domestic violence is given a narrow definition, indicating physical violence, including murder, or threats of violence committed by a husband or former husband towards his wife or former wife. While Albanian legislation

³⁴⁵ See the discussion further on regarding the CPC art. 59 and the reconciliation hearing provided in article 338

³⁴⁶ Meeting 24 May 2005

³⁴⁷ Report of the CEDAW, 28th Session, 13-31 January 2003 (A/58/38), paragraph 73 <http://daccessdds.un.org/doc/UNDOC/GEN/N03/468/20/PDF/N0346820.pdf?OpenElement> [Accessed 24 May 2006]

is in general gender neutral, there is no particular provision penalizing domestic violence. Acts of domestic violence are thus prosecuted and punished under provisions that do not take the relationship between the victim and the perpetrator into account. The relationship, however, in some cases could be taken into account when considering aggravating circumstances. Repeated acts of domestic violence could also be taken into account as an aggravating circumstance. Experience shows, however, that this is rarely the case in practice.

The following table shows the criminal provisions in the Albanian Criminal Code that may be used to punish acts of domestic violence and the range of punishments provided. It further indicates whether the crime is under public or private prosecution and whether prosecution depends on a complaint from the injured party, issues that will be discussed later in this chapter.

Article	Offence	Punishment	Prosecution
76	Intentional murder	10-20 years of imprisonment	Public ³⁴⁸
78	Premeditated homicide	15-25 years of imprisonment	Public
79 b	Intentional murder for reasons of special qualities of the victim (pregnant women)	Not less than 20 years of imprisonment	Public
82	Homicide committed in a state of profound mental distress (caused by violence or serious offense)	Up to 8 years of imprisonment	Public
84	Threat (criminal contravention)	Fine or up to 1 year of imprisonment	Public
86	Torture, inhuman or degrading treatment	5-10 years of imprisonment	Public
87	Torture, inhuman or degrading treatment resulting in serious consequences	10-20 years of imprisonment	Public
88	Serious intentional injury (resulting in disability, mutilation or other permanent damage to health or resulting in interruption of pregnancy, or posing a risk to the life at the moment of infliction)	3-10 years of imprisonment <i>Causing death:</i> 5-15 years of imprisonment	Public

³⁴⁸ With this is meant that the prosecutor is under an obligation to prosecute regardless of a complaint

IV. DOMESTIC VIOLENCE AND THE CRIMINAL JUSTICE SYSTEM

Article	Offence	Punishment	Prosecution
89	Non-serious intentional injury (work incapacity of more than 9 days)	Fine or up to 2 years of imprisonment	Complaint by victim
90	Other intentional harm (Criminal Contravention)	Fine <i>Work incapacity up to 9 days:</i> Fine or up to 6 months of imprisonment	Private prosecution
99	Causing suicide	Fine or up to 5 years of imprisonment	Public
102	Nonconsensual sexual intercourse with a mature woman	3-10 years of imprisonment <i>Serious health consequences:</i> 5-15 years of imprisonment <i>Resulting in death or suicide:</i> 10-20 years of imprisonment	Complaint by victim
104	Intercourse under threat of gunpoint	5-15 years of imprisonment	Public

3. 1. Domestic violence as a crime – some analysis

The Model Strategies, section 9 (iv), urge states, as appropriate, to promote sanctions that are comparable to those for other violent crimes.

The systemic and recurring nature of domestic violence

In many marriages, domestic violence is a recurring pattern and the woman may be beaten and threatened on a monthly, weekly, daily or even hourly basis. If and when one of the violent incidents leads to prosecution and trial, it may be the last of an endless series of violent acts, sometimes counted in the hundreds, by the husband towards the wife. While the last incident that finally leads to police interference may be easily recognizable in time and place for the victim of violence, the exact details and the distinctions between all the other incidents may be hard for the traumatized victim. Moreover, the regular and systematic nature of the attacks may lead to a more severe violation of the injured woman's self-esteem and person than each of the individual attacks may indicate. While several crimes are normally punished separately and the repetition is an aggravated circumstance, domestic violence crimes typically have a low penal value, e.g., threat, non-serious intentional harm or other intentional harm

under the Albanian Criminal Code, and it is hard to penalize sufficiently the systemic attack on the woman's integrity and self-esteem.

To come to terms with these problems, Sweden introduced a separate criminal offence to address domestic violence in 1998. Chapter 4, section 4a of the Swedish Penal Code³⁴⁹ provides:

A person who commits criminal acts as defined in Chapters 3, 4 or 6³⁵⁰ against another person having, or having had, a close relationship to the perpetrator shall, if the acts form a part of an element in a repeated violation of that person's integrity and suited to severely damage that person's self-confidence, be sentenced for gross violation of integrity to imprisonment for at least six months and at most six years.

If the acts described in the first paragraph were committed by a man against a woman to whom he is, or has been, married or with whom he is, or has been cohabiting under circumstances comparable to marriage, he shall be sentenced for gross violation of a woman's integrity to the same punishment.

The first paragraph covers domestic violence in general, while the second paragraph covers domestic violence committed by a man against a woman with whom he has or has had an intimate relationship. While the provision is not intended to cover aggravated crimes, which should be prosecuted separately, it covers series of (even) slight injuries or threats. A necessary condition is, however, that the acts form a part of an element in a repeated violation of that person's integrity and suited to severely damage that person's self-confidence. When deciding what penalties to impose, courts must take particular account of the frequency and systematic nature of such acts. Through the introduction of this crime, a series of offences can thus be punished more severely than would otherwise have been the case. This is one way of indicating that the Swedish state views domestic violence seriously. The Swedish Supreme Court has also, in a series of precedent cases, ruled that when there is a series of similar offences, these can be seen as a whole, whereby each individual offence does not have to be specified in time and place. After some initial problems in the application, the crime of gross violation of a woman's integrity has proved to be a useful tool in the Swedish fight against domestic violence.

³⁴⁹ Swedish Penal Code in English: <http://www.sweden.gov.se/content/1/c6/02/77/77/cb79a8a3.pdf> [Accessed 24 May 2006]

³⁵⁰ Chapter 3; crimes against life and health, chapter 4; crimes against liberty and peace, chapter 6; sex crimes

Penal value of “everyday domestic violence”

The Model Strategies, in section 9(a), urge Member States to ensure that sentencing of offenders meets the goals of:

- (i) Holding offenders accountable for their acts related to violence against women;
- (ii) Stopping violent behavior;
- (iii) Taking into account the impact on victims and their family members of sentences imposed on perpetrators who are members of their families;
- (iv) Promoting sanctions that are compatible with those of other violent crimes.

If we recall the description of the typical domestic violence scenario described at the beginning of this chapter, the wounds in most cases are not such that they would lead to any work incapacity. As a consequence, the majority of domestic violence cases would be classified as other intentional harm under article 90 of the Criminal Code, which is a criminal contravention punishable only with a fine. If the beating led to temporary work incapacity of up to nine days, it would still be a criminal contravention, but punishable by a fine or by up to six months of imprisonment³⁵¹. If threats are involved, this would lead to a combined sentence, which in most cases would not exceed a few months of imprisonment. While the described attack might not lead to any work incapacity, it might lead to an aching body full of bruises and a swollen face with a black eye. Repeated attacks may also lead to post-traumatic stress disorder and irreparable wounds to the self-esteem of the battered woman.

With regard to non-serious intentional injury, it requires work incapacity of more than nine days. This is a long time to be ill. Cases that would fall into this category might be a severe brain concussion, one or several broken joints or other severe injuries that do not permanently damage the health of the person. These crimes are punishable by a fine or by up to two years of imprisonment.

It therefore must be concluded that both the “everyday domestic violence” and the more severe cases of domestic violence have a very low penal value in Albania. Moreover, while the fact that systematic and recurring domestic violence over long periods is sometimes referred to as a mitigating circumstance in cases where women have murdered their husbands, a history of domestic violence does not seem to be considered as an aggravating circumstance in cases against men accused of committing

³⁵¹ It is noteworthy that in the commentary to the Criminal Code, there is no discussion regarding the difference between the first and second paragraphs of article 90. Instead the second paragraph of article 90 is discussed only in relation to article 89, i.e., regarding whether the violence caused up to 9 days of work incapacity to work or whether it caused longer incapacity. In fact, the discussion refers to the term “injury” rather than “battery”, as if the second paragraph of article 90 were part of article 89, rather than of 90. While including the second paragraph of article 90 in article 89 – to create two degrees of *non-serious intentional injury* – might have made more sense, this is not how the legislator solved the issue. See Ismet Elezi, *E drejta penale: pjesa e posaçme* (Tiranë: Shtëpia Botuese e Librit Universitar, 2002), p. 80

acts of domestic violence against women. In fact, in none of the decisions of violence against women covered in the course of the Fair Trial Development Project is there a discussion of whether there have been previous acts of domestic violence.

Torture

Albanian criminal legislation, as with other offences, does not define the elements of the crime of torture. The relevant article simply provides that torture and other degrading or inhuman treatment are punishable by five to ten years of imprisonment³⁵². The Albanian torture article has not been applied for any cases of domestic violence. Torture is normally understood as acts carried out by or on behalf of the state for specific purposes, not acts of domestic violence. Considering, however, the systematic and severe nature of domestic violence in some cases, it has been argued that domestic violence may amount to torture. The UN Convention against Torture, to which Albania is a state party, defines torture as follows:

For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from her/him or a third person information or a confession, punishing her/him for an act s/he or a third person has committed or is suspected of having committed, or intimidating or coercing her/him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions³⁵³.

In her report to the UN Commission on Human Rights in 1996, the UN Special Rapporteur on violence against women, however, compared violence against women in the family, including the use of violence as a means of control and punishment, with torture. She went on to argue that:

Like torture, domestic violence commonly involves some form of physical and/or psychological suffering; including death in some cases. Secondly, domestic violence, like torture is purposeful behaviour which is perpetrated intentionally. Men who beat women partners commonly exercise control over their impulses in other settings and their targets are often limited to their partners or children. Thirdly, domestic violence is generally committed for specific purposes including punishment, intimidation and the diminution of the women's personality. Lastly, like torture, domestic violence occurs with at least the tacit involvement of the State, if the state does not exercise due diligence and equal protection in preventing domestic abuse. This argument contends that, as such, domestic violence may be understood to constitute a form of torture³⁵⁴.

³⁵² It is noteworthy that torture under Albanian legislation seems to be considered only of medium severity

³⁵³ Convention Against Torture and Other Inhuman, Degrading Treatment or Punishment, adopted in New York, 10 December 1984 <http://www.ohchr.org/english/law/cat.htm> [Accessed 24 May 2006]

³⁵⁴ Radhika Coomaraswamy, Report of the Special Rapporteur on violence against women, its causes and consequences, , 6 February 1996, E/CN.4/1996/53, paragraphs 42-50 <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/c41d8f479a2e9757802566d6004c72ab?Opendocument> [Accessed 24 May 2006]

4. Prosecution of cases concerning domestic violence

The Model Strategies, section 7(b), urge states to review, evaluate and revise their criminal procedure, as appropriate, in order to ensure that the primary responsibility for initiating prosecution does not rest with the women subject to violence. The Resource Manual develops the reasons for this as follows:

[I]n the past and still in many jurisdictions, violent acts against women were and are often treated as a private matter. This practise differs from the treatment of other crimes, which are considered to be of sufficient concern for the state to initiate prosecution, on behalf of the victim and all of society. In part, this past practise was a response to traditions regarding the rights of male family members and the ownership of women. It also reflected the fact that women, especially in domestic situations, are often reluctant to cooperate if it means seeing their partners prosecuted and jailed. Placing the responsibility to proceed squarely with the prosecutor is also intended to protect the victim from retaliation by the offender by removing from the victim the apparent choice of laying or dropping criminal charges. It is important, where prosecutions may proceed against victims' wishes, that adequate support be provided to the victim and that police and the prosecutors are will trained in the nature and dynamics of this kind of violence. It should also be recognized, however, that the success of this approach may become highly dependent on prosecutors' ability to develop separate evidence of the crime, independent of the victim's testimony.

Private prosecution – Several criminal offences in Albania are exclusively under private prosecution. Article 59 of the CPC provides:

1. One who is aggrieved by the criminal offences provided for by articles 90, 91, 92, 112, first paragraph, 119, 120, 121, 122, 125, 127, 148, 149 and 254 of the Criminal Code, has the right to apply in court and take part in the trial as a party to prove the charge and claim the reimbursement of the injury.
2. The prosecutor participates in the trial of these cases and, as the case may be, makes a request for the conviction or acquittal of the defendant.
3. If the private prosecutor or the defense counsel assigned by him does not appear during the session without reasonable grounds, the court dismisses the case.

While the wording of section 1, providing that the victims have “the right to apply to court and take part in the trial” gives an impression that these cases would be under public prosecution, sections 2 and 3 make it clear that this is not case. This is also confirmed by the CPC Commentary, which refers to these crimes as “less important crimes” and explains that “the recognition of private accusations in the new CPC is an appropriate solution that will help increase the effectiveness of criminal prosecution and in the prevention of criminality³⁵⁵.”

³⁵⁵ Commentary to the CPC p. 146

In these cases there thus is no preliminary investigation and the responsibility to gather evidence rests entirely on the injured accuser. The prosecutor does participate in the trial and suggests the penalty to be applied. The court is further obliged to hold a preliminary hearing and to propose that the parties reconcile³⁵⁶.

The crimes mentioned in the article are:

Article	Crime
90	Other intentional harm
91	Serious injury due to negligence
92	Non-serious injury due to negligence
112 para. 1	Violation of someone's house
119	Insult
120	Libel
121	Intruding without grounds into someone's privacy
122	Spreading personal secrets
125	Denial of support
127	Unlawfully taking a child
148	Publication of another person's work under one's own name
149	Unlawful reproduction of the work of another
254	Infringing the inviolability of residence

Apart from negligent crimes, the only crime attacking the physical integrity of a person that is included in this group of offences exclusively under private prosecution is thus what is probably the most common type of domestic violence, i.e., other intentional harm³⁵⁷.

³⁵⁶ CPC article 338

³⁵⁷ CC article 90

Example – Access to justice for woman victim of domestic violence

*Case no. 16*³⁵⁸

The case concerns a man charged with *other intentional harm* and *violation of someone's house*. The charges were brought by the former wife of the defendant. According to the court decision, the defendant was released from prison on 21 April 2005, after having served a sentence for illegal weapons possession. The parties had divorced before this sentence and, in accordance with an agreement, divided their residence equally between them³⁵⁹. After his release, the defendant went to their house. According to the wife, i.e., the injured accuser, the defendant refused to leave the house and slapped and kicked her in her body and face. She subsequently brought charges against her former husband in court. Referring to the fact that there was neither medical expertise to prove her injuries, nor any documentation to prove the injured accuser's legal title to the house, the case was [wrongly] dismissed.

Comment – Assuming that the woman/injured accuser was truthful in her statement regarding the violence she had suffered, the only reason the perpetrator was not brought to justice was the lack supporting evidence; in this case this would mean a medical statement and/or photographs. While this kind of evidence may seem obvious to a prosecutor or defence lawyer, and is easily obtainable, it may prove an insurmountable hurdle for a person without legal background or legal advice. The result in this case was that the woman was left without a legal remedy and that the perpetrator was awarded impunity for the violence he committed against his former wife. This is not to say that alleged perpetrators of domestic violence should be found guilty without evidence; it is an argument for bringing all domestic violence related crimes under public prosecution to ensure that these crimes are properly investigated and prosecuted.

Wrong dismissal– Lack of evidence is not a reason for dismissing a case but for finding the defendant not guilty³⁶⁰. To dismiss a case in a situation where there is not enough evidence violates the presumption of innocence and, considering that proceedings could in theory be restarted if new evidence emerges, the defendant's right to have any criminal charge determined within a reasonable amount of time³⁶¹.

Prosecution dependant on complaint – For a number of other offences, the prosecution depends on a complaint by the injured party. Article 284, section 1, of the CPC provides:

³⁵⁸ See Domestic violence – Annex 1

³⁵⁹ From the decision it is not clear whether it means that the former spouses shared the house

³⁶⁰ CPC, art. 387

³⁶¹ ECHR art. 6 (1)

The prosecution for criminal offences provided for by articles 89, 102, paragraph one, 105, 106, 130, 239, 240, 241, 243, 264, 275 and 318 of the Criminal Code, may commence only with the complaint of the injured person, who may withdraw it at any stage of the proceedings.

The crimes are:

Article	Offence
89	Non-serious intentional injury
102 para. 1	Non-consensual sexual intercourse with mature women
105	Sexual or homosexual intercourse through abuse of office
106	Sexual or homosexual intercourses with extended family members or under custody
130	Forcing or impeding to cohabit or divorce
239	Insulting [a public official] on duty
240	Defamation [toward a public official] because of her/his duty
241	Defamation toward the President of the Republic
243	Assaulting family members of a person exercising a state duty
264	Forcing [a person] to go on strike or not to
275	Abuse of telephone calls
318	Insulting a judge

As can be seen from the table, again, in two of the criminal provisions most commonly invoked in cases of domestic violence, i.e., non-serious intentional injury and rape, the prosecution is dependent on the woman victim of the violence. If the prosecution is not dealing with domestic violence cases resulting in death, cases concerning torture, serious intentional injury, threat and rape at gunpoint, it is dependent entirely on the woman.

A consequence of the above provisions is that in the everyday domestic violence scenario described at the beginning of this chapter, the woman carries the burden of bringing the case to court, gathering evidence, going through the reconciliation hearing, and proving the guilt of her husband. In other cases, the prosecution depends on her co-operation, while she might be under pressure from her husband and relatives to withdraw her complaint. In both cases, if the woman does not follow through, it means less work for the court and the prosecution, an incitement for these bodies to make efforts to convince the woman to reconcile with her husband or withdraw her complaint. In light of this, it should not come as a surprise that criminal cases concerning domestic violence in Albania are few and far between. Without the work and support of women's NGOs and

shelters in Albania, those few cases would certainly be even fewer.

*The case of XX*³⁶²

According to XX, in July 2004, she was beaten and mistreated in front of her mother by her husband. She was beaten again the following day after her father had asked the husband to stop the mistreatment and to allow XX to return to her parents' house, a request that was denied. A few days later XX asked her husband for a phone to call her family. This was denied with the reasoning that she would not be allowed to leave the house before her wounds had healed. Later the same day, XX managed to escape and was given medical care. The following day, pictures were taken of her wounds. According to XX, the reason for the mistreatment was that she had refused to accept her husband's request for divorce. Instead of complaining to the authorities about the violence, however, XX's family convinced her that they should try to solve the conflict among themselves. In October the husband filed for divorce. The divorce was granted in November and a week later, XX filed charges against her husband to the prosecution office for *unlawful detention*³⁶³ and *non-serious intentional injury*³⁶⁴. Her charges were accompanied by pictures showing her wounds. The same day, this prosecution office transferred the complaint to another prosecution office.

In April 2005, i.e., five months after XX had filed her complaint, the second prosecution office dismissed the complaint. Regarding the charge for unlawful detention, the prosecution office dismissed the charge because it found that "it was obvious that the fact did not exist"³⁶⁵. Regarding the complaint of non-serious intentional injury, the decision states that criminal offences under article 90³⁶⁶ of the CC should be addressed directly to the Court in accordance with article 59 of the CPC. The decision of the prosecution office went on to state:

Concerning the alleged violence, her statements can be considered as evidence. Nevertheless, these statements remain the only evidence, because it has not been determined whether the pictures (brought by her) were taken during the time she claims that she was maltreated.... In absence of a forensic medical expert statement, we are faced with two facts that cannot be proved....

Comments – The pictures submitted to the prosecution office together with the criminal complaint show a woman who has suffered violence that is typical in domestic violence cases. That is, they show a black eye, a bruised face, bruises on the right arm, bruises just above the waist and bruises on the legs. The pictures also show, beyond any reasonable doubt, that the woman on the picture has been the victim of violence by someone. That someone should be brought to justice regardless of the exact timing of the crime.

³⁶² This case never resulted in a court decision, for which reason it is not covered by the study made on court decisions in cases concerning domestic violence

³⁶³ CC article 110

³⁶⁴ CC article 89

³⁶⁵ CPC article 328, section 1

³⁶⁶ Other intentional harm

Moreover, the pictures were obviously taken by someone who could have been called as a witness regarding the timing of the pictures, the state of the person on the pictures, etc. Based on the pictures, a forensic medical certificate could have been requested at a later stage. The statements of XX also indicate that some of the violence was conducted in front of her mother, who could have been called as another witness. It therefore seems that, together with the statement of XX, there would have been more than enough evidence to initiate a criminal investigation for non-serious intentional injury rather than for other intentional harm. Similar arguments can be raised regarding the accusation for unlawful detention, i.e., the parents of XX should have been heard and there might well have been other persons who could have had relevant information. To conclude, the way this complaint was handled, gives strong reason to suspect that the prosecutor did anything – legally grounded or not – he could to avoid prosecuting the case. The failure to prosecute this case would certainly call for further scrutiny by the Office of the Prosecutor General. Finally, the pictures show a person who has been subject to substantial violence. Regardless of how many days of incapacity the sustained injuries cause, no society should grant impunity to perpetrators of this type of violence by making prosecution dependent upon the victim. To do so would put too heavy a burden on the victim and send the wrong signals about acceptable levels of violence in the society.

5. Possibilities to request compensation in criminal cases

The Model Strategies, section 10(c), urge states to ensure, as appropriate, that women subjected to violence, receive, through formal and informal procedures, prompt and fair redress for the harm that they have suffered, including the right to seek restitution or compensation from the offenders or the state.

A victim of domestic violence may suffer different forms of damages. These may include costs for hospitalization, medication, rehabilitation, damage to clothing or other objects; there may be a loss of income, but, more than anything, there will be pain and physical and mental suffering. A generally recognized legal principle is that anyone who suffers damage or loss due to intentional or negligent actions of another is entitled to compensation. The compensation seeks to restore the injured person to the situation as it was before the attack. It also serves to restore the dignity of the victim. Under the common law systems this area of law is called “the law of torts”. The law of torts determines, among other issues, whether a loss that befalls one person should or should not be shifted to another person. Some of the consequences of injury or death, such as medical expenses, can be made good by payment of damages. Damages may also be paid, for want of a better means of compensation, for non-pecuniary consequences, such as pain and suffering. The risk of having to pay for damages caused by criminal acts may also, apart from the punishment, function as a further deterrent against committing crimes against persons. In its case law, the European Court of Human Rights refers to this kind of reparative measures as “just compensation”. While different states have developed different views on levels of compensations, such as the very high levels

often awarded in the United States as opposed to the quite moderate levels in Sweden, the possibility of compensation for damages suffered as a result of a criminal offence is an important part of every legal system.

The Albanian CPC recognizes the right to ask for compensation in criminal cases in articles 58 and 59. Article 58 provides:

1. A person aggrieved by the criminal offence or his heirs have the right to apply for prosecution of the guilty person (perpetrator) **and reimbursement of the injury [caused]**.
2. An aggrieved person who has no legal capacity to act exercises his rights recognized by law through his legal representative.
3. An aggrieved person has the right to present his claims to the proceeding authority and request the obtaining of evidence. When his claim is not accepted by the prosecutor, he has the right to appeal to the court within 5 days of receiving notice.

Article 59 has been cited before when discussing private prosecution. It reiterates the possibility for the injured party to claim compensation for the injury suffered.

For material damages, article 61 provides that:

A person who has suffered material injury from the criminal offence or his heirs may file a civil lawsuit in the criminal proceedings against the defendant or the person liable to pay damages (defendant), claiming the restitution of the property and reimbursement of the injury.

Finally, the Albanian Civil Code³⁶⁷ provides that a person injured by a criminal offence has the right to initiate civil proceedings to seek compensation for material and moral damages.

Article 608 of the Civil Code provides:

A person who, illegally and with fault, causes damage to the person of another or to his property, is obliged to compensate the damage caused.

A person who has caused the damage is not liable if he proves that he is without fault. The damage is deemed illegal when it is a consequence of the violation or harm of the interests and rights of the other that are protected by legal order or good customs.

³⁶⁷ Law no. 7850, dated 29 July 1994, on the Civil Code of the Republic of Albania

Article 625 provides that:

A person who suffers damage other than property damage has the right to claim compensation if:

- a) he has suffered injury to his health or is harmed in his honor and personality;
- b) the memory of a dead person is desecrated and the spouse with whom he lived until the day of his death or his relatives up to the second degree, seek compensation, except when the offence is committed when the dead person was alive and his right to compensation for the desecration was recognized

The right guaranteed in the above paragraph is not hereditary.

Despite these possibilities to request compensation, however, this area of law seems to be rather undeveloped in Albania. In none of the criminal cases followed in the course of the Fair Trial Development Project has there been any claim for compensation.

6. Study of domestic violence cases in Albanian courts

The Model Strategies, in section 13, urge states and other actors, as appropriate, to develop crime surveys on the nature and extent of violence against women and to gather information on a gender-disaggregated basis for analysis and use, together with existing data, in needs assessment, decision making and policy making in the field of crime prevention and criminal justice, in particular concerning: the different forms of violence against women, its causes and consequences; the relationship between the victim and the offender; and the use of firearms, drugs and alcohol in situations of domestic violence. As was mentioned previously, in its report on Albania in 2003, the CEDAW Committee also recommended that Albania systematically collect data on violence against women, including domestic violence. Nevertheless, no such data exist in Albania.

At the outset of the second phase of the FTDP, the intention was to follow, inter alia, cases concerning domestic violence. Yet, as mentioned before, such cases are extremely rare. Moreover, information to third parties is dependent upon notification by the prosecutor, the judge or the parties involved in a case. Therefore, to get a picture on how these cases are handled by the criminal justice system, the courts covered by the OSCE Presence's field stations were asked the following:

IV. DOMESTIC VIOLENCE AND THE CRIMINAL JUSTICE SYSTEM

As part of the second phase of the project we intend to follow cases concerning domestic violence in a narrow sense, i.e. *cases where a husband has subjected his wife or former wife to threats, physical maltreatment or murder.*

In order to have a better understanding of how cases concerning domestic violence, as described above, are handled by the courts we would like to ask for your kind co-operation in providing us with copies of court decisions concerning domestic violence for the past three years, i.e. 2002, 2003, 2004 and finally 2005.

Specifically we are looking for court decisions where the *offender is a man who is or has been married to the victim*. The offences charged could for example be *articles 76 – 78, 84 – 92 (not 89/a), 102 or 110* of the Criminal Code.

Finally we would also like to ask for your kind co-operation in providing us with copies of court decisions concerning cases where a wife has killed/murdered her husband or former husband.

Police Directorates and Prosecution Offices in the same districts were asked the following:

As part of the second phase of the project we analyze cases concerning domestic violence in a narrow sense, i.e., *cases where a husband has subjected his wife or former wife to threats, physical maltreatment or murder.*

In order to have a better understanding of how cases concerning domestic violence are handled by the justice system as a whole, we are looking for complaints to the police/prosecutor where the *offender is a man who is or has been married to the victim*. The offences could for example be under *articles 76 – 78, 84 – 92 (not 89/a), 102 or 110* of the Criminal Code...

We are further interested in complaints concerning cases where a wife has killed/murdered her husband or former husband, as they are frequently related to previous maltreatment of the wife.

Referring to the above, we would like to ask for your kind co-operation in providing us with information in writing regarding:

1. How many complaints related to domestic violence were registered during the past three years, i.e., 2002, 2003, 2004 and finally 2005?
2. How many of those complaints led to a criminal investigation? and
3. How many of those complaints led to a trial?
4. How many complaints during the same period have concerned a wife killing her husband/former husband?
5. What were the reasons some of the complaints did not lead to any further action?

As can be seen, the various authorities were also asked for cases where a woman had murdered her husband. The reason for this was to see to what extent there was a

previous history of domestic violence against the woman who eventually murdered her husband³⁶⁸.

Statistics by the police and by courts and prosecution offices does not contain indicators for violence against women in general or domestic violence in particular. This means that any request for information regarding cases of this sort requires the responding body to do a case-by-case search. Considering that most police stations, courts and prosecution offices still lack computerized case management systems, this often means a manual search through court files. How thoroughly this search is actually carried out will again depend on the goodwill and ambition of the person given the task. The table below shows some of the results of the inquiry.

District	Police	Prosecution	Court
Tirana	240 complaints ³⁶⁹ regarding DV were registered. Investigation was initiated in 154 cases; 5 cases of a husband injuring wife; 1 case of husband murdering wife and 2 cases of wife murdering husband ³⁷⁰ .	According to Tirana PO ³⁷¹ , DV cases are not specified in the registers, for which reason it was not possible to respond to the inquiry.	23 court decisions by Tirana DC ³⁷² during 2003-2005; 2003 - 6 decisions; 2004 - 9 decisions and 2005 - 8 decisions. The defendant was a woman in 1 case.
Durrës	33 complaints; 2002 - 9 cases were registered; 2003 - 8 cases; 2004 - 6 cases; 2005 - 10 cases. 5 cases concerns a wife threatening, injuring or murdering her husband	32 cases; 2002 - 9 cases; 2003 - 7 cases; 2004 - 9; 2005 - 7 cases. 6 cases dismissed, 1 under investigation.	No reply.
Shkodra	18 complaints 2000-2005; 8 cases of wife murdering her husband. The statistics reflect only cases of murder, i.e., a husband murdering his wife or <i>vice versa</i>	18 cases; 2002 - 3 cases; 2003 - 5 cases; 2004 - 7 cases and 2005 - 3 cases. All cases were sent to trial.	13 court decisions by Shkodra DC; 2002 - 2 decisions; 2003 - 5 decisions; 2004 - 3 decisions and 2005 - 3 decisions. The defendant was a woman in 3 cases.

³⁶⁸ See further Amnesty International, *Albania: Violence against women in the family: "It's not her shame,"* pp. 42-47

³⁶⁹ According to the official reply submitted by the Tirana Police Directorate, one of the cases concerns a father who murdered his daughter

³⁷⁰ From the answer it is not clear what the 148 cases concerned

³⁷¹ Prosecution Office (PO)

³⁷² District Court (DC)

IV. DOMESTIC VIOLENCE AND THE CRIMINAL JUSTICE SYSTEM

District	Police	Prosecution	Court
Kukës	2 complaints. Both cases were investigated and sent to trial.	1 case investigated and sent to trial in 2004.	1 decision by Kukës DC in 2005. <i>This decision is, however, not one of the cases indicated by the prosecutor.</i>
Vlora	11 complaints 2002-2005; 1 case of wife murdering husband.	6 cases investigated; 2002 - 1 case; 2003 - 1 case and 2005 - 4 cases. All cases sent for trial.	No reply from Vlora DC. The court, however, provided a copy of a decision from 2005. The case was privately prosecuted.
Fier	18 complaints 2004-2005; 10 murder cases, 4 cases of causing suicide and 4 cases of husband maltreating his wife. Unclear whether the cases relate only to intramarital violence.	7 investigations 2002-2005; 3 cases sent to trial.	No official reply but unofficially, <u>Fier DC</u> states that they have had no DV cases.
Gjirokastra	4 complaints 2002-2005. All cases were sent for investigation and trial.	No reply from Gjirokastra PO	Gjirokastra DC has heard no DV case during the period 2002-2004.

Comments

The replies received indicate that the questions were frequently misunderstood, resulting in reports of violent crimes between related persons in general, or replies covering periods other than those asked about. In some cases, there was no correspondence between what was reported by the different bodies, i.e., the police, prosecution and the courts. For example, Lushnja District Court provided five decisions, but none of these concerned inter-spousal violence. The information was mostly not disaggregated by year or crime. One reported only murder cases. In some cases we received no replies. Considering that each reply was dependant on someone actually looking for files, cases can easily have been missed.

While the discrepancies and uncertainties described make it difficult to draw any definite conclusions based on the above, a few comments can be made.

Tirana – It is of concern that despite 240 complaints and 154 investigations, only 23 decisions concerning domestic violence were rendered during the relevant period. The reply by the prosecution office also indicates that domestic violence is not a priority area.

Durrës – The replies by the police and the prosecution are coherent, which is a good sign. Considering the number of cases, however, it is of concern that neither a reply nor any decision was provided by the District Court³⁷³.

Shkodra – As mentioned above, Shkodra seems to have a commitment to fight domestic violence and this is shown not least by the rather coherent figures by at least the prosecution and the court. Considering that the police only reported murder cases, no conclusions can be drawn as to how many of the complaints result in criminal investigation and trial.

Kukës – It is noteworthy that neither of the two cases allegedly investigated and sent to court seems to have resulted in a court decision. It is also of concern that neither the police nor the prosecution seems to have any record of the publicly prosecuted case that did result in a court decision.

Vlora – It is of concern that only one of the six cases reportedly sent for trial has resulted in a court decision.

Fier – It is of concern that none of the three cases reportedly sent for trial has resulted in a court decision.

Gjirokastra – It is of concern that none of the four cases reportedly sent for trial has resulted in a court decision.

7. Court decisions on domestic violence

The study covers four years, from the beginning of 2002 to the end of 2005, and six courts: Tirana, Durrës, Kukës, Shkodra, Vlora, Fier and Gjirokastra. The requests yielded a total of 38 court decisions. Apart from that, a search on the web sight of Fier District Court yielded one decision, while one decision by Durrës District Court had been provided previously in response to a general request for decisions from this court. The sum is thus 40 district court decisions by six courts in four years, or an average of 1.6 decisions per court per year³⁷⁴. As a comparison, in Sweden, with a population of ca. 9 million and where the level of domestic violence is reported to be similar to that of Albania³⁷⁵, 5,096 incidents of domestic violence (assault or gross violation of a woman's integrity, i.e., excluding threats) were tried in 2004. As there are 56 district courts in Sweden, it means that on average each court heard 91 incidents/cases of

³⁷³ Part of this may be due to the unwillingness of the previous acting chair of Durrës District Court to co-operate. Since the appointment of the new chair, Mr. Ervin Metalla, co-operation has improved significantly and is now reported to be excellent

³⁷⁴ $40/4/6=1.6$

³⁷⁵ See e.g., Amnesty International, *Men's Violence Against Women in Intimate Relationships; An account of the situation in Sweden*, 19 April 2004, p. 21-27 [http://www2.amnesty.se/svaw.nsf/mvaw/\\$File/mvaw.pdf](http://www2.amnesty.se/svaw.nsf/mvaw/$File/mvaw.pdf) [Accessed 2 June 2006]

domestic violence in 2004³⁷⁶. As stated before, it therefore has to be concluded that the level of underreporting and under-prosecution of cases concerning domestic violence in Albania is significant³⁷⁷.

7. 1. General observations

Of the 40 decisions, 23 are from Tirana District Court, 13 from Shkodra District Court and the remaining 4 are from Kukës, Fier, Vlora and Durrës³⁷⁸. In four cases (nos. 22, 27, 33 and 34), the defendant was a woman. In 38 cases, the defendant was found guilty, while two cases were dismissed – one due to lack of evidence³⁷⁹ (no. 16) and one because the victim withdrew her charges (no. 24).

The defendant pleaded guilty in 35 out of the 40 cases. All women who were charged pleaded guilty. In 27 of the cases there was an accelerated trial. Of the 35 male defendants in cases that were tried on their merits, 31 pleaded guilty, whereas 4 pleaded not guilty (nos. 4, 16, 20 and 30). Of these, 34 were found guilty, whereas the 35th decision was the (wrongly) dismissed case discussed earlier in this chapter, which in fact should be seen as not guilty verdict.

Accelerated trial - At the request of a defendant or her/his attorney, a trial can be held as an accelerated trial, in which case the sentence for the defendant will be reduced by one-third. The court may decide for an accelerated trial when it considers that the case can be resolved on the basis only of the documentary evidence. In this case, no further evidence will be presented. An accelerated trial does not require that the defendant plead guilty³⁸⁰.

The two dismissed cases were both under private prosecution,³⁸¹ which means that there was no preliminary investigation and the prosecutor participated only during the trial and made recommendations concerning the punishment. In total, there were four cases of private prosecution and, not taking into consideration the two dismissed cases, the defendants pleaded guilty in one and not guilty in the other.

³⁷⁶ 91 times 4 years is 364 cases per court. If Albania, with approximately a third of the population of Sweden, had the same rate it would amount to 121 (364/3) cases per court

³⁷⁷ For more information regarding the decisions, please see Domestic violence – Annex 1

³⁷⁸ Nos. 1-23: Tirana District Court (DC); No. 24 Vlora DC; No. 25: Kukës DC; Nos. 26-38: Shkodra DC; No.39: Fier DC; No. 40: Durrës DC

³⁷⁹ See “Example – Access to justice for women victim of domestic violence”

³⁸⁰ CPC art. 403-406

³⁸¹ CPC art. 59, less serious cases fall under private prosecution, see also art. 284 for cases where the prosecution depends on the complaint of the victim

7. 2. Aggravating and mitigating circumstances

Regarding how to determine the punishment, the Criminal Code provides that, apart from respecting the range of punishment, the court considers the dangerousness of the criminal act and of the person, the level of guilt and mitigating as well as aggravating circumstances³⁸². Below is a table indicating aggravating and mitigating circumstances in the Criminal Code that might be of use in cases concerning domestic violence. The table further indicates circumstances that have been referred to in the reviewed court decisions and the number of cases in which a particular circumstance has been referred to. From the decisions, however, it is not always possible to deduct whether a cited circumstance was seen as an aggravating or a mitigating circumstance. Frequently the decisions just state that when defining the type and measure of punishment the court takes the “following circumstances into account”. This is unsatisfactory, as it deprives the defendant as well as other readers of the decision of the possibility to understand how the court has reached its decision regarding the punishment. It also makes it more difficult for higher instances, researchers and others interested to evaluate how aggravating and mitigating circumstances are used and how much they affect the punishment.

Article	Effect	Circumstances	Cases
50 a	Aggravating	Act committed based upon weak motives	
50 c	Aggravating	Act committed savagely or ruthlessly	
50 ç	Aggravating	Offence committed after a sentence was decided for a previous offence	4
50 e	Aggravating	Act committed against a pregnant woman	
50 g	Aggravating	Act committed taking advantage of family relations	
50 h	Aggravating	Act committed more than once	1
50 i	Aggravating	Act committed using arms etc.	1
\18	Aggravating	Intentional intoxication in order to commit crime	
—	Aggravating	The offence has become a more widespread/common offence*	6
—	Aggravating	The threat was carried out in front of the children*	1
48 b	Mitigating	Act committed under the effect of psychiatric disorder caused by provocation or unfair acts of victim or someone else	1
48 ç	Mitigating	Defendant shows deep repentance/shows repentance	22/5
48 d	Mitigating	When the person has compensated for the damage caused by the criminal act or has actively helped eliminate or decrease its consequences	2
48 dh	Mitigating	When defendant gives her/himself over to the authorities	5

³⁸² CC article 47, paragraph 2

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Article	Effect	Circumstances	Cases
48 e	Mitigating	When the relationship between the offender and the victim has returned to normal	8
49	Mitigating	Other circumstances justifying a lower sentence**	
18	Mitigating	Incidental intoxication, causing mental instability	4
53	Sentence under minimum or milder	When court finds that both the act and the person pose a limited danger and there are mitigating circumstances	1
* To commit crimes in front of children or the fact that a crime has become common are not aggravating circumstances provided in the CC. It is, however, very common that courts, both when defining the sentence and when deciding pre-trial detention, refer to the crime in question having become more widespread or common.			
** Other circumstances justifying a lower sentence: Family reasons – 7 cases; Poor economic situation – 5 cases; Not sentenced before – 3 cases; That defendant is police employee – 1 case; The defendant is a mother of newborn baby/mother of seven children – 1 case each; The defendant cannot remember the crime due to mental instability – 1 case; Defendant pleaded guilty – 1 case; Poor health of defendant – 1 case; “Defendant is an intellectual etc” – 1 case.			

7.2.1. Some analysis of the use of aggravating and mitigating circumstances

In cases concerning domestic violence, aggravating circumstances that might be used to address the particular phenomenon of domestic violence would be provisions regarding acts committed taking advantage of family relations (50 g) or acts committed more than once (50 h). As can be seen from the table, however, only in one of the decisions reviewed was reference made to any of these particular factors. And even in that decision, it is not clear in what direction the reference was meant to influence the sentence, i.e., as an aggravating or a mitigating circumstance.

Decision no. 36

The defendant was charged with threatening and with illegal weapons possession. After an accelerated trial, he was sentenced to four months and twenty days of imprisonment. The court states that “[w]hen defining the measures and type of the punishment, the court takes into consideration the fact that crimes within the family have become common and that in the case at hand the cause of the crime was the continuous disputes between the spouses, which also caused them to separate.”

When enumerating mitigating circumstances, the fact that the crime happened as part of a family conflict is frequently mentioned, thus indicating that this is not seen as an aggravating but as a mitigating circumstance.

Decision no. 32

The defendant was charged and convicted of the attempted murder of his wife and of illegal weapons possession. In the decision, it is mentioned that the defendant had frequently mistreated his wife. This is, however, not considered as an aggravating circumstance and the fact that the crime happened as a part of a family conflict is mentioned among other mitigating circumstances.

While mitigating circumstances were referred to in 33 of the cases, aggravating circumstances were referred to in only 12 of the cases. The most commonly used aggravating circumstance was a factor not provided in the Criminal Code, i.e., that the offence has become more widespread or common (6 cases). The fact that the defendant had been sentenced before was referred to in 4 cases. Regarding mitigating circumstances, it is noteworthy that the defendant being a police employee was referred to as a mitigating circumstance in one case (no. 26). In a further case (no. 15), the decision reads “[w]hen imposing the measure of punishment, the court considers the low dangerousness of the offence, of the person, the fact that they are spouses (the parties had in fact divorced prior to the decision), they have a child, the defendant has not been sentenced before, he is an intellectual [sic!], etc.”. While the limited danger of the crime and person are mitigating circumstances provided in article 53 of CC, the other circumstances cited as mitigating, e.g. that the defendant is an “intellectual, etc.”, are not circumstances that should reasonably justify a lower sentence, in particular not in a case concerning domestic violence.

7. 2.2. Intoxication as a mitigating circumstance

The Model Strategies, section 7(e), urge states to ensure that it not be possible to escape all criminal responsibility for acts of violence against women as a result of having been voluntarily under the influence of alcohol or drugs at the time.

Intentional intoxication in order to commit a crime is an aggravating circumstance, while incidental intoxication and any subsequent instability is a mitigating factor. On this particular matter, the Commentary to the Criminal Code states:

Incidental intoxication is understood as intoxication that is not ordinary, but that happens on a distinct occasion that brought about a lowering of mental balance. This circumstance is verified by a report of a psychiatric expert and is to be taken into consideration as a mitigating circumstance in order to lower the penalty against a person who has committed a criminal act in the state of incidental intoxication. Thus, for example, a person who is at his friend’s wedding gets drunk and in this state, while wanting to shoot a pistol into the air, because of his reduced mental balance, negligently shoots a nearby person and seriously injures that person³⁸³.

While it is understandable that intentional intoxication to commit a crime is an aggravating circumstance, it is unacceptable that “incidental intoxication” is considered a mitigating circumstance. In particular circumstances, such as the ones cited in the example, alcohol consumption should not excuse or reduce criminal responsibility of a defendant. Numerous studies show that there is a strong connection between alcohol consumption and violent crime. Not least due to this, voluntary intoxication should not be accepted as a defence or as a mitigating circumstance³⁸⁴. If a person has a tendency to become mentally unstable when drinking, he/she should refrain from drinking.

In five of the decisions covered by the study, the fact that the defendant had been drunk was referred to as a mitigating circumstance (nos. 3, 5, 23, 29 and 37). In none of the cases was there any medical expertise explaining the mental instability caused by the intoxication, nor any further analysis regarding the “incidental intoxication” and why this should be considered as a mitigating circumstance³⁸⁵.

Decision no. 37

The defendant was charged and convicted for murdering his wife as well as for illegal weapons possession. According to the decision, the defendant came home drunk, had a fight with his wife, took out a gun and shot her dead. There is no discussion, let alone psychiatric testimony, regarding the defendant’s “incidental inebriation” or the ensuing mental imbalance, or why this would be the type of extraordinary situation where voluntary intoxication should be allowed to mitigate a sentence. In fact, this seems like a prime example of a situation where voluntary intoxication *should not* be allowed to be used as a mitigating circumstance. In other words, we have a situation where the defendant has voluntarily and, most probably, purposefully got drunk and then committed a crime.

7.2.3. Threat v. armed threat

In 18 of the court decisions, the defendant was charged with threatening his wife. In six of these decisions, the defendant was also found guilty of unlawful possession of weapons, and in each of these cases the threat was committed with the weapon in question. Despite this, the fact that the threat was committed with a weapon was considered an aggravating factor in only one of the cases. In all other cases, weapons possession was just considered a separate offence.

³⁸³ Ismet Elezi, Skënder Kaçupi and Maksim Haxhia, *Komentari i Kodit Penal të Republikës së Shqipërisë* (Tiranë: GEER, 2001), p. 127

³⁸⁴ For further references, see, e.g., Thor Norstrom, “Effects on criminal violence of different beverage types and private and public drinking” in *Addiction*, vol. 93, no. 5 (May 1998), p. 689. One can also readily find articles by using an internet search for “alcohol and aggression”

³⁸⁵ See the discussion earlier regarding voluntary intoxication as a mitigating circumstance

The crime of threatening someone is defined as: Serious threat to cause death or grave personal harm to someone³⁸⁶. Threatening is punishable by a fine or by up to one year of imprisonment, while the use of arms when committing a crime is an aggravating circumstance. Nevertheless, aggravating circumstances can only lead to the maximum punishment provided in the relevant article, as opposed to mitigating circumstances which can lead to a sentence under the minimum provided, or to a milder sentence, e.g., a fine instead of imprisonment. This means that a threat of using a weapon can be punished by a maximum of one year of imprisonment. This should be compared with intercourse under threat at gunpoint, for example, which is punishable by five to fifteen years of imprisonment, as opposed to non-consensual sexual intercourse with a mature woman, which is punishable by three to ten years of imprisonment. Comparison also could be made with armed theft, which is punishable by ten to twenty years of imprisonment as opposed to simple theft, which is punishable by imprisonment from three months to three years³⁸⁷. This indicates that the armed threat is “worth” two to five years of additional imprisonment when combined with rape, whereas the armed threat combined with theft, is “worth” ten to seventeen years of additional imprisonment. As a result, the typical domestic violence threat with the use of a weapon is not even considered a crime, but a criminal contravention, and is not worth much in terms of punishment, whereas theft of property using an armed threat is considered to be among the most severe crimes in the Criminal Code. This discrepancy in penal value for the use of weapons when committing a crime is of concern.

It is a different issue that an armed threat is frequently punished as two offences, i.e., threat and illegal weapons possession. As will be seen in the second example below, possessing a weapon is seen as a much more serious crime than threatening someone with that same weapon. This is again an unfortunate discrepancy and indicates again that the personal integrity of a person is treated lightly by the Albanian criminal justice system.

³⁸⁶ CC article 84

³⁸⁷ CC articles 140 and 134

Decision no. 25

Here the male defendant was charged with and found guilty of threat and insult. The threat, which was directed both at the former wife of the defendant and at her brother (which is not reflected in the charge), was carried out with a knife. This is, however, not referred to as an aggravating circumstance.

Decision no. 35

This case concerns a man charged with threatening his wife and two daughters with an automatic gun, as well as with the illegal possession of the automatic gun. The court found the defendant guilty on both counts and sentenced him to one year and six months of imprisonment for the illegal weapons possession and to two months of imprisonment for the armed threat against his wife and two daughters. Considering that the case was resolved through an accelerated trial, the combined sentence for the husband was one year of imprisonment.

7. 2. 4. *Illegal weapons possession*

Under article 278 paragraph 2 of the Criminal Code, holding weapons, bombs, mines or explosive materials without the authorization of competent state bodies is punishable by a fine or by up to seven years of imprisonment. It has to be assumed that the purpose of this and of related provisions is to prevent the uncontrolled spread of weapons in Albanian society. In line with this, what should reasonably be penalized is the unauthorized possession³⁸⁸, i.e., the keeping as “one’s own”, rather than the mere “holding in one’s hands” of a weapon. As has been discussed earlier in this chapter, committing crimes with the use of weapons is sanctioned in particular provisions such as armed robbery³⁸⁹ or armed rape³⁹⁰, or is considered as an aggravating circumstance when defining the punishment. The term for “possession” in Albanian is, however, “zotërim”, whereas the term used in article 278, “mbaj”, is closer to the “holding in one’s hands” terminology. While this seems inadequate, experience gathered during the course of the Fair Trial Development Project shows that this is how the provision is interpreted and used. That is, regardless of who possesses a weapon without authorization, the one who holds it in her/his hands at a particular moment is punished for it. Moreover, there is never any discussion regarding the criminal intent to hold or possess a weapon, as opposed to the criminal intent to threaten or use the weapon against someone. This, indeed, is a problem of general concern within the Albanian criminal justice system, i.e., that criminal intent is rarely addressed in court decisions.

³⁸⁸ *Black’s Law Dictionary*, 8th ed., (St. Paul, Minnesota [U.S.A.]: West Publishing Co., 2004), s.v. “possession”: ” 1. The fact of having or holding property in one’s power; the exercise of dominion over property...3. *Civil law*. The detention or use of a physical thing with the intent to hold it as one’s own.... 4. ... Something that a person owns or controls...”

³⁸⁹ CC article 140

³⁹⁰ CC article 104

Decision no. 34

In this case, the female defendant was originally charged with murder, but eventually convicted of homicide in excess of the limits of necessary self-defence. The decision starts by explaining that the defendant was accused of intentionally killing her husband with an automatic gun that, *he*, the victim, was illegally keeping. Despite this and without any discussion regarding the criminal intent to keep the weapon, the female defendant, apart from the homicide carried out with the weapon, was found guilty of illegal weapons possession.

7.2.5. Female defendants

In four of the decisions (nos. 22, 27, 33 and 34), the defendant is a woman. Two women were charged with murder (nos. 22 and 34), but as the court changed the charge to homicide committed in excess of the limits of necessary self-defence in one of these cases (no. 34), only one woman was convicted of murder. One woman was charged and convicted for homicide committed in a state of profound mental distress, caused by violence or serious offense by the victim in combination with illegal weapons possession (no. 27). One woman was convicted of serious intentional injury, after having injured her husband with a kitchen knife (no. 33). All women pleaded guilty. Three of the cases were resolved as accelerated trials, which mean that the sentence was reduced by one-third (nos. 22, 27 and 33). The woman convicted of murder was sentenced to 12 years of imprisonment, which was reduced by one-third to 8 years of imprisonment due to the accelerated procedure (no. 22). The woman convicted of homicide was sentenced to 4 years and 6 months of imprisonment, which was reduced by one-third to 3 years of imprisonment due to the accelerated procedure (no. 27). The woman convicted of serious intentional injury was sentenced to the minimum 3 years imprisonment provided for the crime, which was then reduced to 2 years due to the accelerated procedure (no. 33). The woman convicted of homicide in excess of the limits of necessary self-defence, finally, was given a 5-year suspended sentence (no. 34).

8. Further analysis of domestic violence decisions

Decision no. 8 – The defendant was charged with and convicted of threatening his wife and sentenced to imprisonment equaling the time spent in pre-trial detention; i.e., three months and 24 days. According to the decision the defendant had also punched and kicked his former wife until the neighbors intervened.

Comment – From the decision, it is unclear from where the information regarding the assault stems, but it is still noteworthy that the defendant was not charged for assault under article 89 or 90 of the Criminal Code.

Decision no. 27 – The case concerns a 20-year old woman, LL, killing her husband. LL was charged with and convicted of homicide committed in the state of profound mental distress and of illegal weapons possession. During the trial, LL was represented by a lawyer. According to the decision, the pre-trial investigation had revealed that LL had been subject to regular violence from the first day of her marriage and that because of the physical and psychological maltreatment, LL had been hospitalized in a mental institution in 2001. In 2002 LL had a miscarriage³⁹¹ caused by the injuries progressively inflicted by her violent husband. On 22 June 2003, the husband brutally mistreated LL because she was pregnant. He then grabbed a gun and threatened that he would kill LL. He further ordered LL to undress and threw her on the bed. At this moment LL noticed that the weapon was close to her and took it and shot her husband, causing his instant death. In defining the punishment the court refers to the difficult economic situation of LL and the environment in which she committed the crime, as well as to the circumstances that led her to commit the crime. After combining the sentence for the two offences and considering that the case was resolved through an accelerated trial, LL was sentenced to three years of imprisonment. The decision was not appealed.

Comment - From the decision, it appears that, after severely mistreating LL and threatening her with a gun, the husband was about to rape LL. If this was the case, LL acted in necessary self-defence and should bear no criminal responsibility³⁹². Despite the fact that the court does not in any way seem to question the credibility of LL, there is no discussion regarding LL's right to defend herself against the ongoing and serious criminal attack against her physical integrity! While it is primarily the responsibility of a defence lawyer to argue that LL was acting in self-defence, in circumstances such as those described, the prosecutor as well as the court should have ensured that LL was not punished for something for which she, according to the Criminal Code, bears no criminal responsibility.

Furthermore, LL was convicted for illegal weapons possession in a case where it is explained how her husband had first threatened her with that same weapon and ordered her to undress at gunpoint. The decision contains no discussion as to whose weapon it was and whether LL had any criminal intent as to the possession or keeping of the weapon. Based on the above, it can be argued on good grounds that this decision represents a miscarriage of justice against LL and further compounds her victimization after the systematic mistreatment to which she was subjected by her late husband.

³⁹¹ This is wrongly described as a “propreedient abortion” in the decision. A “progreedient” process is a German medical term used to describe a progressive process

³⁹² CC article 19 section 1: “Necessary defense”: A person bears no criminal responsibility if he commits the act while being compelled to protect his or somebody else's life, health, rights and interests from an unfair, real and immediate attack, provided that the defense is proportionate to the dangerousness of the attack.

Obvious disproportion between them constitutes excessiveness over the limits of necessary defense.

Decision no. 34 – The case concerns another female defendant, DT, who was originally charged with intentional murder and illegal weapons possession. According to the decision, on 24 July 2003, the husband of DT had consumed a large quantity of alcohol and maltreated DT and their sons, who were 11 and 12 years old. In this state, and with the intention to kill his sons, the husband went out to the garden to fetch a gun he kept hidden there. He had no authorization for the gun. When he entered the house, in order to protect her sons, DT pushed her husband, who fell down and lost control over the gun. DT took the gun and shot her husband dead. During the trial, DT explained that she had been convinced that her husband would kill their sons and that she acted in order to protect her sons and herself against the imminent attack from her husband.

In this case, the court did come to the conclusion that DT had acted in necessary self-defence, but that by killing her husband she had exceeded what was necessary to defend herself. Considering the circumstances under which the event took place – presumably the very drunken state of the husband – the court found that DT could have stopped the attack in ways that would have paralyzed her husband, but that she should not have killed him. Her defence was therefore not found to be proportionate to the attack. The court thus found that DT had exceeded the limits of necessary self-defence, and re-qualified the charge to murder committed in excess of the limits of self-defence³⁹³. In the decision, the court noticed that the husband had been violent and maltreated DT during the entire duration of their marriage. In defining the punishment the court, among other mitigating circumstances, considered that the act had been committed under mental distress caused by provocation and unfair actions by the victim³⁹⁴. DT was thus found guilty of murder committed in excess of the limits of self-defence and of illegal weapons possession and punished with a five year suspended sentence. The decision was appealed by the prosecutor, but was upheld by the appellate court.

Comment – It is positive that the court considers DT’s claim to have acted in necessary self-defence seriously and that the past history of violence is taken into account. Regarding the charge and conviction for illegal weapons possession, however, it is again of concern that the court explicitly notices that the gun was illegally kept by the husband and then punishes DT for this. As in the previous case, had the husband not had the weapon, things would obviously have turned out quite differently for the wife. She should therefore not be penalized for him keeping a weapon without authorization.

9. Draft law on Domestic violence

On 23 January 2006, a coalition of Albanian non-profit organizations (NPOs), including the main Albanian women’s and children’s NPOs, led by the Citizen’s Advocacy Office (CAO), presented a draft law “On Measures Against Violence in Family Relations”

³⁹³ CC article 19 section 2, see the previous footnote, and article 83

³⁹⁴ CC article 48 b

(draft Law on Domestic Violence) to Parliament³⁹⁵. The draft was presented after more than 20,000 signatures of Albanians supporting the draft law had been collected in only a few months time at the end of 2005. The draft Law on Domestic Violence aims to prevent and reduce domestic violence by establishing a co-ordinated network to protect, support and rehabilitate victims and by empowering the judiciary to issue “protection orders” against perpetrators of domestic violence³⁹⁶. The draft law also obliges the authorities to “help abusers with medical and social treatment”, although the emphasis is clearly on the victim³⁹⁷. The “protection orders” include measures to remove a violent family member and to keep the member from approaching or contacting the victim or other family members³⁹⁸. The victim and other family members can be placed in shelters and the perpetrator can be ordered to support the victim and other family members. Thus, the draft law develops the possibilities set forth in article 62 of the 2003 Family Code, to remove a violent spouse from the family premises³⁹⁹. The law is of an entirely civil character but depends on the violation of a protection order being considered a criminal offence either under current legislation or through the introduction of a specific criminal offence.

The draft Law on Domestic Violence, and the strong popular support it has already received through the collection of signatures, shows that the Albanian society is ready to take concrete steps to fight the prevalence of domestic violence. At the time of writing, the draft law has yet to be discussed in Parliament, but once the draft law has been adopted, Albania will align itself with many other countries of the world having passed either domestic violence laws or general laws against violence that are also applicable in this area. With a law on domestic violence, it becomes clear that violence in the family is not just a private affair. There are costs for the general public, which are not only financial but also social. The costs for the public health system dealing with injuries, illnesses, shock, post-traumatic stress disorder and other effect of gender-based violence are considerable.

The adoption and proper implementation of the draft law on Domestic Violence will certainly represent a significant step forward and give some protection and relief to women suffering domestic violence. By providing protection to women who are victims of domestic violence, implementation of the law could also serve to increase prosecution of cases concerning domestic violence. It is, however, important that this be seen as a first rather than a last step in the fight against domestic violence in Albania and that measures be taken to strengthen the legislative framework to fight domestic violence, which is a crime.

³⁹⁵ During the drafting process the OSCE Presence has presented several rounds of comments on the draft law and many, but not all, of these comments have been taken into account

³⁹⁶ Draft law on Domestic Violence, article 2

³⁹⁷ Draft law on Domestic Violence, article 6, section 1 d

³⁹⁸ Draft law on Domestic Violence, article 12

³⁹⁹ Law no. 9062, dated 8 May 2003, Family Code of Albania, article 62: “A spouse who is subjected to violence has the right to request that the court order as an urgent measure the removal of the spouse who perpetrated violence from the marital residence.”

10. Concluding observations and the way forward

Domestic violence is estimated to affect 30 per cent of Albanian women but this figure is not reflected in the number of sentences in criminal cases concerning inter-spousal violence. Domestic violence is thus under-reported, under-investigated, under-prosecuted and under-sentenced. As a result, the overwhelming majority of perpetrators are granted impunity, while there is little redress and protection for women who suffer violence at the hands of their husbands and intimate partners. The under-reporting of domestic violence is an effect of patriarchal traditions, lack of awareness and the often weak position of women in Albanian society. Women who do seek redress get little or no support from the authorities and are stigmatized by society for breaking up their families. The under-prosecution and under-sentencing is a result of several factors. Domestic violence is many times seen as insignificant and a matter that should be solved within the family rather than by involving the authorities. The unit of the family is seen as more important than the physical and mental integrity and well-being of an individual woman. Police officers, prosecutors, judges and lawyers lack awareness and training regarding how to deal with cases concerning domestic violence. Evidence to support the victims' accounts of the events is not gathered, no psychological support is provided to the women, sentences are low and do not take previous incidents or the systematic nature of domestic violence into account.

The fact that prosecution in most cases of everyday domestic violence depends entirely on the woman is a burden too heavy for most women to bear and in practice denies many women access to justice. Sentences provided in the Criminal Code for everyday domestic violence cases are low compared to the levels of punishment for other violent crimes. Neither sentences nor the aggravating circumstances in the Criminal Code take into account the systematic nature of domestic violence, or the impact on victims who may have suffered years and years of violence at the hands of their husbands. As has been noted, of the 35 male defendants in cases tried on their merits, 31 pleaded guilty. This, in combination with the very low number of cases concerning domestic violence, is a strong indication that prosecution domestic violence cases depends heavily on the "participation" of the (male) defendant. This again strengthens the impression that access to justice for woman victims of domestic violence is yet far away.

Recommendations

Legislative measures

1. The draft law on Domestic Violence should be adopted as soon as possible.
2. The Criminal Procedure Code (CPC) should be amended to ensure that prosecution in all cases of domestic violence, i.e., regardless of how minor or severe the offence is, does not depend on the woman victim of violence.
 - This could be done either by creating a separate domestic violence offence based on the Swedish model, which would be entirely under public prosecution, or
 - By adding one or two articles to the CPC, providing exceptions to articles 59 and 284 of the CPC, and stating that,
 - the crimes of non-serious intentional injury, other intentional harm and non-consensual intercourse with a mature woman (as well as any other crime which might be frequent in cases of domestic violence), committed in an ongoing or previous intimate partner relationship, fall under public prosecution and do not depend on a complaint by the injured party.
3. The Criminal Code should be amended to ensure that voluntary (or incidental) intoxication cannot be cited as a mitigating circumstance.
4. The Criminal Code should be amended in order to make a differentiation between threat and armed threat.
 - In order to keep the structure of the Criminal Code, this should be done by adding an article after article 84 called “armed threat”.
5. Article 278 of Criminal Code should be amended in order to make it clear that that this article penalises the unauthorized *possession* of weapons, not the mere *use* or *holding in ones hand* of a weapon. This aim could also be achieved through a High Court ruling.
6. It should be considered whether the second paragraph of article 90 should be moved to article 89.
7. An overview of the penal value of crimes common in cases of domestic violence⁴⁰⁰ should be carried out to ensure that punishments match the damage caused by domestic violence and have a deterrent effect.
 - This could be done either by creating a separate domestic violence offence based on the Swedish model, which would be entirely under public prosecution, or
 - By increasing the maximum punishment foreseen for crimes common in cases of domestic violence.
 - This should be accompanied with guidelines/instructions on how to evaluate the penal value and how to use aggravating and mitigating circumstances in cases of domestic violence, taking into account repeated acts of domestic violence, the systematic nature of domestic violence, as well as the vulnerable situation of the woman subject to domestic violence.
 - In grave cases of domestic violence, prosecutors should consider using the torture article.

⁴⁰⁰ See the discussion under the heading “Domestic violence in Albanian criminal legislation” earlier in this chapter

Other measures

8. The police, the prosecution offices and the courts in Albania should, for statistical purposes, be obliged to have collect data on every case of intimate partner/domestic violence and set up case management systems with indicators for intimate partner/ domestic violence.
9. As the state institution responsible for implementing the draft Domestic Violence Law, the Ministry of Labour, Social Affairs and Equal Opportunities should conduct a thorough study on how complaints of domestic violence are handled by the criminal justice system in order to identify and address shortcomings in giving women who are victims of domestic violence access to justice and redress.
10. Lawyers and NGOs offering legal services and support to women victims of domestic violence should encourage victims to seek compensation for the damages they have suffered either in the criminal proceedings or in separate civil proceedings.
11. The police should encourage victims of domestic violence to seek legal advice and support.
12. Police officers, prosecutors, judges and lawyers should receive continuous training on the phenomenon of domestic violence and its consequences.
 - These groups should further be trained on how to deal with cases concerning domestic violence to ensure that victims receive necessary support and that perpetrators are brought to justice and punished.
 - Education on issues concerning domestic violence should also be part of the curriculum at law faculties, the School of Magistrates, the Police Academy as well as of the continuous training offered by the National and Regional Chambers of Advocates.

V. TRANSPARENCY AND ACCESS TO INFORMATION

1. Introduction and legal framework

Transparency and access to public information are key elements in a democratic society and serve to give media, civil society and other interested bodies the necessary tools to scrutinize how state power is used and resources are managed.

The right to information is reflected in international documents such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the ECHR⁴⁰¹.

Article 23 of the Constitution of Albania provides:

1. The right to information is guaranteed.
2. Everyone has the right, in compliance with law, to obtain information about the activity of state organs, and of persons who exercise state functions....

The Law “On the Right to Obtain Information About Official Documents⁴⁰²” (Law on Information) provides.

Article 3 – The Right to be Informed

Every person has the right to request information about official documents that have to do with the activity of state organs and persons who exercise state functions, without being obliged to explain the motives.

A public authority is obliged to give all information related to an official document, except for the cases when it is provided otherwise by law.

Every piece of information about an official document given to a person may not be refused to any other person who requests it, except when this information constitutes personal data of the person to whom the information was given.

Article 4 – Limitation

If information requested about an official document is limited by law, the public authority issues to the person who requests it a declaration in writing in which the reasons for not giving the information and the rules on the basis of which he may request it are shown.

If a limitation is only for a part of the data in the official document, the other part is not refused to the person requesting it.

⁴⁰¹ UDHR art. 19 and ICCPR art. 19 ECHR art. 10.

⁴⁰² Law no. 8503, dated 30 June 1999 “On the Right to Obtain Information About Official Documents”. For comments to the law made by ARTICLE 19 (a human rights organisation dedicated to the defence and promotion of freedom of expression and freedom of information worldwide), see http://www.osce.org/documents/html/pdf/html/3760_en.pdf.html [Accessed 5 June 2006]

Article 6 – Obligation for the Quality of the Service of Information

A public authority issues rules and creates structural and practical facilities for the receipt by the public, in an exact, full, appropriate and speedy manner, of information about official documents.

Article 9 – Documents Prepared Ahead of Time

In compliance with the laws, sub-statutory acts and rules published by it, a public authority prepares ahead of time for examination or copying, in anticipation of a request from the public, documents such as:

- a) final decisions on a specific question, include the positions of the minority, as well as orders or instructions in implementation of them;
- b) internal orders and instructions that influence the relations of the public authority with the public;
- c) copies of every official document that has previously been given to at least one person, regardless of its format, and which the public authority believes will be of interest to other persons;
- ç) an index or schedules of official documents.

Article 10 – Time Period for Not Accepting a Request

A public authority is to decide on the full or partial non-acceptance of the request within 15 days from the day it is deposited. If a request is not accepted, the negative answer, whether full or partial, is given with reasons and in writing by the public authority.

Article 11 – Term for Answer

A public authority fulfils the request within 40 days from the day it is deposited, except when it is provided otherwise in this law.

Article 12 – Extension of the Term

If it is impossible for a public authority to fulfil the request within the time period provided in article 11, because of the particularity of the request or the need to consult with a third party, then it notifies the interested party in writing, no later than seven days from the end of the first time period, of the impossibility of fulfilling the request for information in whole or in part, as well as the reasons or causes that have led to it.

In this case, the public authority proposes to the interested party one of the following solutions:

- a) the designation of a new time period, which begins with the end of the prior term and which may not be more than 10 days, without the right of repetition;
- b) the amendment of the request by the person in such a manner that the time period provided in this law can be respected by the public authority.

The interested party chooses one of the above proposals. If the person in question does not express his agreement before the end of the first time period, the public authority extends the time period.

Article 13 – Payments for the Service of Giving Information

For the performance of the service of giving information about official documents, if this requires expenses, the public authority may establish tariffs, which it sets beforehand.

Tariffs for standard services or those for which an experience has been created are made public. Tariffs for other services are set on a case-by-case basis and are made known to the interested party at the moment of acceptance of the request.

The tariffs may not be higher than the cost of performing the service. This cost includes only the material expenses for performing the service.

The data specified in article 8 are given without payment.

The procedures and decisions for setting tariffs for the service of giving information are in themselves official documents, within the meaning of this law.

Thus, the law provides that everyone has the right to request information without being obliged to explain the motive for the request and further that public authorities shall be organized in a way that facilitates the provision of information in a speedy manner. The person requesting information has the right to obtain copies of the document in full or, if the applicant accepts it, information about the document in another form, which may also be oral.

Final decisions on specific questions, e.g., court decisions⁴⁰³, shall be prepared in advance in anticipation of requests from the public. Furthermore, copies should be prepared in advance of official documents that previously have been given to at least one person and that the authority believes will be of interest to other persons. The Law on Information provides a 15-day time period for a full or partial rejection of the request but a 40-day time limit to fulfill the request (when advance copies are not required)⁴⁰⁴. As copies of final decisions and documents that have already been provided to someone should be prepared in advance⁴⁰⁵, and as all court decisions have been provided to the parties in the case, the 40-day time limits do not apply. Instead copies of these documents should be provided immediately upon request.

⁴⁰³ Note: “Final decision or a final judgment” as opposed to a decision/judgment “that has become final”.

A *final decision/judgment* is a decision by a court on the merits of a case or the decision whereby the court disposes itself of a case. A final decision can, normally, be appealed to a higher level court. A decision/judgment *that has become final* is a court decision that can no longer be appealed; either because the term for appeal has expired or because the decision is rendered by an appellate court whose decisions cannot be appealed, e.g., the High Court or the Constitutional Court in Albania.

⁴⁰⁴ Law on Information, arts. 10-11

⁴⁰⁵ Law on Information, art. 9

The People's Advocate has been vested with the responsibility of overseeing the implementation of the Law on Information⁴⁰⁶. On 12 October 2005, the People's Advocate issued a recommendation to the Prime Minister on increased transparency and implementation of the Law on Information by means of a Model Regulation⁴⁰⁷. In the recommendations, the People's Advocate notes that, among other obstacles for the successful implementation of the Law on Information, officials responsible for providing official information and documents are not trained on issues related to transparency and access to information. To come to terms with this, officials should be made aware that, as a rule, official acts and documents may be shared with anybody provided that it does not violate the rights of another party and it is not a state secret. The general public should also be informed and educated on its right to be informed and know the administrative procedures used by the public administration⁴⁰⁸.

In order to unify public administration practices and procedures for providing information, the People's Advocate, in co-operation with the USAID, drafted a Model Regulation on the Right to Information. In the Model Regulation, the meaning of an official document is explained, as are the restrictions to the application of the Model Regulation. Furthermore, it is specified how requests for information should be compiled. The adoption of the model regulation would in many ways improve the quality of services in providing information about official documents. It should be noted, however, that it does not cover documents such final decisions, copies of which should be prepared in advance of requests and delivered immediately upon an informal or oral request⁴⁰⁹. Therefore there is a risk that the Model Regulation would be used as an argument to deny immediate access to this category of information.

Comment: While the requirement to prepare copies in advance of final decisions on specific questions serves the purpose of transparency, it may not be practical to prepare copies of each and every court decision in advance of any request. This may both incur unnecessary costs and require space that is much needed. A pragmatic interpretation would thus be that copies be prepared in advance of the decisions of high public interest, whereas copies of other decisions be prepared immediately upon request.

⁴⁰⁶ Law on Information art. 18. See also Law no. 8454, dated 4 February 1999, "On the People's Advocate"

⁴⁰⁷ People's Advocate of the Republic of Albania; Prot. no. 177, Tirana 12 October 2005 on "Recommendations on increasing transparency and implementation of the law on the right to obtain information on official document by means of a prepared Model Regulation" [Recommendations by the PA]

⁴⁰⁸ Recommendations by the PA, paragraphs 4, 8 and 9

⁴⁰⁹ Law on Information, article 9

The CPC provides:

Article 105 - Receiving copies, excerpts and certificates

1. During the proceedings and after their termination, any interested person may obtain, at his own expense, copies, excerpts or certificates of specific acts.
2. The request is examined by the prosecutor, for acts of the preliminary investigation, or by the court that has rendered the decision for acts of judicial examination.
3. The issuing of copies, excerpts or certificates does not remove a prohibition of their publication.

Article 103 – Prohibition of publication of an act

1. It is prohibited even partly to publish through the press or mass media, secret acts connected with a case or even only their contents.
2. It is prohibited even partly to publish non-secret acts until the termination of the preliminary investigations.
3. It is prohibited even partly to publish acts of the judicial examination when the hearing is held *in camera*. The prohibition to publish is cancelled when the time period provided by law for state archives expires or when the time period of ten years from the date that the decision has become final has expired, provided that the publication is authorised by the Minister of Justice.
4. It is prohibited to publish personal data and photographs of defendants and witnesses who are minors, accused or damaged by a criminal offence. The court may permit the publication only when this is in the interest of the minor or when the minor has reached the age of sixteen.

Thus, according to the CPC, anyone with an interest may get copies, excerpts or certificates of specific acts. According to the CPC Commentary the “certificate” confirms the contents of the document or its particular parts⁴¹⁰. This gives interested persons a broad right to get information on the contents of a court file. The issuance of copies, extracts or certifications does not, however, affect the prohibition to publish secret acts. Therefore, anyone who has received secret acts is bound to comply with the rules prescribed under article 103 of the Code of Criminal Procedure pertaining to the publication of acts⁴¹¹.

None of the legal acts referred to specify how or in what form requests should be made, i.e., whether a written request is required. Oral requests should therefore be sufficient, although for practical reasons, and in particular where information about more than a very limited number of documents is requested, written requests might still be preferable.

⁴¹⁰ CPC Commentary p. 188

⁴¹¹ CPC Commentary p. 188

Regarding the time periods for fulfilling requests for access, a 15-day decision period has been considered to be in line with international standards, whereas the 40-day fulfillment period is considered an unacceptably lengthy period⁴¹². Final decisions, and documents previously requested by at least one person, should be prepared in advance and should therefore be provided immediately upon request.

Finally, an order from the Ministry of Justice on the organization and functioning of the judicial administration reiterates that courts should create conditions that facilitate the receipt of information by the public in an accurate, complete and rapid manner. It further provides that trial schedules should be prepared and made public⁴¹³.

Public court hearings and court decisions

One aspect of transparency and access to public information, and an essential element of the right to a fair trial, is the right to a public hearing⁴¹⁴. This means that apart from in particular cases, where the law specifies that hearings can be held in camera (in a closed hearing excluding the public), anyone has the right to be present and follow trials. The right to a public hearing is an essential safeguard of the fairness and independence of the judicial process, and a means of protecting public confidence in the justice system. In order for the right to public hearings to be effective and practical, information regarding trial schedules, as well as changes to schedules, needs to be available to the general public. A further aspect of this transparency is that judgments, i.e., final court decisions, shall be pronounced publicly⁴¹⁵. This can be done by reading out the judgment/court decision in a public hearing, by making the decision publicly available (e.g., by providing anyone interested with copies or by publishing the decisions on internet or in an official journal), or both.

⁴¹² See the comments made by ARTICLE 19, pp. 10-11 (footnote 33). It should be noted that the comments do not differentiate between the time periods to refuse and fulfill the request

⁴¹³ Order no. 1830, dated 3 April 2001, "On the approval of the rules 'On the Organization and Functioning of the Judicial Administration'". Published in the Official Journal of the Republic of Albania, Nr. 17/2001 (April, art. 24, sections 7 and 8; see also article 5, section 4 and article 21, section 15

⁴¹⁴ ECHR Article 6, paragraph 1, Albanian Constitution article 42, section 2

⁴¹⁵ ECHR Article 6, paragraph 1

The CPC provides:

Article 339 – The publicity of the hearing

1. The hearing shall be public; otherwise it shall be void.
2. Juveniles under sixteen years and those who are drunk, intoxicated or mentally disordered shall be not allowed into a hearing.
3. The presence of armed persons, except members of public order forces, in a hearing is prohibited.

Article 340 – Cases of closed hearings

1. A court decides to hold the court examination or some of its actions *in camera*:
 - a) when publicity may damage the public morals or may disclose data to be kept secret for the interest of the state, if this is requested by the competent authority.
 - b) in case of behaviour that impairs the normal performance of the hearing
 - c) when it is necessary to protect witnesses or the defendant
 - ç) when it is necessary during the questioning of juveniles
2. The decision of the court holding the hearing *in camera* is revoked once the causes that required it no longer exist.

Article 384 – Pronouncing the decision

1. A decision is to be pronounced in a court session by a presiding judge or a member of the panel reading it.
2. The pronouncement is also valid as notification of the decision for the parties who are or who must be deemed to be present at the hearing.

2. The Albanian reality

On 7 June 2006, the Albanian Institute for Development and Research Alternatives (IDRA) and Casals & Associates, Inc., issued the results of their 2005 survey on corruption in Albania⁴¹⁶. According to the survey, the courts are listed as the least transparent institutions, while the armed forces were listed as the most transparent institution in Albania.

Trial schedules

Trial schedules are mostly posted on billboards near the entrances of court buildings. Upon request, copies of court schedules may be provided to interested parties, such as members of the media, NGOs or international organizations. As trial schedules at many courts are made public only once every week, or less frequently, postponements

⁴¹⁶ Corruption in Albania: Perception and Experience, Survey 2005, Summary of findings [June 2006] http://www.idra-al.org/pdf/en/IDRA_-_Corruption_in_Albania_-_Summary_of_Findings.pdf [Accessed 8 June 2006]. This study is also discussed in the chapter on Corruption

or changes of trial sessions within this period are not reflected in the trial schedule. This means that interested persons have to contact the court in order to find out when a hearing will be held. As courts in Albania are not set up to answer questions from the general public by telephone, interested persons may have to visit a court on a daily basis to find out when a particular case will be heard. Trial schedules do not indicate in which courtroom a particular hearing will be held. This again forces interested persons to contact someone in the court to find out exactly where a hearing will be held.

At Tirana District Court, where sessions are frequently held in judges' offices, anyone who wishes to participate in a trial has to contact the judge in charge of the particular case. Occasionally, but not always, the secretary will be able to give this information. Sometimes observers from the OSCE Presence in Albania have been informed that a trial would be held in a courtroom, only to be informed shortly thereafter that it would take place in a judge's office and finally to learn that it would take place in a courtroom after all. As there are separate entrances to the judge's offices and to the courtrooms, each change forces interested person to leave the court building and enter again. Considering that the public usually is not allowed to enter after a session has started, this form of confusion can effectively hinder persons from participating in a hearing.

At the Tirana Court of Appeals, trial schedules are posted once a month on a billboard outside the court building. The billboard is divided by civil and criminal cases, but cases are frequently mixed and the billboard is difficult to read. The monthly posting of trial schedules means that trials that are rescheduled during this period will not appear on the billboard, forcing interested persons to contact the court. The guards at the entrance are not aware of updated or amended trial schedules and only refer to the billboard. The court has no webpage and no public relations office. There is no official contact information available and without a previous appointment (or without personal contacts) it is virtually impossible to find out accurate timings for court hearings from this court. The chief secretary has also proved unwilling to provide any information about trial schedules.

From Kukës, it has repeatedly been reported that trial schedules are not made public or that they are made public with a delay.

Example – Trial schedules at Kukës District Court

- Schedules for Kukës District Court were not made public or were made public with a delay for the following periods:
 - Between the beginning of July and 17 October 2005, no trial schedule was posted.⁵⁶
 - Between 6 December 2005 and 31 January 2006, no trial schedule was posted.
 - Between 15 and 28 February 2006, no trial schedule was posted.
 - The trial schedules are frequently inaccurate with regard to the date and time for court sessions as well as with regards to charges.

Court web pages

The High Court; the Constitutional Court; the district courts of Tirana, Shkodra, Fier, Vlora and Kavaja,; as well as the First Instance Court for Serious Crimes have internet pages⁴¹⁸. The information available on these web pages varies.

⁴¹⁷ The holiday period lasted from 20 July to 5 September 2005.

⁴¹⁸ The High Court <http://www.gjykataelarte.gov.al/> [Accessed 8 June 2006]
 The Constitutional Court <http://www.gjk.gov.al/> [Accessed 8 June 2006]
 Tirana District Court <http://gjykata.altirana.com/> [Accessed 12 June 2006]
 Shkodra District Court <http://shkoder.gjykata.info/> [Accessed 12 June 2006]
 Fier District Court <http://fier.gjykata.info/> [Accessed 13 June 2006]
 Vlora District Court <http://vlore.gjykata.info/> [Accessed 13 June 2006]
 Kavaja District Court <http://kavaje.gjykata.info/> [Accessed 13 June 2006]

V. TRANSPARENCY AND ACCESS TO INFORMATION

Court/ Web page	Trial/ Hearing schedule	Contact information	Judgments/ Court decisions
High Court	Yes	Only an e-mail address	Yes, according to web page, all since 1999.
Constitutional Court	No	No	Yes, according to web page, all since 1992.
Tirana District Court	Yes, but difficult to access. A click on a link called "Datën e gyqit penal" (date of criminal trial) opens a page listing pending cases. For each case it is possible to find out hearing dates. Surprisingly, if one clicks on a link called "Një vendim penal" (a criminal decision), a page listing trial dates and cases appears for a period of one week calculated from the day of entry. This is misleading and makes the page difficult for an inexperienced user to use.	Online contact to the chair, the deputy chair and the chancellor. Their telephone extensions are provided but there is no telephone number to the court.	Yes, but difficult to access. Instead of clicking on the obvious link "Një vendim penal" (a criminal decision), one has to go via a link called Arkivi (archive). It also appears that not every decision is available.
Shkodra District Court	Yes, but same difficulties to access as at the Tirana District Court web page.	Online contact to the chair and the chancellor. No other contact information.	Yes, but same difficulties to access as at the Tirana District Court web page. Not all decisions are available.
Fier District Court	Yes	Online contact to the chair and the chancellor. No other contact information.	No
Vlora District Court	No	Online contact to the chair and the chancellor. No other contact information.	Yes, but same difficulties to access as at the Tirana District Court web page. Not all decisions are available.
Kavaja District Court	Yes, but lists only past trials, not upcoming trials.	No	Yes, but same difficulties to access as at the Tirana District Court web page. Not all decisions are available.
First Instance Court for Serious Crimes	No. According to the web page weekly trial schedules are "coming soon".	Yes, complete contact information with address, telephone and fax numbers, e-mail address and a map to show the location of the court.	No. According to the web page information about pending and concluded cases is "coming soon".

As can be seen, of the eight courts with a web page, only five list trial schedules. Access to the schedules, however, is complicated and it is doubtful whether an inexperienced user would find the trial schedules. Only one of the web pages, the CSC, lists complete contact information. While it is an improvement that some contact information is provided, it seems very unpractical if each person who may be interested in finding out what cases will be heard on a particular day would have to contact the court electronically and it is doubtful whether there is a system in place to respond to such inquiries in a timely manner.

Access to information from courts and prosecution offices

As part of the Fair Trial Development Project (FTDP), courts covered by OSCE PiA Field Stations have been asked to provide copies of final court decisions, some decisions on pre-trial detention and some copies of indictments/requests for trial. Prosecution offices have been asked to allow for the consultation of a number of prosecution files after the completion of a case⁴¹⁹. Finally, courts have been asked to provide copies of all court decisions concerning domestic violence during a certain period, whereas prosecution offices and police commissariats have been asked to provide court information regarding the number of cases or complaints of domestic violence with which they have dealt during the same period⁴²⁰.

Court decisions

In most cases the OSCE Presence in Albania received the copies and the information it requested. Sometimes the information was provided promptly, sometimes only after a substantial delay and repeated reminders. Most courts covered by this study seem at least to be somewhat accustomed to providing copies of final court decisions, but not to requests for court decisions covering a particular subject matter, such as domestic violence. None of the courts had any particular arrangements in place to facilitate the provision of information.

Some courts, however, have repeatedly denied access to copies of court decisions. Thus the previous acting chair of Durrës District Court stated that copies are provided only of decisions in civil cases, whereas for criminal cases, copies were provided only to the defendant and her/his defence counsel⁴²¹. The reason forwarded for this was that the defendant might be embarrassed if the decision were given to anyone else. The acting chair further stated that they tried to limit defence lawyers from having access to court files, as the lawyers might steal evidence! With the appointment of the new chair to Durrës District Court, the situation has improved significantly⁴²².

⁴¹⁹ The requests were sent to Gjirokastra, Vlora, Fier, Lushnja, Tirana, Durrës, Shkodra and Kukës, as well as to the First Instance Serious Crimes Prosecution office. A copy of the request was sent to the Prosecutor General with an explanation specifying that the purpose of the survey was not to get access to classified information, but to consult the copy of the court file kept at the prosecution office. See also Chapter 1, section 14.1: Consultation of prosecution files

⁴²⁰ See also Chapter IV, Domestic violence and the criminal justice system

⁴²¹ Meeting with acting chair of Durrës District Court, Rexhep Bektashi, on 24 May 2005.

⁴²² Ervin Metalla was appointed as chair of Durrës District Court in early November 2005

The chairs of both Tropoja and Kukës District Courts expressed attitudes similar to that expressed by the acting chair in Durrës. Both stated that they never gave copies of decisions to anyone but the defendant and the defence counsel⁴²³. Though requests for copies of court decisions have not been expressly denied at Shkodra District Court, they have been difficult to obtain. A recent request for a copy of a court decision that had not been posted on the court website was denied with the reasoning that the decision had been appealed and was therefore not final, which according to the court secretary meant that copies could not be given⁴²⁴.

The Tirana Court of Appeals has also repeatedly denied the OSCE Presence access to copies of court decisions, with the reasoning that they do not give copies to anyone. This has happened despite the fact that this court on many other occasions has provided the requested decisions. After repeated requests, it has been possible to receive all requested court decisions. The impression has been that the requests for information have eventually been granted because it was the OSCE asking for it. It is therefore impossible to draw any conclusions as to how requests from a random person would be handled.

From the CSC, we have requested access to court decisions, files and copies of indictments in concluded and ongoing cases. While court decisions may sometimes not have been available in written format until after a substantial delay, there has been no problems obtaining copies of any decisions requested. Regarding the request for access to copies of indictments and court files, the Chancellor of the court replied in writing, explaining that concluded files could be consulted after contacts with the archive and upon approval by the Chair⁴²⁵. For cases being tried at the CSC, copies of indictments were sent upon the approval of the judge in charge of the case. A copying charge of 10 leks per page was levied⁴²⁶. For cases on appeal, OSCE observers were referred to the court examining the case. After having analyzed both the indictment and the decision in a particular case, the observers requested access to consult the court file⁴²⁷. It was apparent that there was no routine or structure in place to handle such a request and observers were indeed told that no such requests had been submitted during the one-year existence (at the time) of the CSC. In spite of this, efforts were made to facilitate the consultation of the file. Access, at least for the OSCE Presence in Albania, at the CSC can therefore be said to be at least satisfactory considering this court's logistical situation, until recently sharing space with the much better equipped Tirana District Court⁴²⁸.

⁴²³ Meeting with chair of Tropoja District Court, Kujtim Dusha, on 30 May 2005 and with chair of Kukës District Court, Granit Qypi, on 31 May 2005.

⁴²⁴ Court decisions are public from the moment they are pronounced and regardless of whether they have become final. Copies should be prepared in advance of requests from the public

⁴²⁵ Letter from First Instance Court for Serious Crimes on 13 April 2005

⁴²⁶ As provided in CPC art. 105, para. 1

⁴²⁷ Regarding the consulted file, see "Rights during pre-trial detention"

⁴²⁸ The CSC has since moved to its own premises

As for access to court files at the Tirana Court of Appeals, observers were told that only defence counsel can consult a criminal file, whereas any interested party can consult a civil file⁴²⁹.

Court decisions available through internet

As can be seen from the table above, six of the web pages give access to some, but not all, court decisions as a Microsoft Word document. For some decisions, only the outcome is available on the webpage.

The availability of court decisions on the internet is an improvement and gives the general public access to court decisions at an unprecedented scale. This may in itself serve to improve the level of legal reasoning and writing, as well as substantially to increase the level of transparency and accountability of judges. To this end it is, however, important that there be clear rules in place specifying the modalities for making decisions available through the internet. For example, it needs to be determined to what extent the personal data of defendants, witnesses and other participants in trials are revealed. Moreover it has been ensured that court web pages cannot be searched by name of defendants or other trial participants, as this could easily be abused. Court web pages also need to be developed to become transparent and user friendly.

While a court decision, including names of persons appearing in the trial, are public documents and as such available to anyone upon request, the purpose of posting decisions in full can be achieved without revealing the full names of persons appearing during a trial. There are both security and integrity concerns that need to be properly balanced against the right to information. In Sweden, this has been solved by only giving the initials of defendants and other persons appearing in a trial in versions of decisions that are made available through the internet. The full information, however, would be made available upon request to anyone interested, except where the information is confidential for lawful reasons.

Prosecution offices

Access to prosecution files was requested only in cases where the investigation had been completed and the case had been tried and decided in court. The request for access was further limited to the part of the prosecution files that is sent to court together with the request for trial, which consequently is an official document⁴³⁰. None of the prosecution offices who were asked to provide access to consult prosecution files had previously had a similar request. The issue was first discussed with the chief prosecutor at the Serious Crimes Prosecution Office⁴³¹. While his first response was that article 105 of the CPC only referred to the right of interested parties, such as the defence lawyer, he agreed that in principle the article had a general application. Before he would be willing

⁴²⁹ Meeting 5 May 2005 with the chair of Tirana Court of Appeals, Muharrem Kushe

⁴³⁰ CPC article 332

⁴³¹ Meeting, 27 January 2005

to grant access, he requested the observers to inform the Prosecutor General. While this is not a procedure provided by law, an information letter was sent to the Prosecutor General. After that, access was granted to consult files at the Serious Crimes Prosecution Office. Access to consult files at the Prosecution Offices in Durrës, Fier, Gjirokastra, Lushnja, Tirana and Vlora was granted without discussion. Despite the prosecution offices not being accustomed to this kind of request and there being no structure in place to facilitate access, the prosecution offices were helpful and forthcoming during the consultations.

A request to consult a number of specified prosecution files was submitted to the Kukës Prosecution Office on 9 January 2006. At a meeting, the chief prosecutor in Kukës responded that only the parties involved in a case can have access to the prosecution files. The prosecution office then by itself completed the forms that had been submitted as part of the request. After renewed attempts to get direct access, the chief prosecutor tried to get advice from the Office of the Prosecutor General, but failed. After further discussion, a new request was submitted requesting direct access to consult the files. A copy of the request was sent to the Prosecutor General. After a number of further contacts and after the chief prosecutor had consulted with his colleagues in Shkodra, access was finally granted on 22 February 2006. The reactions were very similar at the Shkodra Prosecution Office. After several meetings with the chief prosecutor and after he had consulted the Office of the Prosecutor General as well as the Kukës Prosecution office, access was granted.

Court hearings

Trials in Albania in general are held in public and there are few reported incidents where persons interested in following a court session have expressly been denied entry. In particular in Tirana, however, court sessions are frequently held in judges' offices, rather than in courtrooms. This is of concern not least because the limited space in a judge's office severely restricts the possibility for interested persons to follow the session. That this happens in practice has been observed on several occasions. Judges' offices are at best equipped with a few extra chairs (of varying shapes and sizes), but no space for the prosecution and defence to keep their papers or to take notes during the proceedings. Giving parties direct access to judges' offices is also of concern, as it facilitates improper contacts between the parties and the court, which may be used for corruptive purposes or to put pressure on a judge. Finally, hearings in a judge's cramped offices, sometimes with the parties slouching in worn easy chairs with their papers awkwardly sliding around in their laps, does little to maintain the solemnity of a court hearing and imbue parties and the public with respect for the court as an institution of justice.

From Kukës, it has been reported that family members of persons standing trial in criminal cases have not been aware that they have the right to be present during trials.

A problem of a different kind is that court hearings hardly ever start on time and that they are frequently postponed. As there are mostly no waiting areas attached to courtrooms, persons wait, sometimes for hours, outside the courthouse. At Tirana District Court, on the other hand, the corridors outside the judges' offices are mostly packed with people waiting for their case to be heard or to meet a judge or secretary. This is obviously highly unsatisfactory from a security perspective. It also creates a very chaotic working environment for judges who need some tranquility to write their decisions.

The Court of Appeals in Tirana is surrounded by a fence and persons wishing to follow a hearing are not allowed to enter until the secretary of the case comes out and announces the hearing. The area is often packed with people and on at least one occasion the hearing was not announced, or was announced in such a manner that those present did not notice it. When inquiries were made about this hearing, observers were informed that the hearing had taken place, that it was not held in camera, but that there had been no members of media or the general public present⁴³². It has also happened that cases have been announced, but observers who have gone directly to the courtroom have been denied access – along with many other members of the public – on the grounds that the hearing had already begun. In other words, no time was left for people to get to the courtroom. On other occasions, it has been noticed that an OSCE staff member, but no members of media, have been allowed to enter. On other occasions again, observers have been asked why they wanted to observe a case, after which the secretary has gone to inquire with the chair of the court before allowing them to enter. This is perceived as one of the least accessible courts in the country.

3. Concluding remarks

The computerization of some of the main courts in the country and the creation of internet pages where court decisions are posted in full is a significant step towards a more transparent justice system in Albania. Apart from this, however, much remains to be done to give media and the general public the insight into the Albanian justice system that is necessary in a democratic society based on respect for human rights and the rule of law. Thus courts and prosecution offices need to establish internal rules as well as to create structures to respond diligently to requests for access. The general public also needs to be made aware of their right to participate in trials and have access to court decisions as well as information about other official documents at courts and prosecution offices.

⁴³² Hearing 1 February 2006 in a case regarding the Zogu i Zi conflict

RECOMMENDATIONS

1. The Model Recommendation drafted by the People's Advocate should be adapted into a regulation on the right to information.
2. All public officials should receive mandatory training on the right to information about official documents.
3. All persons working in courts or prosecution offices should receive training specifically on the right to access to court decisions and to other court/prosecution documents.
4. Through public awareness campaigns, the general public should be made aware of its right to attend trials and to obtain information about public documents.
 - The general public should also be encouraged to request access to information through the official channels.
5. Each court and prosecution office should have structures in place to respond to requests for information.
 - This could be done either by appointing one of the court/prosecution officials as a focal point, by appointing a spokesperson/press officer or by establishing an information office within the court/prosecution office.
6. Through court web pages and/or bill boards outside court/prosecution offices, the general public should be informed how to go about to get copies of court decisions or access to other court/prosecution documents.
7. Contact information, including telephone numbers and e-mail addresses, for each court and prosecution office should be made available to the general public through regularly updated telephone directories and through the Ministry of Justice's internet page. Courts with internet pages should post contact information on their websites.
8. Trial schedules should be updated on a daily basis and for each trial, the courtroom where the hearing will be held should be specified.
9. Billboards where trial schedules are posted should be organised in a clear and comprehensible manner.
10. Courts with internet pages should post accurate and easily accessible trial schedules on their webpage.
11. Court/prosecution offices with internet pages should analyse, update and redesign their webpages so as to make the information available on the respective webpages easily accessible and user friendly
 - Court web pages should, however, not be searchable by the name of a defendant or other trial participant.
12. Court inspectors at the Ministry of Justice should take transparency issues into account when conducting their inspections.
 - The manner of posting and updating trial schedules and contact information should be evaluated.
 - The accessibility and user-friendliness of court/prosecution internet pages should be evaluated.

VI. CORRUPTION WITHIN THE ALBANIAN JUSTICE SYSTEM

Corruption - the misuse of entrusted power for private gain - has a severely debilitating effect on the economic, social and political environment in which it occurs. Corruption appears independently of the systemic context and at all levels in industrialised and developing countries alike.

Corruption was, until recently, defended as an effective way to circumvent cumbersome regulations and red tape. It was alleged that corruption could advance economic efficiency, play a re-distributive role and even serve as a tool for national integration.

Such views, and the belief that corruption is but a stage of development, have since been discredited by economic and political analysts alike. Indeed, the realisation and quantification of the costs and consequences of corruption since the mid-1990s has played an important role in putting corruption on the national and international agenda⁴³³.

1. Corruption as a criminal offence

Corruption by an official is the misuse of an official position for private advantage. Corruption crimes include the abuse of duty; asking for, offering and receiving bribes; and the misuse of public funds⁴³⁴. Corruption within the justice system is addressed in articles 319 and 319/a of the Albanian Criminal Code, which provide:

Article 319 – Active corruption of judges, prosecutors and other justice officials

Promising, proposing or giving directly or indirectly any irregular benefit to a judge, prosecutor or any other official of the justice bodies or to other persons, in order for the judge, prosecutor or any other official of the justice bodies to carry out or avoid carrying out an action related to her/his position, is punishable by from one year to four years of imprisonment and by a fine from four hundred thousand to two million ALL.

Article 319/a – Passive corruption of judges, prosecutors and other justice functionaries

Asking for or receiving directly or indirectly any kind of irregular benefit or of a promise of such, by a judge, prosecutor or other functionaries of the justice bodies for herself/himself or for other persons, or the acceptance of an offer or promise of an irregular profit, in order for the judge, prosecutor or other functionaries of the justice bodies to carry out or avoid carrying out an action related to the duty of her/his position, is punishable by imprisonment by from three to ten years and by a fine from eight hundred thousand to four million ALL.

⁴³³ [The entire text in the box is a citation] Transparency International Anti-Corruption Handbook: National Integrity Systems in Practice (Introduction) <http://www1.transparency.org/ach/introduction.html> [Accessed 13 June 2006]

⁴³⁴ CC articles 244, 245, 245/1, 248, 250, 256, 259, 260, 319, 328

It is thus a criminal offence for a judge or prosecutor, or other official within the justice bodies, to ask for or receive any sort of remuneration, gift or benefit in order to do or refrain from doing something. It is similarly a criminal offence for a person, e.g., a party, a defence lawyer or another person with an interest in a case, to offer or give such benefits to a judge or prosecutor in order to make the official do or refrain from doing something. This means that whatever gift or benefit, however small, such as a cup of coffee given with the intention to influence a judge or a prosecutor is a criminal offence. Of course, a cup of coffee is in most cases not enough to corrupt anyone, but may be the first step to reach a corruptive agreement. In fact there are two, and some times three, criminal offences: the one committed by the person giving the benefit, the one committed by the middleman, e.g., a defence lawyer, as well as the one committed by the judge or prosecutor receiving the benefit.

2. Corruption perception in Albania

In 2003, Albania, with a score of 2.5, was ranked in 92nd place out of the 133 countries surveyed for Transparency International's Corruption Perceptions Index (CPI)⁴³⁵. The score ranks from 10 to 1, where the highest score 10 indicates that the perceived level of corruption is zero and the lowest score 1 indicates that the corruption is perceived to dominate the state. In 2003, Finland, with a score of 9.7 was perceived as the least corrupt country, whereas Bangladesh scored 1.3 and was perceived as the most corrupt country. In 2004, Albania was ranked in 108th place among 145 countries surveyed, with the same score as in 2003. In 2005, Albania scored 2.3, together with Niger, Russia and Sierra Leone and was ranked in 127th place among the 158 countries surveyed. Iceland, with 9.7 had the highest score, while Chad with 1.3, had the lowest. Albania had the lowest score among the European countries. The following European country up the list was the former Yugoslav Republic of Macedonia which was ranked in 102nd place with a score of 2.7. Albania is thus perceived as the most corrupt among European countries and the perceived level of corruption has not improved, but deteriorated during the last three years, with Albania falling from 92nd to 127th place during this period. Stated in a manner that is statistically more meaningful (given the increase in total number of countries surveyed), just under 31% of countries scored lower than Albania in 2003, while just under 20% were worse in 2005.

The new Government that came into power after the July 2005 elections, vowed to tackle the endemic levels of corruption within the Albanian society. Thus, in March 2006, the Government's supervisory group on pyramid-scheme companies filed a lawsuit against its former head, Farudin Arapi, and the state telecommunications company began legal proceedings against former employees – all on the grounds of corruption. The Venice Commission of the Council of Europe presented its opinion on the Government draft decision on the lifting of immunity of Deputies for the purposes of prosecution

⁴³⁵ See <http://www.transparency.org/surveys/index.html#cpi> [Accessed 13 June 2006]

for corruption - a verdict that broadly was in line with Government thinking⁴³⁶. In April 2006, the High State Audit criticized the last Government on procurement irregularities, and the Assembly approved a law on the public's co-operation in the fight against corruption, where citizens can report directly on suspected cases of corruption. Furthermore the High State Audit has filed dozens of cases for prosecution.

3. Corruption within the Albanian justice system

On 7 June 2006, the Albanian Institute for Development and Research Alternatives (IDRA) and Casals & Associates, Inc., issued the results of their 2005 survey on corruption in Albania⁴³⁷. According to the survey, Albania is still considered a country with a high level of corruption, although it is slightly reduced compared to last year. Members of Parliament, customs officials, tax officials, doctors, judges are considered the most corrupted, while the President of the Republic, religious leaders and the military are seen as the three most honest among the 17 institutions and groups covered by the survey. As corrupt transactions such as bribery require two actors, the one who offers a bribe and the one who takes, the survey also looks at attitudes towards corruption. In this respect, it is interesting to note that the survey indicates that the persons who receive a bribe are judged more harshly than the one who gives it. Thus, for example, 68 per cent of the respondents think that a student who gives his teacher a gift in the hope of receiving a better grade is either not corrupt or is justified, and 77 per cent feel that a mother who pays a bribe to get a birth certificate for one of her children is either not corrupt or justified⁴³⁸. With regards to crime and administration of justice, the survey notes that less than half of victims report crimes and that the most common reason cited for this is it is not worth the effort. This reflects, among other things, a lack of confidence in the justice system⁴³⁹. Slightly more than half the judges surveyed agree that corruption in the Albanian court system is a serious problem and that lawyers approach them outside of court to influence decisions. Judges acknowledge that neither they nor lawyers are viewed in a flattering light by the public; both categories receive mean scores well below the midpoint of the scale⁴⁴⁰.

Corruption incidents

During the course of the FTDP, the OSCE Presence in Albania has come across numerous accounts of more or less credible accounts of corruption within the justice system. In some cases, it has been obvious that the person relaying the story has just been

⁴³⁶ [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)005-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)005-e.asp) [Accessed 21 August 2006]

⁴³⁷ Corruption in Albania: Perception and Experience, Survey 2005, Summary of findings [June 2006] (Corruption in Albania)

http://www.idra-al.org/pdf/en/IDRA_-_Corruption_in_Albania_-_Summary_of_Findings.pdf [Accessed 8 June 2006]. This study is also discussed in the chapter on Transparency and access to information

⁴³⁸ Corruption in Albania, p. 11-12

⁴³⁹ Corruption in Albania p. 14

⁴⁴⁰ Corruption in Albania p. 15

convinced that he/she “lost” a case because the court or the prosecution was corrupted, without the person being able to substantiate her/his allegation in any way. In many other cases, stories have seemed credible and the person providing the information has had no reason to give incorrect information. Below follows a sample of [small and big] corruption incidents of which the OSCE Presence has been alerted and that seem credible, i.e., they are based on the informant’s own observation or experience. There is no intention, however, to prove that any of these incidents have in fact happened, but only to describe in some detail part of the general picture of a corruptive justice system. Regarding corruption within the penitentiary system, in a recent report the European Committee for the Prevention of Torture and Inhuman Treatment or Punishment expresses “its serious concern that many detained persons interviewed in the course of the visit not only expressed profound mistrust of the justice system, but also their perception that the rights of detained persons within police and prison establishments, which are based on law, can only be enjoyed in exchange for bribes⁴⁴¹.”

	Examples of incidents of corruption within the justice system
1	Y was charged with armed robbery. Via a middleman, Y’s relatives approached the judge and offered a brand new Mitsubishi in exchange for a low sentence. The judge agreed but stated that he would not give his word until he had seen the car. The car was brought in front of the court, after which the judge accepted the car and gave the defendant a very low sentence.
2	A person entered the office of a judge and handed the court secretary a set of documents for registration of a juridical person. When the person handed over the file to the secretary, several 500 Lek notes fell out. The person told the secretary that that it was just a coffee for the judge. This person came every day to the same judge’s office, while the lot system should have brought him to different judges, as there were several judges dealing with commercial issues.
3	X and Y were tried under charges of cannabis cultivation and trafficking. They risked high prison sentences. After several months, their wealthy relatives identified acquaintances of the judge in the case. Through these acquaintances, they offered the judge 20,000 US dollars as well as jewelry, watches and cellular phones. The judge accepted the bribe and sent a middleman to collect the “gifts”. The defendants were given low sentences and shortly afterwards, they were released as their sentences had been completed through conversion of the time they spent in pre-trial detention.

⁴⁴¹ Council of Europe Report to the Albanian Government on the visit to Albania carried out by the European Committee for the Prevention of Torture and Inhuman Treatment or Punishment (CPT) from 23 May to 3 June 2005, CPT/Inf (2006) 24, Strasbourg, 12 July 2006 <http://www.cpt.coe.int/documents/alb/2006-24-inf-eng.pdf> [Accessed 20 July 2006]

	Examples of incidents of corruption within the justice system
4	One of the parties to a case entered the judge's office to find out when the next session of a trial was going to be held. After being informed of the dates, the person told the judge that the person was going to travel abroad and asked the judge what the judge wanted the person to bring. The judge ordered the person to buy clothes.
5	A court secretary met a person in the corridor of the court. The person asked the secretary how to file a lawsuit, and whether the secretary knew any lawyer. The person also asked about registering a juridical person. The secretary took the person to a judge's office and prepared the documents. When the secretary was finished, the person gave money to the secretary.
6	A defence lawyer: I have to pay for everything. Today, for example, I had no money to give to the police guarding the entrance to the courtroom and therefore I was not allowed to enter and was treated very rudely. If a judge orders one of my clients to be released from pre-trial detention, I have to pay to get the decision delivered to the detention facility.
7	X from a "Greek minority" village filed a case in court to obtain Greek nationality, as both his parents already had Greek citizenship registered in their passports. The judge postponed the case without reason. X found out that he and the judge had a common relative. Through this relative, X offered 50,000 ALL to the judge. The judge ruled in his favour in a court session that lasted one minute.
8	The wife of a person detained on remand: My husband told me that he needs to pay the judge 1,000 € to go free.
9	X, a well known and wealthy criminal, was arrested by the police following an attempted murder in which the victim was injured. X's relatives offered 10,000 EUR to the Judicial Police Officer (JPO) to hide or destroy evidence and to present the incident as an act of necessary self-defence. At first the JPO refused the offer, but following pressure from the middleman, the JPO accepted the "present." The Court eventually ruled that the defendant had acted in necessary self-defence and sentenced X to only 5 years of imprisonment ⁴⁴² .
10	A lawyer entered a judge's office and thanked the judge for a court decision and tried to offer the judge a coffee. The judge did not accept so the lawyer put a note of what appeared to be 5000 lek on the judge's desk, which the judge accepted.
11	Family A filed a law suit against family B disputing ownership of a land on which family B (the rightful owner) was constructing two apartment blocks. Despite the simplicity of the case, which required only the verification of documents, the panel of three judges postponed the sessions to put pressure on family B. Family B promised three apartments in the building to the judges via a middleman. The judges rule in favour of family B.
12	A person: There is no hope for the Albanian justice system. I had a property dispute and since I knew the other party was going to bribe the judge, I paid the judge 10,000 USD to get a decision in my favor; this was also the correct decision.
13	A detainee: I have been told that I can get a lower sentence for 5,000 EUR.

⁴⁴² The minimum punishment for intentional murder is 10 years of imprisonment, while an attempted murder may, depending on the circumstances, be sentenced under the minimum, CC articles 76 and 23

VI. CORRUPTION WITHIN THE ALBANIAN JUSTICE SYSTEM

	Examples of incidents of corruption within the justice system
14	Family A, involved in the construction industry, had a property dispute with family B (the rightful owner). As the court sessions evolved, family B seemed to be winning the case. Family A offered a shop in a recently constructed building to the judge who accepted and ruled in favour of family A.
15	Y was charged with trafficking in human beings and sentenced to 3 years' imprisonment in absentia. Y's defence counsel appealed the decision. Y and his defence counsel, however, failed to bribe judges at the Appeal's Court. Instead Y paid the prosecutor 1,000 USD via a middleman. During the trial at the Court of Appeals, the prosecutor did not present the right evidence and denigrated the work of his first instance colleague. The Court of Appeals reversed the District Court decision and lowered the sentence to a fine of 200,000 ALL.
16	A notary entered a judge's office and gave the judge many presents coming from Italy. The notary and the judge co-operated closely. When asked about procedures to register a juridical person, the judge would tell the person to contact any notary. The judge, however, accepted as correct only those forms that had been drafted by this particular notary, so people had no choice but to go to this notary.
17	The relatives of a trafficker, who was in jail, approached the judge of a case with 50,000 EUR to release the trafficker. The judge refused and threatened to report the relatives to the police. Soon after the trafficker was sentenced with seven years of imprisonment. The decision was appealed. The defence lawyer of the trafficker managed to get in touch with the victim of trafficking, the main witness of the case, and paid her 30,000 Euro. After that, the defence lawyer approached the appellate judge, explained everything and paid him 20,000 EUR. In one week, the trafficker was released and the charges were dropped due to the withdrawal of the testimony by the witness.
18	A defence lawyer was waiting outside a judge's office for the commencement of a hearing regarding a declaration of heirs. After having waited for more than half an hour, the lawyer knocked on the door. The judge shouted at the lawyer to wait as she had to make an important call and her mobile credit was almost finished. The lawyer went out and bought three mobile cards for the judge. He gave the cards to the judge and was asked to enter the office. The hearing was over in ten minutes.
19	A person: Cases regarding the adjustment of age or confirmation of years of employment are very frequent, but only a few judges deal with them. To get a particular judge to handle a case, the chancellor is paid between 500 and 1,000 EUR. The size of the bribe depends on the case. Immigrants have to pay close to 1,000 EUR per adjusted year.

	Examples of incidents of corruption within the justice system
20	A conversation between what appears to be a defence lawyer (DC) and the family member (FM) of one of the defence lawyer's clients, recorded on a mobile phone on a morning bus ride in Tirana: DC: Don't worry, I will arrange everything. I guarantee you that he [the client] will only be sentenced with the time served and immediately released in the court \room. You will give the money and he will be released. FM: That's great, how much should we pay? DC: Well, that depends..., you know... the judges. I have to talk to the judges, and then we will see. FM: Okay, but can you tell me approximately how much? DC: I told you, it depends on the judges, on the evidence collected, on the situation... FM: But you know approximately, don't you? DC: Do you remember L, the son of M? He was released immediately. I made it possible by talking to the judges, and he did not pay very much considering the crime he had committed. It's nothing, it's ridiculous, you know. There are also cases when people believe that they can get out of prison for small amounts, but that is not possible, my friend. You know S, he wanted to pay 50,000 ALL to a judge to have his son released. His son had stolen a motorbike. But the judge, of course, couldn't accept. She laughed and said "You don't release someone for 50,000 ALL. You have fun, or you may have dinner, for 50 000 ALL, but you don't release people from prison." So the son of S is still in prison... FM: So how much should we pay? DC: Well, my friend, I told you, it depends on the judges... But I guarantee that if you pay as much as the judge asks, he will immediately be released, he will be out... immediately. Then, you know G, don't you? FM: No, I don't. But how much may they request, tell me a minimum amount, so that we may start to provide for the money. DC: Don't worry. I was telling..., yes, the son of G. He paid the judges as much as they requested and he stayed in prison for three more months, three more months only. It's nothing, it's ridiculous, not three years, three months. And he was going to be sentenced with at least four years... But no, he was released after three months. I told you, DO NOT worry. I guarantee you immediate release... Don't you trust me? FM: Of course I trust you, but we have financial problems. We should start to obtain the money, in order to give to the judges, as you said... We want to give all the money they ask for, but we might need to borrow some, so please tell me a minimum. DC: Well, okay... five (DC shows the palm of his hand with his five fingers wide open), the minimum is five, so prepare yourself, will you? FM (disturbed): Yes... okay...huh... okay... yes... don't worry. DC: Don't forget, I guarantee immediate release. But let me talk to that judge first, and then we will talk again, huh? FM: Well, yes, sure, we will.

4. Efforts to tackle corruption within the justice system

Despite the government's promise to fight corruption, anti-corruption efforts within the judiciary until now have been limited to amendments to the Law on the High Council of Justice as well as to proposed changes to the law on the Organization of Judicial Power⁴⁴³. It is noteworthy that despite the perceived very high level of corruption within the justice system, no concrete action has been taken to tackle this by adopting an action plan or by asking court chairs to adopt action plans or report what concrete measures they are planning to undertake in order to address corruption within their court. During visits to a prosecution offices as well as to district and appellate courts in Tirana, Durrës, Vlora, Gjirokastra, Shkodra, Kukës and Tropoja in the spring 2005, the chief prosecutors and court chairs, referring to the low level of confidence in the Albanian justice system, were asked about whether they had an anti-corruption strategy and how they dealt with corruption within their institution. The answers varied from simply stating that corruption within their particular institution was impossible, to stating that there was indeed room for improvement. None, however, had any concrete strategy or plan to address the issue.

The Annual Report presented by the Prosecutor General on 8 May 2006 indicates that 422 cases of corruption were prosecuted in 2005, as opposed to 433 cases in 2004⁴⁴⁴. During the past year, however, few high profile cases concerning corruption have been brought to the public attention. Of the cases that have reached public attention, e.g., those mentioned in the Prosecutor General's press release of 28 March 2006, it is worth mentioning that most cases relate to abuse of duty and not to the taking or receiving of bribes⁴⁴⁵. It is noteworthy that of the five corruption cases specified, four were based on findings by the Fiks Fare television programme. Furthermore, while a number of state officials have been implicated, including two chiefs of police, not one prosecutor or judge has been brought to justice on corruption charges during the past year. There have been discussions concerning the nomination of the former chair of Lushnja District Court, Artan Gjermeni, to the High Council of Justice, the nomination of the chair of Vlora Court of Appeals, Gjino Vefa Gaba to the High Court and the Investigative Committee on the Prosecutor General, Theodori Sollaku. Apart from that, however, no charges have been brought against members of the judiciary or of the prosecution in 2006. Even in the cases mentioned, however, at the time of writing, very little evidence has come forth.

The reasons for this are of course manifold. In a corrupt agreement, each party has an interest to protect. Even if one party to the illicit agreement does not follow through,

⁴⁴³ Law No. 8436, dated 28 December 1998 "On the Organisation of the Judicial Power in the Republic of Albania"

⁴⁴⁴ Report of the General Prosecutor On the Situation of Criminality in Albania in 2005, 8 May 2006 <http://www.pp.gov.al/eng/shtypi/inform.in%20englisht.html> [Accessed 14 June 2006]

⁴⁴⁵ <http://www.pp.gov.al/alb/shtypi/zyrtaretekorruptuar.html> [Accessed 14 June 2006]

there is little incentive for any of those involved to report the crime. Furthermore, if the justice system is as corrupt as it is seen, each person working in a court or at a prosecution office, as well as each defence lawyer, either has been involved in corruption herself/himself, or knows someone who has taken or given bribes. A report from within the system would therefore be likely to turn everyone else in the working place against the reporter and he/she might become a target for repercussions. While the transfer of large sums of money would probably leave traces in how the recipient lives and spends money, a continual stream of minor sums does not leave much trace and an individual corruption incident may be very difficult to prove. Corruption cases against members of the judiciary or the prosecution would be prosecuted and tried by prosecutors and judges who might have received bribes themselves or who are aware of their close colleagues or friends who have taken or given bribes.

5. “A corruption friendly environment”

The lady of justice is blindfolded and in her hand she holds a scale in which she balances the two sides of each matter. She is blindfolded in order not to be able to distinguish or differentiate between black and white, rich and poor, young and old, female and male or friend or foe. On her scale she should balance only the facts and evidence presented in a case against the background of the relevant legislation or case law.

In order for a judge to be able to carry out her/his duties as the acting lady of justice, there are rules regarding conflicts of interest that requires a judge to withdraw from hearing a case⁴⁴⁶. There are similar rules for prosecutors⁴⁴⁷. A judge needs to keep a distance from the parties and only consider the facts of a case. In line with this, any contacts with one of the parties outside of the court room should be avoided. This principle is also reflected in the CCBE Code of Conduct, which provides that a lawyer must not “make contact with the judge without first informing the lawyer acting for the opposing party⁴⁴⁸”. The Code of Judicial Ethics applicable in Albania states that a judge and members of her/his family “should not accept presents, favours, privileges or promises for material assistance from a person who has a direct or indirect interest in a matter the judge will examine⁴⁴⁹”. In addition, the Code of Judicial Ethics prohibits judges from taking into consideration discussions that take place outside the presence of both parties⁴⁵⁰, which is usually the case in a corruptive arrangement.

In stark violation of the above principle, however, parties to cases in Albania are frequently seen approaching judges or prosecutors; prosecutors or other parties to a case are found sitting in judges’ offices or entering the courtroom together with judges.

⁴⁴⁶ CPC articles 15-18

⁴⁴⁷ CPC article 26

⁴⁴⁸ CCBE Code of Conduct, section 4.4, see also the Albanian Code of Ethics for Advocates, article 29

⁴⁴⁹ Code of Judicial Ethics, article 23

⁴⁵⁰ Code of Judicial Ethics, article 9

Defence counsel are seen having coffee with judges. Parties hand in documents directly to the judge rather than through the court registrar. In Tirana, hearings are daily held under informal conditions in judges' offices. All these are instances of inappropriate and unnecessary contacts between members of the judiciary or prosecution and parties or their legal representatives to a case. While most of these contacts might have no criminal implications, they contribute to creating an impression of a judiciary that is much too open to inappropriate contacts. Of course, many corrupt agreements and transactions, in particular the more lucrative ones, do not take place in courts or judges' offices but outside and through other channels and carefully chosen middlemen.

6. Concluding remarks

While corruption within the justice system is perceived to be very high and seriously impedes the functioning of the justices system, few concrete measures have been taken to tackle this problem. In order to come to terms with both the actual and the perceived corruption within the justice system, decisive measures need to be taken. A first step would be to put an immediate end to inappropriate contacts between members of the judiciary and parties to a trial or their representatives. Furthermore, each court and prosecution office should be asked to set up concrete strategies and undertake concrete measures to fight corruption within the respective institution. One possible way forward could be through a "pilot project" where one court and one prosecution office, through strategic plans, concrete measures and strict follow-up mechanisms, commit to become "corruption-free zones". The project would also depend on close collaboration with the Chamber of Advocates. Any strategy contemplated also would have to take into consideration the levels of pay and other benefits of staff within the justice system in general and of judges⁴⁵¹ in particular. An adequate level of pay and other benefits is probably one of the most efficient ways to "immunize" an employee against corruption.

⁴⁵¹ In particular for judges serving outside their home areas, housing should be considered as a possible non-monetary benefit

RECOMMENDATIONS

1. The Ministry of Justice, the High Council of Justice, the Prosecutor General and the National Chamber of Advocates should adopt a common strategy against corruption within the justice system. The strategy should include strict follow-up mechanisms.
2. Courts and prosecution offices should be required to adopt strategies and undertake concrete measures to address corruption.
 - Courts and prosecution offices should post their anti-corruption strategies on billboards or other places where they are clearly visible for the general public.
 - Courts/prosecution offices with internet pages should post their anti-corruption strategy on the web.
3. Together with the anti-corruption strategies, courts/prosecution offices should post information for the general public regarding behaviour and actions that are considered or can be suspected to be corrupt. Information about whom to contact and how to proceed if corruptive practises are observed or suspected should also be provided.
4. The general public should be informed through public awareness campaigns about corruption within the justice system; i.e., they should be informed what actions and behaviours are, or can be suspected to be, corrupt.
5. Judges should be trained to draft clear, concise and well-argued court decisions so as to be able to convince both the parties and other readers that the correct decisions, based only on the facts and evidence presented during the trial, have been reached.
6. Increased efforts should be made to make court decisions available to the public by posting them on internet pages or by making them *easily* available upon request.
7. Inspections of courts by the Ministry of Justice and by the High Council of Justice should consider how courts implement anti-corruption measures.
8. Each court and prosecution office should take immediate measures to stop inappropriate and informal contacts between judges/prosecutors and the parties to a conflict⁴⁵².
9. Each indication of corruption should be taken seriously and dealt with in a transparent and diligent manner.
10. Levels of pay for employees within the justice system should be increased.
11. The possibility to appoint a “corruption-free” court and prosecution office as a pilot project should be considered.

⁴⁵² The parties to a criminal case are on the one hand the prosecutor and on the other hand the defendant(s)

VII. EFFICIENT TRIALS AND WITNESS ISSUES

In this chapter, two discussion papers that have previously been presented in different contexts will be presented.⁴⁵³ The first, “Efficient trials”, was presented as a discussion paper to the Minister of Justice on 25 November 2005 following a discussion regarding trial delays. The second, “On the integrity of witnesses and other issues”, was presented at the International Consortium Working Group on Witness Protection on 16 March 2006.

1. Efficient Trials

According to the European Convention on Human Rights and the Albanian Constitution everyone has the right to trial within a reasonable time.⁴⁵⁴ In deeming whether a length of time can be considered reasonable, the complexity of the case, the conduct of the defendant, the conduct of the judicial and administrative authorities of the State, as well as what is at stake for the defendant are taken into account. The courts have a duty to ensure that all those who play a role in the proceedings do their utmost to avoid unnecessary delays.⁴⁵⁵ The Albanian Criminal Procedure Code provides that courts should strive to complete trials within one hearing or, if not possible, during the next working day and that only for good reasons can trials be postponed up to fifteen days.⁴⁵⁶ This is in line with the principle of an “uninterrupted trial”, aiming to give the panel hearing the case a complete and coherent presentation of the facts, thus facilitating the panel’s proper evaluation of the materials before it.⁴⁵⁷ Apart from the human rights aspect of court proceedings, the length of trials obviously has substantive economic implications. While increased efforts to ensure the timely participation of all involved, might require increased expenditure, shorter and more efficient trials would substantially reduce costs for all involved and would free resources to adjudicate more cases.

Nevertheless, the CPC does not seem properly to facilitate uninterrupted trials. Parties are required to file call rolls for witnesses and experts with the court at least five days prior the start of the trial.⁴⁵⁸ This time period is, however, insufficient to notify and bring witnesses to court, not least considering the inadequate civil registers and inefficient postal system in Albania. Moreover, it seems that it is only after the opening of the judicial examination that the parties “formally” request the evidence they want to bring and the court decides on its permissibility.⁴⁵⁹ Thus, in particular in cases where there are

⁴⁵³ For the purposes of this publication, both texts have been re-edited

⁴⁵⁴ ECHR Article 6 and Albanian Constitution art. 42 para. 2

⁴⁵⁵ See, e.g., *Vernillo v. France*, 20 February 1991, para. 38

⁴⁵⁶ CPC art. 342

⁴⁵⁷ *Procedura Penale*, p. 471 and the Unifying Decision of the High Court, No. 6, 11 November 2003

⁴⁵⁸ CPC art. 337, para. 1

⁴⁵⁹ CPC art. 357

requests for hearing witnesses or experts, it does not seem feasible to complete a trial in one hearing, or even to continue the next day.

Consequently, and in spite of the principle of uninterrupted criminal trials, main hearings in Albania frequently continue for extended periods of time and occasionally take years to complete. Only as a very rare exception are trials completed within one hearing, and instead of continuing the next working day, trials are as a rule and not as an exception postponed for the maximum period allowed, i.e., fifteen days. Moreover hearings frequently consist of only noting that someone or something is missing, as a result of which the trial is postponed for an other two weeks.

Just to give some outside reference, below are some statistics provided by the Swedish Court Authorities.

Criminal Cases at Swedish District Courts 2004⁴⁶⁰

Total number of criminal cases submitted to court	68	512	
Total number of decided criminal cases	65		070
Percentage of cases with more than one defendant	11,1	(%)	
Number of defendants per case	1,03		
Percentage of cases where detention hearing was held	14,6		
Percentage of cases with more than 6 hours* hearing time	4,8		
Percentage of cases with more than 12 hours hearing time	1,3		
Average hearing time (hours/case)	1,72**		

Comments

* A full days hearing would normally consist of 6 hours effective hearing time

** A large number of hearings in cases where the defendant pleads guilty and no oral evidence is presented take no more than 15 minutes

The reasons for the long trials in Albania are manifold and while some reasons may be easy to overcome, others will require profound changes and take time to achieve.

1.1. Causes

Through its trial observation the OSCE Presence in Albania has identified a number of causes behind delays in criminal trials:

- The failure to find/notify persons
- The failure of notified persons to appear
- The failure of the police to bring persons detained on remand to court

⁴⁶⁰ Court Statistics, Official Statistics of Sweden, excerpt from table 1.7, p. 19 http://www.dom.se/Publikationer/Statistik/domstolsstatistik_2004.pdf [Accessed 15 July 2006]

- The failure of defence counsel to appear or otherwise fulfil their duties
- The failure of prosecutors to appear or otherwise fulfil their duties
- Lack of planning/preparation and a developing tradition of long trials
- Unjustified prolongations of pre-trial investigations

In the following we will suggest some ways to overcome these obstacles.

1.2. Remedies

Notifications

Civil registry & Address system – The inadequate civil registry and address system in Albania pose major obstacles to notifying persons involved in court proceedings. The OSCE Presence is presently involved in a dialogue with the Ministry of Interior to launch a project to deliver technical assistance to relevant Albanian authorities in the process of modernisation of the national civil registry and administrative address system. While this is a large-scale project which will take time to implement it will substantially improve the possibilities to summon persons to court. Finally a better system of registering telephone, including mobile phone, numbers should be created.

Police & Prosecution – The first actors to come into contact with persons involved in criminal trials are the police and the prosecution. To ensure the success of future notifications to appear in court, the police and prosecution must make increased efforts to collect detailed and all-inclusive information relevant for notification purposes on persons they interrogate. Relevant information would be, e.g., detailed and descriptive address, any telephone numbers where the person can be reached, including mobile number and telephone numbers of close relatives, address and phone number to work place and any other information that might facilitate notification.

Rules on notifications – The simplest way to notify a person is by regular mail with a request to resend a signed receipt of the notification which is included in the mail. Another option is by registered mail or by registered mail with confirmation of receipt. The rules on the use of mail for notification are, however, rather unclear and should be reviewed.⁴⁶¹ An analysis/inquiry should be made in order to find out whether the present rules of notification are used efficiently. Thus are the possibilities to notify witnesses by telephone, telegram, fax, other technical means properly used?⁴⁶² It should also be considered whether after an initial notification of the proceedings and the charges, the parties (i.e., the defendant and injured parties) could be notified in a “simpler” manner

⁴⁶¹ At present CPC art. 132 para. 1 only states that notification of acts is carried out by the clerk or by mail service. It is thus unclear what the exact conditions for mail notification are.

⁴⁶² CPC art. 133

than for the first notification; e.g., through simple mail or technical means.⁴⁶³ The law seems to indicate this; it refers to rules of “first notification”⁴⁶⁴ and further obliges the *defendant, but not private parties*, to notify the proceeding authority of changes of address.⁴⁶⁵ The law, however, never goes on to explain how subsequent notifications should or could be made. It should also be considered whether it would be more efficient, where regular notification has failed, to use *private notification agencies*, as opposed to court clerks or the judicial police. When need be, the agents carrying out notifications can be called to testify in court, and the agencies would obviously be liable for any damage they cause by not fulfilling their contractual obligations.

When notification is carried out by court clerks, judicial police or through mail with confirmation of receipt, the subject of notification should be required to confirm and provide additional contact information, in particular telephone numbers.

The notifications should also specify what consequences there are for failure to comply with the order; i.e., that the failure to appear is a criminal contravention punishable by a fine or up to six months of imprisonment⁴⁶⁶ and that the person can also be forcibly accompanied by the police.⁴⁶⁷

Failure of notified persons to appear or to fulfil their duties

Failure of witnesses to appear – Once witnesses are notified, efforts should be made ensure they will be present in a timely manner. Thus where telephone numbers are available, the court clerks should confirm by telephone that the summoned persons are aware of when and where they should appear. At present, the only realistic way to contact the courts is by visiting the court personally. In order to make communications easier, telephone numbers for the court, and the name of the contact person, should be listed on all communications from the courts, as well as be made readily available to the general public. This would enable persons to inform the court of unexpected delays, which in turn would enable the court to reschedule or take other measures to avoid unnecessary delays.

As mentioned above, failure of witnesses to appear is a criminal contravention. In order to enforce this, however, a new proceeding needs to be initiated requiring additional time and resources. Instead it should be considered whether the summoning court should be allowed to issue a fine for persons who fail to appear without lawful reasons and the execution of the fines should be swift.

⁴⁶³ E.g., in Sweden after a person has received the first notification regarding the proceedings, which also includes information about “simplified notification”, subsequent notifications are done through regular mail. In Albania, where the mail system is not always reliable, other ways such as telephone, sms or even email could be considered.

⁴⁶⁴ CPC art. 133, para. 1, 2 & 3, art. 142

⁴⁶⁵ CPC art. 140 para. 6

⁴⁶⁶ Criminal Code (CC) art. 310

⁴⁶⁷ CPC art. 164

Furthermore, as witnesses are frequently afraid to testify, apart from the witness protection program envisaged in the Law on the Protection of Witnesses and Collaborators of Justice, further measures should be considered to ensure their [safe] participation. Thus, for example, each court could appoint a clerk/secretary as a witness focal-point with responsibility for informing witnesses about the proceedings. Where there is a need, the focal-point could meet the witness at the court and ensure that the witness is not confronted by the defendant or other persons. The witness focal-point also could alert the court/police/prosecution where there is a need for additional measures, such as *in camera* hearings or hearing the witness without the presence of the defendant and/or other persons.

Failure of defence counsel to appear – A frequent cause of postponement of court proceedings defence attorneys who without lawful reason fail to appear. There are indications that some defence counsel use procrastination as a defence technique.⁴⁶⁸ Whether this is related to the fact that pre-trial detention counts as a day and half when calculating the terms of imprisonment⁴⁶⁹ or to achieve the expiry of the maximum period of pre-trial detention⁴⁷⁰ or for other purposes remains an open question.

Apart from a provision regarding the conduct of hearings,⁴⁷¹ the CPC does not contain any provisions on disciplinary measures for defence counsel.⁴⁷² Instead the CPC provides possibilities to suspend the time periods for the defendant for actions by her/his defence counsel.⁴⁷³ Although this provision has the aim of barring defendants and defence counsel from using postponements as a tactic in line with the explanation forwarded above, it might also result in defendants being “punished” for an act attributable only to defence counsel. This provision is also regularly abused by suspending the time periods for all defendants when only one of the defence counsels is missing, thus “punishing” defendants for acts with no relation to them.⁴⁷⁴ As for disciplining defence attorneys, it is the National Bar Association that has been vested with the power to implement disciplinary measures.⁴⁷⁵ So far, and in spite of numerous reports by the courts, no disciplinary measures have been imposed by the Bar Association.⁴⁷⁶

In order to come to terms with defence counsel who without lawful reasons delay the proceedings, disciplinary measures should be introduced into the CPC. Measures that

⁴⁶⁸ See also the European Court of Human Rights judgment in the of case Balliu v. Albania, 16 June 2005

⁴⁶⁹ CPC art. 238, para. 2 and CC art. 57

⁴⁷⁰ CPC art. 263

⁴⁷¹ Art. 341, which does give a possibility to fine anyone for, e.g., obstructing the normal proceeding of the hearing, but which does not seem to be used in situations described above

⁴⁷² E.g., a possibility of dismissing or fining counsel, or of obliging counsel to take part in the procedural costs

⁴⁷³ Art. 265 and 350, para. 3, see also Annex A, p. 5 ff.

⁴⁷⁴ Procedura Penale p. 366

⁴⁷⁵ Art. 56

⁴⁷⁶ In accordance with Law no. 9109, dated 17 July 2003, “On the Legal Profession”, the National Bar Association adopted their statutes in April 2005 and also set up a disciplinary committee.

could be considered are the obligation to pay [part or all] procedural expenses, fines, prohibition to act as counsel in the particular case or before the court. The first and most important measure is, however, for the courts to make it absolutely clear to all parties that no stalling of the proceedings will be tolerated and that any delay that cannot be objectively justified will lead to disciplinary measures. It also needs to be made clear to attorneys that the fact that they might take on more cases than they are able to handle is not a reason to delay trials. Whereas the first unjustifiable absence or delay might lead to a fine, several unjustifiable delays should lead to an obligation to pay procedural cost. Systematic and repeated abuses should lead to a prohibition to continue as counsel in the case at hand, while when it is established that a particular lawyer has a record of stalling proceedings, he/she could be barred from acting before the court in question.

In order to give an incentive to the Bar Association to live up to its responsibilities as a disciplinary body, measures introduced in the CPC could be made dependent on whether adequate measures are undertaken by the Bar Association. Another option would be to let the Bar Association know that if they do not dispose of their disciplinary duty in a responsible manner, the courts will be empowered to impose disciplinary measures.

There should also be a possibility of imposing disciplinary measures in other cases where defence counsel fail/refuse to fulfil their duties in a timely manner.

Another frequent cause of postponement related, but not necessarily attributable, to the defence are requests for additional time to examine the file. This may be due to failure of the prosecution to make the file available to the court or of the court to make it available to the defence. It could also be a result of the defence failing to examine the file in a timely manner. Nevertheless, the court should ensure that the file is available for examination as well as for copying and that the defence is informed of this fact. An even better solution would be to oblige the prosecutor to provide a copy of the file to the defence.⁴⁷⁷

Failure of the prosecutor to appear – While the failure of prosecutors to appear is, fortunately, a much less infrequent occurrence, it does happen. There are also cases where the prosecution in other ways delay the proceedings by not fulfilling their duties in a timely manner. To come to terms with this, there should also be a possibility to request the prosecutor to be exchanged or to impose disciplinary measures on the prosecutor.

Failure of the police⁴⁷⁸ to bring a detainee – This is another frequent cause of postponement and depends to a large extent on the existence of a proper infrastructure.

⁴⁷⁷ Compare CPC art. 332

⁴⁷⁸ Ministry of Public Order, Regulation No. 1075 dated 15.09.1999, For the security and treatment of the pre-trial detainees, chapter XI. Although not expressly stated, the regulation refers to the [Public] Order Police, which is now regulated by Law, No. 8553, dated 25.11.1999, On the State Police

However, some measures that would improve the situation are:

- Location of detainees at facilities close to the court hearing the case.
- Enough vehicles to bring defendants to courts.
- Better/easier communications possibilities between the police and the courts.
 - o Has the defendant/detainee been transferred to another facility? The summons should be forwarded and the court informed.
 - o Will the defendant/detainee be late for the session? The court should be informed.
- Any substantive delays or failures to bring detainees to court should be reported by the court to the relevant directors of the police.
- The police responsible for accompanying detainees to court should be subject to regular inspections.
- Compliance with these recommendations should be a regular subject of inspections at courts.

Trial planning and scheduling

As mentioned initially, there is a need to review the CPC not least as it pertains to the scheduling and holding of trials. In general, for reviews of the CPC the OSCE Presence would recommend looking at the Criminal Procedure Code of Bosnia and Herzegovina. Nevertheless, even under the present CPC and with proper planning, there is plenty of room for shorter trials. It needs to be stressed again that, while what is brought forth during the hearing is largely up to the parties, it is the court that is responsible for ensuring that the trial is carried out in a diligent and efficient manner. The court should therefore react strongly against any attempts to stall the proceedings and scrutinize any requests for postponements with critical eyes.⁴⁷⁹

Together with the request for trial,⁴⁸⁰ the prosecutor should submit all information relevant for the successful notification of witnesses. As mentioned above, the defence should immediately be notified on the request for trial and of the fact that they may examine and have a copy of the file.⁴⁸¹ In order to plan how long each witness hearing will take, the prosecutor should be requested to indicate subject and evidentiary value of each witness's testimony. This would also make it easier for the court to evaluate which witnesses are needed and which not.⁴⁸² The prosecutor should also give an indication of how long he/she deems each witness hearing will take. The defence, when submitting their call rolls for the interrogation of witnesses,⁴⁸³ should have the same obligation. Before the start of the trial, the court should prepare a detailed draft-plan on how long/how many sessions the trial will require and what will happen during each session. *To the extent possible under the present CPC, the principle of the un-interrupted trial should be respected and full-day hearings should be planned*

⁴⁷⁹ CPC art. 342, see also Decree No. 1830, dated 3 April 2001, approving the Regulation on Organization and Functioning of the Judicial Administration, art. 8 p. 10

⁴⁸⁰ CPC art. 331

⁴⁸¹ CPC art. 335

⁴⁸² CPC art. 357 para. 2

⁴⁸³ CPC art. 337

*until the trial is completed.*⁴⁸⁴ The draft plan should be discussed and agreed with the prosecution and the defence and efforts should be made by all to respect the plan and ensure the presence of those called to testify. Based on the requests for witness hearings, the court should start summoning witnesses. Any need to change the plan should be communicated immediately to the court in order to make rescheduling possible.⁴⁸⁵

Simple cases, requiring a maximum of a few hours, should be scheduled together so that several cases can be resolved in one day.

Efforts should also be made to avoid the verbatim reading of long documents that are already available to the court and the parties. This seems to serve no practical purpose, as the reading is usually done as monotonous “speed-reading” of which it is difficult to make sense. Either the principle of the oral hearing should be respected strictly (allowing notes, but not reading out texts), or written documents should be presented in a summarised version.⁴⁸⁶ The same can indeed be said about the reading out of final decisions. The principle of publicity is guaranteed by making final decisions and written submissions readily available to *any* interested party upon request.

The implementation of the suggestions forwarded above could be completed either through amendments of the CPC and through administrative orders by the Minister of Justice, in areas under his jurisdiction, detailing the obligation of the courts to ensure that trials are kept within a reasonable amount of time and to respect the principle of the uninterrupted trial. The disciplinary measures suggested above could then be specified.

Court statistics should indicate the number of hearings for different types of cases (or percentage of cases that have, for example, more than 1, 3, or 6 hearings), total hearing time and *effective* hearing time⁴⁸⁷ as well as indicate reasons for postponements. Finally the inspections and the evaluation of judges should take into account such things as their ability to plan and conduct uninterrupted trials, as well as whether or not they follow how investigations regarding persons detained on remand are proceeding (see further below).

1.3. Pre-trial investigation

Although the OSCE Presence has not yet completed a comprehensive analysis of the pre-trial investigation, the experience so far indicates that in many cases rather than striving to conduct investigations within the shortest possible time, the maximum periods

⁴⁸⁴ CPC art. 342

⁴⁸⁵ *Procedura Penale – Komentarj*; Halim Islami, Artan Hoxha and Ilir Panda, 2003, p. 444

⁴⁸⁶ In some countries, e.g., Sweden, the principle of the oral hearing is interpreted strictly; thus chapter 46 paragraph 5 of the Procedure Code (pertaining to criminal matters) states that “[T]he main hearing shall be oral. The parties may submit or read out written submissions only if the court finds that that it would facilitate the understanding of a presentation or else benefit the process.”

⁴⁸⁷ The cumulative time between the start and the end of each session

provided by the CPC are used.⁴⁸⁸ The length of pre-trial investigations is of particular concern where persons are detained on remand. As an example, the examination of a case file at the SCC shows the following.

The case concerns a person charged at the Serious Crimes Court with participating and organizing a criminal organization and with trafficking in narcotics.⁴⁸⁹ The investigation was mainly carried out in Italy by means of intercepting phone calls prior to the transfer of the case to Albania. It is unclear what, if any, investigative actions were undertaken after the defendant was arrested in Albania on 9 July 2003 and the case was registered by the Albanian prosecution. Neither the indictment nor the judgment indicates that any investigative actions were undertaken after the file was transferred. The time period to conclude the “investigation” in Albania was, however, prolonged three times for a total period of 8 months. The indictment was then filed on 23 April 2004 and, after an accelerated trial, the court pronounced the judgment on 7 June 2004.

A number of decisions concerning domestic violence also indicate that even were the defendant pleads guilty and the evidence is collected in close connection with the event, the investigation may take months to complete. In particular, psychiatric legal expertise seem to stall the proceedings.

The CPC obliges the prosecutor to inform the judge in writing about the person detained on remand every two months after the arrest.⁴⁹⁰ Numerous discussions with judges and prosecutors around the country, however, *show that this provision is not implemented, thus invalidating one of the safeguards provided in the CPC to ensure that investigations are carried out with “special diligence” where persons are detained on remand*.⁴⁹¹ A similar concern is related to the prolongation of pre-trial investigations.⁴⁹² Prolongations are decided by the prosecutor in charge of the case and can be appealed to the district court.⁴⁹³ While the first three-month prolongation requires no justification, further prolongations up to two years require that the investigation be [particularly] complex or be objectively impossible to complete within the time permitted. Beyond the two-year period, the investigation may in extraordinary cases, with the approval of the Prosecutor General be prolonged for another year, three months at a time. Nevertheless, little guidance is to be found as to what comprises a complex investigation or an extraordinary case and as the example cited above shows, there is reason to suspect that investigations are frequently prolonged without any objectively justifiable reason.

To come to terms with this even the first three month prolongation should require a justification and clear guidelines as to what constitutes complex or extraordinary cases should be provided (e.g., *through administrative regulations*) and prolongations should

⁴⁸⁸ CPC art. 263, 264, 323 & 324. See also the discussion on this issue in the High Court Unifying decision No. 6, dated 11 November 2003.

⁴⁸⁹ Penal Code art. 333 and 284/a

⁴⁹⁰ CPC art. 246 para. 6

⁴⁹¹ ECHR art. 5, para. 3 and art. 6, para. 1. See also the Constitution of Albania, art. 28, para. 3

⁴⁹² CPC art. 324

⁴⁹³ CPC art. 324 and 325

be granted *only* when there are objectively justifiable reasons for this. Prolongations should also be decided by the courts or at least by the chief prosecutor and not, as today, by the prosecutor in charge of the case. *Furthermore the prosecutor's obligation to inform the judge every two months should be strictly adhered to by both the courts and the prosecution*; i.e., absent such information, the court should inquire about the information and if the court deems that the investigation is not proceeding with the required special diligence, the court should release the defendant in question. Furthermore, as already suggested above, maximum time periods should be introduced for submitting medical-legal as well as psychiatric-legal expertise. Statistics should clearly indicate prolongations and reasons for prolongations. How criminal investigations are carried out should be subject to regular inspections.

Recommendations

1. Better civil registry and address systems should be developed
2. A better system of registering telephone and mobile phone numbers should be developed
3. The police and the prosecution should collect all-inclusive information relevant for notification purposes
4. Rules of notifications should be revised
 - o After initial notification, "simplified notification" should be considered
 - o Use of private notification companies should be considered
 - o Any notification should require the recipient to confirm and give additional information relevant for a successful notification
 - o Notifications should specify in detail consequences of failure to comply with the order
5. All communications from courts should specify whom to contact in case of problems to appear as summoned
6. Once notified, witnesses should be contacted to ensure that they will appear as scheduled
7. It should be considered whether the summoning court could issue administrative fines for persons who fail to appear without lawful reasons
8. Apart from what is foreseen in the Law on the Protection of Witnesses and Justice Collaborators, other witness protection measures, such as the appointment of a witness contact point, should be considered
9. Disciplinary measures, possibly dependent on action by the Bar Association, against defence lawyers should be introduced
10. The defence should be given a copy of the court file or
11. The courts should ensure that defence counsel are given prompt access to the court file and notified of this fact
12. The possibility of requesting the exchange of a prosecutor for failure to appear or of imposing disciplinary measures, should be introduced
13. Detainees should be placed at facilities near the court hearing the case
14. The police should be under an obligation to communicate any delays to the court

15. Failure of the police accompanying detainees should be reported and there should be regular inspections of the police responsible for accompanying detainees
16. The CPC should be reviewed
17. Court statistics should give comprehensive information on number of hearings and trial lengths
18. The responsibility of the courts to ensure efficient trials should be stressed and detailed in *administrative instructions*
19. Together with the request for trial the prosecutor should submit all information relevant for a successful notification of witnesses
20. The prosecution and the defence should indicate the subject and evidentiary value of each witness testimony as well as give an indication of the time needed for each hearing
21. The court should be obliged to draft trial plan detailing how long/how many sessions are needed and what will happen during each session; i.e., when will each witness be called etc.
22. The draft plan should be agreed with the parties prior to the start of the trial and then adhered to
23. Simple cases should be scheduled together and heard within one day
24. Verbatim reading of documents should be avoided
25. Inspections of judges should take into account their ability to plan and conduct uninterrupted trials
26. Legal time periods to conduct medical-legal as well as psychiatric-legal examinations should be introduced
27. The obligation of the prosecution to inform the court in writing about the proceeding in cases where a person is detained on remand should be strictly adhered to. Both judges and prosecutors should be inspected regularly to ensure compliance
28. Any prolongation of the pre-trial investigation should be justified and decided by a court or at least a chief prosecutor
29. Guidelines on what is a justifiable cause of prolongation should be introduced
30. Statistics should give comprehensive information on prolongations

2. On the integrity of witnesses and related issues

Introduction

Albania is a country in transition and since the fall of the dictatorship in 1991, its justice system has undergone radical changes aimed at bringing it in line with European standards. These changes will continue during the foreseeable future, albeit at a lesser pace. A society in transition is a vulnerable society and transitional countries, not least in the Balkans, have been plagued by organised crime in all its forms. In Albania, trafficking in humans, narcotics, weapons, vehicles, cigarettes and other goods by groups or loosely organised criminal structures have become increasingly common as these commodities are being brought and exploited at the large and lucrative European Union market. Recently much attention has also been paid to the fight against corruption and organised crime in Albania. To build a society based on the rule of law and respect for human rights it is, however, not enough to fight high profile criminality. While organised crime has huge social costs, it does not affect the everyday life of most citizens, who are much more affected by property and contractual conflicts and by ordinary criminality such as violent crimes or infringements with their property. Parallel to fighting organised crime and corruption, building a strong justice system with a high level of integrity, where the parties can trust that their civil and criminal conflicts will be solved in a just and transparent manner based on facts and credible evidence, not least *witness testimony*, is essential.

Witnesses⁴⁹⁴ are an important part of most trials and, as a consequence, for the functioning of any justice system. It is therefore necessary to ensure, to the extent possible, that witnesses appear in court and give correct and truthful statements, i.e., that there are measures that serve to prevent that witnesses are harmed, intimidated, threatened or otherwise influenced. While what is at stake in civil cases may well result in attempts to influence witnesses to give testimony in favour of one party, in criminal cases there may be persons involved who do not hesitate to commit or contract others to commit violent crimes to stop or influence witnesses. In Albania, as well as in many other countries, it is an obligation under law to give witness testimony.⁴⁹⁵ It is, however, not reasonable to force a person to appear as a witness if this would risk the life and security of that witness. The duty to appear as a witness consequently has to be balanced against the witness's right to life and family life as expressed in articles 2 and 8 of the European Convention on Human Rights, and against the general right to security of person and property. In the Doorson case, the European Court of Human Rights (European Court) stated that:

⁴⁹⁴ It should be noted that in trafficking cases, for example, witnesses are frequently also victims/injured parties and in this paper, unless otherwise stated, the notion of witness includes victims testifying in court.

⁴⁹⁵ Criminal Procedure Code (CPC) articles 157, 297 and 312; see also Criminal Code art. 310

It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.⁴⁹⁶

To encourage further that possible witnesses step forward to reveal their information, measures should also be taken to ensure that their appearance in court is as smooth and as comfortable as possible and that it does not interfere with the witnesses' ordinary life more than necessary. On the other hand, any measures undertaken to increase the security and comfort of witnesses has to be balanced against the rights of the defence and the obligation to respect the principles of due process under article 6 of the ECHR.

The Albanian context

For the purposes of this chapter, witnesses are divided into three loose categories: protected witnesses, witnesses involved in cases before the Serious Crimes Courts and other witnesses. The aim is to look at the situation of all witnesses coming to testify before the courts in Albania and to suggest areas where further analysis and improvement are needed in order to diminish the risk of manipulation and improve the quality of witness statements.

One of the most frequent causes of trial delays in Albania is the non-appearance of witnesses. The causes for this vary from inability to locate and notify witnesses, to witnesses refusing to appear due to *fear of reprisals*. Witnesses may be killed to stop them from testifying, they may also be influenced by threats or violence or they may be "bought". When witnesses appear in court there generally is no protected environment⁴⁹⁷ for them, which in many cases leaves them to be confronted with the parties or persons related to the parties. This makes witnesses vulnerable to intimidation and violence. There are also witnesses who may not fear reprisals, but whose testimony is negatively influenced by the presence of the defendant or other persons. This is a concern in particular in cases involving victims who are minors as well as cases concerning all forms of domestic and sexual violence. Another factor that may have a negative influence on both witnesses' willingness to testify and on the quality of their testimony is the lack of information among the general public regarding the role and purpose of witness testimony.

There are also indications that the police sometimes threatens or puts pressure on witnesses, when witnesses withdraw or change their statements [after threats or

⁴⁹⁶ Doorson v. the Netherlands, 26 March 1996, para. 70

⁴⁹⁷ At the First Instance Court for Serious Crimes, a Witness Room with a separate entrance has recently been set up. Otherwise no such facilities exist.

pressure from defendants or others]. For example the witness might be told that he/she will be prosecuted for having given false testimony. This is apparently a concern in particular with trafficked women, minors and other people who lack strong support mechanisms.

In Albania some steps have been taken to increase the security of witnesses, in particular with a view to fighting organized crime, with the adoption of the Law on the Protection of Witnesses and Collaborators of Justice (Witness Protection Law) and its sub-legal acts.⁴⁹⁸ The purpose of the law is to provide effective protection to witnesses and collaborators of justice involved in cases of serious crime. The definition of a “serious crime” for the purposes of the Witness Protection Law has a different scope than the jurisdiction of the Courts for Serious Crimes.⁴⁹⁹ This means that cases involving persons under protection can be tried by the various district courts but also that witness protection measures are not available for all persons involved in trials at the Serious Crimes Courts. In the majority of cases, however, persons who are eligible for protection under the Witness Protection Law, i.e., protected witnesses⁵⁰⁰ and collaborators of justice, will be involved in cases tried by the Courts for Serious Crimes (SCC).⁵⁰¹ See further the table below.

Scope of Witness Protection Law		Jurisdiction of Serious Crimes Courts	
Article CC	Offence	Article CC	Offence
73	Genocide	73	Genocide
74	Crimes against humanity	74	Crimes against humanity
75	War crimes	75	War crimes
79 a-ë	Intentional murder for reasons of special qualities of victim	79 c, ç	Only against public officials (c), informers, witnesses, victims and other litigating parties (ç)

⁴⁹⁸ Law no. 9205 dated 15 March 2004, On the Protection of Witnesses and Collaborators of Justice (Witness Protection Law) and the secondary legislation as published in Official Journal no. 61, 3 August 2005. The law is to a large extent based on the Lithuanian legislation; Republic of Lithuania, Law on the Protection from Criminal Influence of the Participants of the Criminal Proceedings and Clandestine Activities, Officers of the Law Enforcement and Justice Administration, Vilnius, 13 February 1996, No. I – 1202

⁴⁹⁹ First Instance Court for Serious Crimes and Court of Appeals for Serious Crimes (SCC; indicating both)

⁵⁰⁰ The terminology is slightly confusing as the Witness Protection Law defines a person towards whom special protection measures are applied as a “witness of justice”, while the title of the law refers to the “protection of witnesses” and CPC art. 361/a, refers to “protected witnesses”. Here the term “protected witness” is used.

⁵⁰¹ Witness Protection Law, art. 2 f), Criminal Procedure Code (CPC) article 75/a, and Law no. 9110, dated 24 July 2003, On the Organization and Functioning of the Courts for Serious Crimes (SCC Law), art. 5

Scope of Witness Protection Law		Jurisdiction of Serious Crimes Courts	
Article CC	Offence	Offence	Offence
89/a	Trade of transplants		
100	Sexual or homosexual intercourse with minors		
101	Sexual or homosexual intercourse, by force, with minors between 14-18 years		
109	Kidnapping or keeping a person hostage	109	Kidnapping or keeping a person hostage
		109/b	Coercion through threats or violence to hand over property
110/a	Trafficking in human beings	110/a	Trafficking in human beings
111	Hijacking planes, ships and other means	111	Hijacking planes, ships and other means
114/a	Exploitation for prostitution under aggravated circumstances		
114/b	Trafficking of women for prostitution	114/b	Trafficking of women for prostitution
128/b	Trafficking of children	128/b	Trafficking of children
208	Transferring territory		
209	Surrendering the army		
211	Provocation of war		
213	Handing over secret information		
219	Assassination	219	Assassination
220	Conspiracy	220	Conspiracy
221	Uprising	220	Conspiracy
222	Calls for taking on the arms or unlawful taking over of the command		
230	Terrorist acts	230	Terrorist acts
230/a	Financing of terrorism	230/a	Financing of terrorism
		230/b	Concealing funds and other property used to finance terrorism

VII. EFFICIENT TRIALS AND WITNESS ISSUES

Scope of Witness Protection Law		Jurisdiction of Serious Crimes Courts	
Article CC	Offence	Offence	Offence
231	Violent acts against property	231	Violent acts against property
232	Delivering dangerous substances	232	Delivering dangerous substances
233	Creating armed gangs	233	Creating armed gangs
234	Producing military weapons	234	Producing military weapons
		234/a	Terrorist Organizations
		234/b	Armed Gangs
278/a	Trafficking of arms and munitions	278/a	Trafficking of arms and munitions
283	Manufacturing and selling narcotics		
		283/a	Traffic of narcotics
284/a	Organizing and leading criminal organization	284/a	Organizing and leading criminal organization
284/c	Production and fabrication of narcotic and psychotropic substances		
284/ç	Production, commercialization and illegal use of precursors		
286	Inducing the use of drugs		
287	Laundering the products of criminal acts		
		287/a	Opening anonymous accounts
333	Criminal organisations	333	Criminal organisations
		333/a	Structured criminal groupings
334	Committing crimes by an armed gang and criminal organization	334	Committing crimes by an armed gang and criminal organization

Protected witnesses and collaborators of justice – In order to be defined as a protected witness or collaborator of justice, the witness or collaborator has to be involved in a case concerning a “serious crime” as defined in the Witness Protection Law. The testimony of the person must be of fundamental importance for the case or must serve to prevent other serious crimes, and the person must be in a “real, concrete and serious danger” and be willing to collaborate fully.⁵⁰² Special measures that can be applied are:

Change of identity, relocation within or outside the country, temporary protection of identity, information and documents, physical and/or technical protection measures, social rehabilitation, maintenance, change of work and temporary employment, financial aid, professional re-qualification, specialised legal assistance or other measures defined by law.⁵⁰³

Persons *close to* or *related to* a protected witness or justice collaborator can also benefit from the special protection measures. The law defines “close persons” as persons who are in a real, concrete or serious danger because of their kinship relations based on blood or marriage with a protected witness or collaborator of justice, while “related persons” are defined as persons who, due to the nature of their concrete relationship with the protected witness or collaborator of justice are in a real, concrete or seriously dangerous situation.⁵⁰⁴

At trial, protected witnesses and justice collaborators can be heard under another/fictive identity, through special means for voice deformation or at a distance via audiovisual link.⁵⁰⁵

Witnesses at the SCC – Apart from the measures reserved for protected witnesses and justice collaborators, the SCC may permit the questioning of *any witness* [before the SCC] in the presence of but without visual contact with the defendant and the defence lawyer or without revealing the identity of the witness to the defendant and the defence lawyer.⁵⁰⁶ The SCC also has a wider margin than other courts to hold closed hearings, not least when the security of *any* participant is at stake.⁵⁰⁷ The use of anonymous witnesses should, however, be limited as this has serious implications for the possibility for the defendant effectively to challenge the statement of a witness. The European Court has found that anonymous witness statements cannot be used as sufficient evidence to found a conviction and that when anonymous witnesses are used, the handicap this causes the defence has to be counterbalanced by the procedures followed by the judicial authorities.⁵⁰⁸

⁵⁰² Witness Protection Law, art. 8 & 9

⁵⁰³ Witness Protection Law, art. 10

⁵⁰⁴ Witness Protection Law, art. 2, para. c, ç, and art. 9

⁵⁰⁵ Witness Protection Law, art. 10 para. 1 d), CPC art. 361/a and SCC Law art. 8 c

⁵⁰⁶ For this article to be effective, it has to be assumed that the purpose is to keep the identity of the witness secret to anyone, not just the defendant and her/his defence attorney, thus allowing testimony by anonymous witnesses

⁵⁰⁷ SCC Law art. 7

⁵⁰⁸ *Kostovski v. the Netherlands*, 20 November 1989, para. 43, 44, see also *Doorson v. the Netherlands*, 26 March 1996, para. 71 et seq.

Other witnesses – The fact that a witness does not qualify for measures under the Witness Protection Law, or is not heard at the SCC, does not mean that there cannot be a threat, even a severe one, against the witness. Furthermore, as has been pointed out above, in some cases, in particular concerning domestic or sexual violence, it might be very difficult for the witness to speak freely in the presence of the defendant and/or other persons. It is therefore necessary to take a comprehensive look at what measures can be taken in different cases and what can be done to improve the situation without compromising the defence rights. For witnesses who are neither protected witnesses nor testify as the SCC, ordinary rules for witness hearings apply. That is, as a general rule, the witness has to appear at a public hearing, where her/his identity and address is revealed, and be confronted with the defendant and defence attorney.

There are, under the present legal framework, a number of rules that can be used in order to avoid witnesses being influenced or otherwise intimidated. These rules apply to any witness in criminal cases.⁵⁰⁹ Thus, where there are *reasonable* grounds to believe that the person may be subject to violence, threats or offers of benefits in order not to testify or to give false testimony, evidence may be *secured* during the pre-trial investigation, which means the witness will not have to appear at trial and that there is therefore less incentive to influence the witness.⁵¹⁰ The hearing is carried out in the compulsory presence of the defence lawyer and the defendant has the right to be present (the defendant could probably be excluded without substantive infringement of defence rights).⁵¹¹ A reason to hold a criminal hearing *in camera*, i.e., a hearing excluding the public and media, is to protect witnesses or the defendant in criminal cases.⁵¹² In civil cases *in camera* hearings can be held under special circumstances when the interest of justice so requires.⁵¹³

In criminal cases, where it is *absolutely impossible* for the witness to appear, the court may also, upon the request of the parties, decide to examine a witness or expert where he/she resides. This hearing is closed to the public and the defendant is represented by her/his defence lawyer, but may be allowed to participate in person.⁵¹⁴ Regarding the notion of *absolute impossibility*, the strong wording seem to indicate that this provision is only applicable when a witness due to serious illness or other compelling reasons is unable to appear. In the Commentary to the CPC, it is, however, only explained that when the witness fails to appear for *justified reasons*, the hearing may be held where he/she is located.⁵¹⁵ It could therefore be argued that when the security of a witness is threatened, without the witness being eligible for measures under the Witness Protection Law, this provision could be applied, in which case the CPC could

⁵⁰⁹ For civil cases see, CivPC art. 292

⁵¹⁰ CPC art. 316

⁵¹¹ CPC 321 & 322

⁵¹² CPC art. 340

⁵¹³ Code of Civil Procedure (CivPC), art. 173 dh)

⁵¹⁴ CPC art. 364

⁵¹⁵ Criminal Procedure Commentary; Halim Islami, Artan Hoxha and Ilir Panda, Tirana 2003, p. 489

be amended to request that the defendant be excluded where appropriate. Furthermore, in criminal cases the court can remove from the courtroom any person hindering the normal performance of a hearing.⁵¹⁶ In civil cases witnesses and experts may, due to illness or other particular reasons, be questioned outside the court but in the presence of the parties or their representatives.⁵¹⁷

There is also the rather ambiguous article 361, section 7, of the CPC which provides that “[t]he witness may be interrogated at a distance, in the country or abroad, through audiovisual connection, in compliance with rules stipulated in international agreements and provisions of this Code. A person authorized by the Court remains at the witness’s location, confirms her/his identity, and ensures the correct process of interrogation and of the implementation of protective measures. These actions are shown in a report.”

While this provision could be interpreted as being applicable to any witness, the reference to international agreements and [other] provisions of the code might be an indication that it is only applicable to certain categories of witnesses. Thus, e.g., the Palermo Convention,⁵¹⁸ which is applicable to transnational organized crime and to which Albania is a party, requests states party to provide evidentiary rules to permit witness/victim testimony to be given in a manner that ensures the safety of the witness/victim, such as permitting testimony to be given through video links or other adequate means.⁵¹⁹ Furthermore, article 361/a, which was adopted by the same law as section 7 of article 361,⁵²⁰ provides that “[w]hen technical means are available, the court may determine that the interrogation will be conducted at a distance, via audiovisual connection according to the rules stipulated in article 361, paragraph 7.” In particular, this provision and its reference to article 361, section 7, is a rather strong indication that the measures mentioned in article 361, section 7, are only intended for protected witnesses and collaborators of justice. On the other hand, considering that article 361, section 7, does not contain any limitations or conditions for its application, it should be argued that this provision is applicable to any witness when there are security concerns.

Finally it is a criminal offence to influence, by threat, violence or by offering benefits, witnesses or victims whereas the intentional murder of a witness, victim or litigating party, is considered particularly serious.⁵²¹

Juveniles – Under Albanian legislation there are no limitations on calling juveniles as witnesses, but witnesses up to 14 years cannot take the witness oath.⁵²² The questioning

⁵¹⁶ CPC art. 341

⁵¹⁷ CivPC art. 236

⁵¹⁸ United Nations Convention against Transnational Organized Crime (Palermo Convention) adopted 12-15 December 2000

⁵¹⁹ Palermo Convention, article 24, paragraphs 2 b and 4, see also article 18, paragraph 18

⁵²⁰ Law no. 9276, dated 16 September 2004

⁵²¹ CC art. 79, 311, 312 and 312/a

⁵²² CPC art. 155, 360

VII. EFFICIENT TRIALS AND WITNESS ISSUES

of juveniles may be performed by the presiding judge, who may also be assisted by a member of the juvenile's family or by an expert on children's education.⁵²³ Other than this, no special rules apply.

See the table below for an overview of the various measures that can be taken in order to protect witnesses within the Albanian justice system.

Type of witness	Measure	Conditions to apply	Article/s
Any witness	Securing of evidence during the pre-trial investigation. Defence lawyer has to be present, defendant has the right to participate	Grounded reasons to believe that witness may be subject to violence, threat or be offered benefits not to testify or give false testimony	CPC 316
Any witness	In camera hearing (only public and media excluded)	Necessary to protect witness/s	CPC 340, CivPC 173 dh)
Any witness	Hearing where the witness is located/resides. In camera hearing where defence counsel has to be present and the defendant "may" be present.	"Absolute impossibility", illness or other particular reasons	CPC 364, CivPC 236
Any witness	Expulsion of persons intimidating a witness	Hinders the normal performance of hearing	CPC 341
Any witness	It is a criminal offence to influence a witness	Action directed against the person in her/his capacity as a witness	CC 79, 311, 312 and 312/a
Witness at SCC	Questioning of witness in the presence but without visual contact with defendant	No conditions mentioned in the law, but purpose is to protect witness	SCC Law 8 a)
Witness at SCC	Questioning of witness without revealing the identity of the witness (anonymous witness)	No conditions mentioned in the law, but purpose is to protect witness	SCC Law 8 b)
Protected witnesses and justice collaborators at trial	Questioning of witness under another/fictive identity	That the person has been defined as a protected witness or justice collaborator	Witness Protection Law 10, 1 d), CPC 361/a and SCC Law 8 c

⁵²³ CPC art. 361 para. 5

Type of witness	Measure	Conditions to apply	Article/s
Protected witnesses and justice collaborators at trial	Questioning of witness through special means of voice deformation	That the person has been defined as a protected witness or justice collaborator	Witness Protection Law, 10, 1 d), CPC 361/a and SCC Law 8 c
Protected witnesses and justice collaborators at trial	Questioning of witness at a distance via audiovisual link	That the person has been defined as a protected witness or justice collaborator	Witness Protection Law, 10, 1 d), CPC 361/a and SCC Law 8 c
Type of witness	Measure	Conditions to apply	Article/s
Protected witnesses and justice collaborators	Change of identity, relocation within or without the country, temporary protection of identify, information and documents, physical and/or technical protection measures, social rehabilitation, maintenance, change of work and temporary employment, financial aid, professional re-qualification, specialised legal assistance or other measures defined by law.	The testimony of the person must be of fundamental importance for the case at hand or to prevent other serious crimes and the person must be in a real, concrete and serious situation and be willing to collaborate fully.	Witness Protection Law 8 and 9

Victims of trafficking – Apart from the measures outlined above, there are regional programs for temporary residence permits for victims of trafficking. Albania has committed itself to participating in this program and amendments to the Law on Foreigners have been suggested, but as of yet not adopted.⁵²⁴ The rationale behind these programs is to enable victims of trafficking to act as witnesses during judicial proceedings against offenders.⁵²⁵ In this respect, shelters for victims of trafficking play an essential part.⁵²⁶

⁵²⁴ Law No. 8492, dated August 1999, “On Foreigners”; see also the Stability Pact for South Eastern Europe (Task Force on Trafficking in Human Beings), Statement on Commitments – Legalisation of the Status of Trafficked Persons, Tirana, 11 December 2002

⁵²⁵ Council of Europe Recommendation R(2000)11 on Action against Trafficking in Human Beings for the Purpose of Sexual Exploitation (19 May 2000), Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation (26 April 1997)

⁵²⁶ See OSCE Ministerial Council Decision No. 1, Enhancing the OSCE’s Efforts to Combat Trafficking in Human Beings (28 November 2000)

Concluding remarks

While the Witness Protection Law and its secondary legislation certainly represent a significant step forward, much remains to be done to ensure the security of other witnesses and to increase the credibility of witness testimonies in Albania. Indeed, the special measures provided in the Witness Protection Law are expensive and, as it is the case with similar legislation in other countries, the scope of the law is limited.⁵²⁷ Bearing this in mind, below are listed some concrete initiatives that, if implemented, could contribute to strengthening the cooperation of witnesses with the courts while at the same time guaranteeing them protection where necessary.

A particular problem for many witnesses are difficulties to find transportation and costs associated with travel to court. An obvious way to improve this situation would be to cover travel expenses for witnesses coming to testify. This might also have an effect on witnesses' willingness to appear in court. At the moment, this is regulated only for witnesses in civil proceedings, where the party requesting to hear a witness is obliged to cover the witness's costs.⁵²⁸ In criminal cases, at best the police brings the witness to court.

⁵²⁷ Report on Witness Protection (Best Practice Survey) – To prevent witnesses from becoming victims; PC-CO (1999) 8 REV, adopted by Committee PC-CO at its Third plenary meeting (Strasbourg, 15-17 February 1999).

According to a report on Witness Protection prepared by the Council of Europe in 1999, covering three member countries, the number of witnesses admitted to their respective protection programmes varied from two to seven per million inhabitants per year, and the average number of relatives accompanying a witness was two to three.

⁵²⁸ CivPC art. 105, 105/a, 105/b and 106

Recommendations

1. A comprehensive study on the situation of witnesses coming to testify in court and on the measures available to protect witnesses of different categories should be conducted
2. The legislation concerning witnesses should be reviewed in order to ensure that it is clear and coherent, and that the different categories of witnesses receive an adequate level of protection without infringing the rights of the defence
3. A handbook on witness issues should be considered
4. Each court should appoint a person who could act as a focal point for witnesses called to testify in court
 - o The witness focal point should be trained on witness protection issues and protective/security measures available for witnesses of different categories
5. Each court should have a separate space for witnesses coming to testify in court
6. Summonses to witnesses should contain information regarding what will happen in court and whom to contact in case of security concerns or other questions
7. The possibility to set up witness support programs should be considered
8. Courts with internet pages should provide information particular information directed to witnesses or the Ministry of Justice could provide information relevant for witnesses called to testify in court
9. Public awareness campaigns directed towards the general public should be undertaken in order to increase the role and purpose of witnesses
10. Media should be trained/sensitized on witness issues in order to respect the integrity and security of witnesses

Pre-trial detention Annex 1

Questionnaire for the Detention Centre Authority & Description of Detention Facility

1. Detention facility:
2. Is the facility for males, females or minors?
3. Name of Director:
4. Date/s of visit/s:
5. Name of interviewer:
6. What is the maximum capacity of the detention facility? How many detainees are there at present?
7. How many cells? What is the size of the cells? How many detainees are in each cell?
8. If the facility is mainly for adult males, are there women or juveniles kept as well?
If, yes, how many women/juveniles?
9. If there are juveniles, are they separated from adults? If they are not, how are they kept/with whom do they share the cells?
10. If there are women, are they separated from males?
11. Are there convicted prisoners? If yes, how many and when where they sentenced?
12. Does the detainee have a possibility to be outside and do exercise; where and how often?
13. Does the detainees have access to adequate medical facilities?
14. What are the sanitary facilities and how often are the inmates allowed to take a shower?
15. What are the conditions for family visits (when, how often, how long, where)?
16. What are the conditions for visits by defence counsels (e.g. only weekdays or certain hours, how often, how long, where, do they need authorization by the prosecutor)?
17. After making a tour of the detention site, please describe the situation of the sanitary facilities, hygienic conditions of the sites, airing room, meeting rooms, etc.
18. Any other comments

Pre-trial detention Annex 2

Questionnaire for Detainees

Note: The questionnaire consists of some 65 questions for detainees, some of which will not be applicable to the case at hand. However, if a question is not applicable, note this with a **n/a**, rather than leaving the space blank. In order to facilitate the interview and to avoid having to pose 62 questions to the detainee, please familiarise yourself with the questionnaire and the “Detention Issues memorandum” before doing any interviews. In particular in relation to minors, try to pose the questions in simple and clear language.

Important!

Before you start the interview, inform the person that participation in the interview is absolutely voluntary and that any information given will be kept confidential. Ask whether he/she wants to participate. Also inform the person about the purpose of the Fair Trial Development Project, that you cannot interfere in the individual case and that you are not in a position to discuss whether the person is guilty or not.

General information

1. Date of interview
2. Name of FS assistant/interviewer
3. Name of defendant (optional):
4. Gender:
5. Date of Birth: Minor:
6. Minority (e.g. Greek, Roma etc):
7. Residence:
8. Place of detention:
9. Defence counsel (name):

Case Information

10. Special Classification of the Case; to be determined by the interviewer (e.g. domestic violence, honour crime, corruption, abuse of duty, politically motivated crime, blood feud, electoral issues, mentally ill or juvenile defendant):
11. Offence Charged/Under Investigation (crime and relevant articles):
12. Has the defendant been convicted and sentenced before (if so for what and what was the sentence)?

Arrest

13. Date of arrest:
14. Describe the arrest (how did it happen)?
- III. Describe any maltreatment during the arrest or during the initial interrogation by the police?

15. Was the detainee provided a copy of a decision?
16. If no copy was provided, was the detainee provided reasons for the arrest (i.e. information regarding the charge)? Who provided the information; judicial police or prosecutor or both?
17. Was the detainee informed of the right to remain silent, the right to counsel and to notify her/his family of the arrest? Who gave this information; judicial police or prosecutor?
18. Was the detainee provided facilities to contact counsel and to notify their family of their arrest or notified that the authorities had contacted counsel and/ or such persons?
19. Has the detainee been transferred from one detention facility to another (if so, was the defendant's counsel, family and/or friends notified):
20. If the place of detention is not the same as the place of residence, what is the reason (e.g. offence committed in other district, security reasons, etc)

Search and medical examination

21. Was the detainee searched? If so, describe the search.
22. Was any physical evidence taken from the detainee (blood samples, bodily fluids)?
23. Was the detainee fingerprinted, photographed or were other identification records taken?
24. Was the detainee examined by a medical examiner? If so, when and by whom and what was the result of the examination? If the detainee was a female, are there concerns regarding how intimate examinations were conducted?

Initial interrogation and information to the detainee

25. Was the defendant questioned by the authorities (if so, how many times and by whom)? If not, go to question 33.
26. If questioned, was the defendant informed of his/her rights to counsel prior to questioning?
27. If questioned, was the defendant informed of his/her right to remain silent prior to questioning?
28. If questioned, was defence counsel present during the questioning?
29. If questioned and defence counsel was not present; did the defendant request that counsel be present during questioning?
30. If applicable, was the defendant informed of his/her right to an interpreter (if so, was an adequate interpreter provided)?
31. If questioned and if the defendant is a juvenile, was a parent or other appropriate adult present during questioning?
32. If questioned, describe the circumstances of the questioning (for example, coercion, what was the length of time of the questioning, number of breaks in the questioning etc...):

Access to defence counsel

33. When was defence counsel appointed for the detainee? Who appointed the defence attorney; the detainee, her/his family, the prosecutor/court?
34. When did the detainee first meet her/his defence attorney? How long did the meeting last, and was it held in private?

Detention hearings

35. When the defendant brought before a judicial authority (**Important!** how many hours/days after the arrest)? If the detainee has not seen a judge, please note that.
36. Was the defendant represented at the detention hearing(s) (by court-appointed or private counsel)?
37. Did the detainee have a chance to consult with her/his defence counsel prior to the hearing? How long did they consult? Was the consultation held in private; if not, who was present?
38. Where did the hearing take place (court room, judges office, other location)?
39. How long did the hearing take?
40. Did the defendant or her/his counsel present evidence in order to challenge the order for detention (if so, did the court hear the evidence)?
41. What were the reasons for the detention (risk of escape, risk to destroy evidence, risk to commit another crime)?
42. Was the defendant informed of his/her right to appeal his/her detention (if so, was an appeal filed)?
43. Has there been any additional hearing(s) in court where the detainee was present (e.g. appeals hearing or other)?

Further regarding defence counsel

44. Is the defendant able to initiate contact with counsel by mail, telephone or through family or prison authorities (provide any reasons for restriction on contact)?
45. How often (weekly, monthly) and how many times has the detainee met her/his defence counsel?
46. Is the detainee in general able to communicate privately with counsel (identify any restrictions on private communications and other persons present during the communications)? Where do the consultations take place?
47. Are any other restrictions placed upon meetings with counsel (e.g. no visits during weekends or on lengths of consultations)?
48. Note any other forms of communication with counsel (written or telephone):
49. Is counsel representing co-defendant(s) (note any conflict of interest issues)?
50. Note the defendant's assessment of his/her defence counsel (conflict of interest concerns, appropriate representation of defendant's case, etc...):
51. How much is counsel charging (note any cases where court appointed counsel is also requesting additional payments)?

Investigation

52. Apart from the detention hearing/s, how many times has the defendant been interrogated by the police or prosecutor?
53. Was defence counsel present at each hearing? If not, when and why was defence counsel not present?
54. Has the defendant participated in any other investigative actions (e.g. identifications, examination of crime scenes or objects etc)?
55. Was defence counsel present?
56. Note any long period of inactivity on the part of the authorities or defence counsel and the reasons (has there been weeks or months without anything happening)?

Defendants understanding of the proceedings

57. Language of the proceedings (if not in Albanian):
58. In applicable, has the defendant been provided with an interpreter (if required) and is the defendant satisfied with the translation of the proceedings and documents (for example, was the defendant provided with a copy of his/her statement in a language they understood):

Conditions of detention and treatment

59. How often does the detainee receive family or other visits (e.g. by a guardian or social worker if the detainee is a juvenile)? How long are the visits and where do they take place (note any restrictions placed on family visits)?
60. Has the detainee experienced any violence, threats or other forms of maltreatment by the police or staff at the detention centre (describe)?
61. Are juveniles and adult detainees separated or kept together? If they are kept together, how are the relationships?
62. Does the detainee have a possibility to be outside and do exercise; where and how often?
63. Does the detainee have access to adequate medical facilities (state any special concerns such as mental illness etc...)
63. What is the detainees opinion regarding the detention facilities (food physical conditions etc)?

Concluding remarks

64. Considering the above, indicate any concerns, breaches of law or international conventions, such as ECHR (information to defendant, family members, access to counsel, time periods etc.):

Pre-trial detention Annex 3

The table below provides information collected from 10 court decisions regarding detention on remand. It should be noted, however, that the fact that something has been discussed does not mean it has been discussed *satisfactorily*.

No	Case ⁵²⁹	Arrest ⁵³⁰	Facts ⁵³¹	1. Reason. suspicion criteria discussed?	2. Specific criteria discussed ⁵³² ?	3. Proportionality criteria discussed?	4. Necessity criteria discussed?	Other reasons	
	Offence CC							Comments	
1.	Durrës No. 82, 3/2-03	Flagrancy	Yes	Yes	No	No	Dangerousness of crime	Prosecutor needs more evidence	Connected to no. 2
	114/b ⁵³³							Connected to	
2.	Durrës No. 86, 4/2 -03	Flagrancy*	Yes	Yes	No	Grave offence	No	Further investigation needed	Connected to no. 1
	114/b/2 & 25 ⁵³⁴							Connected to	
3.	Durrës No. 112, 20/2-03	Flagrancy*	Yes	Yes	- Escape - Crime	Crime has grave sanctions	No	Crime & arrest not same day	
	114/a/5, 84 ⁵³⁵								
4.	Durrës No. 137, 3/3-03	Court order	No	Yes	No	No	Social danger of defendants		Two suspects
	114/a								

⁵²⁹ All decisions are from first instance courts; no. 9 is from SCC. The cases will be described as follows: Name of court, decision number and date of decision

⁵³⁰ Was the arrest carried out after a decision of a court, at the order of the prosecutor or was it carried out at the initiative of the police, i.e., in flagrancy

⁵³¹ Are the facts, i.e., the crime, which led to the arrest described

⁵³² That is, risk of destroying evidence, escape or further criminality, CPC art. 228 section 3

⁵³³ Trafficking of women for prostitution (114/b)

⁵³⁴ Trafficking of women for prostitution in collusion with others

⁵³⁵ Exploitation of prostitution under aggravated circumstances (114/a) and threat (84)

No	Case ⁵³⁶ Offence CC	Arrest	Facts	1. Reason. suspicion criteria discussed?	2. Specific criteria discussed ⁵³⁷ ?	3. Proportionality criteria discussed?	4. Necessity criteria discussed?	Other reasons	
								Comments	
5.	Durrës No. 221, 3/4-03	Flagrancy	Yes	Yes	- Evidence - Escape	Sanctions	Dangerous- ness of act		
	278/3 & 283 ⁵³⁸								
6.	Durrës No 226, 6/4-03	Inter- national order	Yes	Yes	No	No	Social dangerous- ness of act	The need for investigation while defendants detained	
	333, 34, 110/ a/2, 128/b/2 & 189/1 ⁵³⁹							Five defend-ants	
7.	Gjirokastra No. 2, 4/1-04	Flagrancy	No	No	No	No		Arrest considered illegal	
	260 ⁵⁴⁰							The two suspects released	

⁵³⁶ All decisions are from first instance courts; no. 9 is from SCC. The cases will be described as follows: Name of court, decision number and date of decision

⁵³⁷ That is, risk of destroying evidence, escape or further criminality, CPC art. 228 section 3

⁵³⁸ Illegal weapons possession (278/3) and manufacturing and selling narcotics (283)

⁵³⁹ Creating and armed gang or criminal organization (333), committing crimes by an armed gang or criminal organization (334), trafficking of human beings in collusion (110/a), trafficking of children in collusion (128/b) and falsifying of identity cards, passports and visas (189 section 1)

⁵⁴⁰ Receiving a bribe (260)

No	Case ⁵⁴¹	Arrest	Facts	1. Reason. suspicion criteria discussed?	2. Specific criteria discussed ⁵⁴² ?	3. Proportionality criteria discussed?	4. Necessity criteria discussed?	Other reasons	
	Offence CC							Comments	
8.	Durrës No 309, 24/6-05	Flagrancy	Yes	Yes	Escape	Severe punishment Serious-ness of fact	No	Tense situation between families & commonness of crime	
	88 ⁵⁴³							Suspect suffered from epilepsy and died in detention	
9.	SCC No 114, 9/9-05	Court order	Yes	Yes	No	No	No		
	333/a, 172, 28/ ⁵⁴⁴							Arrest of Leonard Koka	
10.	Gjirokastra No 40, 5/6-05	Flagrancy	Yes	No	No	No	No		
	283/ ⁵⁴⁵							Two defendants, an adult and a minor	

⁵⁴¹ All decisions are from first instance courts; no. 9 is from SCC. The cases will be described as follows: Name of court, decision number and date of decision

⁵⁴² That is, risk of destroying evidence, escape or further criminality, CPC art. 228 section 3

⁵⁴³ Serious intentional injury (88)

⁵⁴⁴ Structured criminal grouping (333/a), smuggling goods to which excise duty is applied (172), and armed gang and criminal organization (28)

⁵⁴⁵ Manufacturing and selling narcotics

*From decisions 2 and 3 it is unclear whether the arrest was made in *flagrancy*, but from the context it appears that the arrests are “considered” to have been made in *flagrancy*.

Pre-trial detention Annex 4

Information from the detention survey

- The information below represents the viewpoints and perceptions of those interviewed and not of the OSCE.
- The percentages relate only to the total number of detainees interviewed and not to the prison population as a whole.
- When a question could be answered with YES or NO, both replies are presented. When the added proportions of YES and NO answers do not equal 100% it is because the interviewee *did not know, was not sure or because the question was not applicable*.

General information
• 71 detainees were interviewed • 21% (15 detainees) were minors • 3% (2 detainees) were women • 4% (3 detainees) were foreigners; 1 Italian & 2 Kosovars
Criminal record
• 72% (51 detainees) had not been sentenced before • 28% (20 detainees) had been sentenced before
Moment of the arrest
• 49% (35 detainees) stated that they had experienced maltreatment by the police at the moment they were arrested or when they were interrogated ◦ Of those who stated that they had experienced maltreatment, 7 were minors • 51% (36 detainees) stated that there had <u>not</u> been any maltreatment at the moment of arrest or during the first interrogation • 37% (26 detainees) stated that they were provided with a copy of the decision to detain them on remand at the moment of the arrest ➤ It is not clear if this happened at the moment of arrest or when they were brought to police commissariats • 61% (43 detainees) stated that they were <u>not</u> provided with a copy of the decision • 32% (23 detainees) stated that they were informed about the reason for the arrest • 27% (19 detainees) stated that they were <u>neither</u> provided with a copy, <u>not</u> informed about the reason for the arrest • 70% (50 detainees) stated that they were informed about their right to remain silent • 28% (20 detainees) stated that they were <u>not</u> informed about their right to remain silent • 34% (24 detainees) stated that they were informed of their right to counsel • 63% (45 detainees) stated that they were <u>not</u> informed of their right to counsel • 28% (20 detainees) stated that they were informed of the right to notify their family • 51% (36 detainees) stated that they were <u>not</u> informed of the right to notify their family ➤ Only 24% (17 detainees) were informed of all their rights, i.e., to remain silent, to have counsel and to notify their family

• 21% (15 detainees) stated that they were provided facilities to contact defence counsel • 68% (48 detainees) stated that they were <u>not</u> provided facilities to contact defence counsel • 25% (18 detainees) stated that they were provided facilities to contact family members • 41% (29 detainees) stated that they were <u>not</u> provided facilities to contact family members ➤ 34% (24 detainees) were arrested at home or otherwise in the presence of members from their family ➤ 20% (14 detainees) stated that they were provided facilities to contact both defence counsel and their family
Transfer of the detainee from one place of detention to another
• 34% (24 detainees) stated that they were transferred from one detention facility to another ➤ In 50% of these cases, the family of the detainee was <u>not</u> notified about the transfer
Search and medical examination
• 89% (63 detainees) stated that they were searched after the arrest • 10% (7 detainees) stated that they were not searched after the arrest • 10% (7 detainees) stated that physical evidence (blood samples, bodily fluids, hair, etc.) was taken from them • 90% (64 detainees) stated that no physical evidence was taken from them • 92% (65 detainees) stated that they were fingerprinted • 90% (64 detainees) stated that they were photographed • 13% (9 detainees) stated that they were examined by a medical examiner • 87% (62 detainees) stated that they were not examined by a medical examiner Female detainees - 2 Both female detainees stated that all women who are detained on remand have to undergo a pregnancy test.⁵⁴⁶ f the two females interviewed, however, one refused to undergo the test and was not forced to do it
Initial interrogation and information to the detainee
• 79% (56 detainees) stated that they had been interrogated by the police • 18% (13 detainees) stated that they had <u>not</u> been interrogated by the police • 35% (25 detainees) stated that they were informed of the right to counsel prior to the interrogation • 49% (35 detainees) stated that they were <u>not</u> informed of the right to counsel prior to interrogation • 21% (15 detainees) stated that they were informed of the right to remain silent prior to interrogation • 62% (44 detainees) stated that they were <u>not</u> informed of the right to remain silent prior to interrogation

⁵⁴⁶ According to CPC article 230, section 2, pregnant women cannot be detained on remand. This, however, is a right accorded to women and unless a woman claims she is pregnant, women in general should not be required to undergo a pregnancy test

- 14% (10 detainees) stated that defence counsel was present during the interrogation
- **70% (50 detainees) stated that defence counsel was not present during the interrogation**
- 25% (18 detainees) requested that counsel should be present during the interrogation
- **48% (34 detainees) stated that they were not aware that they had the right to counsel**

Minors - 14

- 3 stated that they had a parent or other appropriate adults present during the questioning
- **11 stated that they did not have a parent or other appropriate adults present during the questioning**

Access to defence counsel(DC)

- 52% (37 detainees) stated that they met with their DC before the detention hearing.
- 41% (29 detainees) stated that they first met their DC at/during the detention hearing.
- 49% (35 detainees) stated that the first meeting with their DC was held in private
- **39% (28 detainees) stated that the first meeting with their DC was not held in private**
- 46% (33 detainees) stated that they were represented by a privately appointed DC
- 34% (24 detainees) stated that they were represented by a state appointed DC
- 73% (52 detainees) stated that they were able to initiate contact with DC
- 17% (12 detainees) stated that they were not able to initiate contact with DC
- 66% (47 detainees) stated that in general they were able to have confidential communication with their DC
- **18% (13 detainees) stated that in general they were not able to have confidential communication with their DC**
- 25% (18 detainees) stated that there were restrictions placed upon their meetings with DC
- 70% (50 detainees) stated that there were no restrictions placed upon their meetings with DC
 - Those who referred to restrictions said that meetings could take place weekdays between 9.00 and 15.00 and could not last longer than 10-15 minutes. Considering that detainees were not asked whether meetings could take place outside those hours, it is likely that those who stated that there were no restrictions did so to indicate that there were no other restrictions
- 18% (13 detainees) stated that one or more co-defendants are represented by the same defence DC
- 45% (32 detainees) stated that their DC was present at each hearing
- 32% (23 detainees) stated that their DC was not present at each hearing

Detention hearing

- 93% (66 detainees) stated that they had seen a judge
- 13% (9 detainees) stated that they had been brought in front of a judge within two days [48 hours]of the arrest
- 59% (42 detainees) stated that they had been brought in front of a judge within three days [72 hours]of arrest
- 17% (12 detainees) stated that they had been brought in front of a judge later than three days [72 hours] from the arrest

- 4% (3 detainees) stated that they had never seen a judge
 - 2 were captured after they had been tried and sentenced in absentia
 - 1 had escaped from prison in 1997 where was serving the sentence and had been re-captured
- 7% (5 detainees) stated that this was not applicable to them
 - 2 detainees could not remember when they were brought in front of a judge
 - 3 had been tried at their own recognizance [not detained on remand] and were serving their sentence after a final court decision
 - **76 % (54 detainees) stated that they were not brought in front of a judge within the 48-hour time limit provided by the Constitution**
- 80% (57 detainees) stated that the detention hearing took place in the courtroom
- 11% (8 detainees) stated that the hearing took place in the office of the judge
- 77% (55 detainees) stated that they had been represented by DC at the detention hearing
- 13% (9 detainees) stated that they had not been represented by DC at the detention hearing
- **39% (28 detainees) stated that they were able to consult the DC prior to the detention hearing**
 - Of these 17 detainees stated that they could consult their DC in private
 - 11 detainees stated that they had to consult their DC in the presence of other, i.e., in the courtroom
- 48% (34 detainees) stated that their DC challenged the remand order
- 31% (22 detainees) stated that their defence counsel did not challenge the remand order
- **8% (6 detainees) stated that the reasons for detaining them on remand had been mentioned when the decision was rendered after the detention hearing**
 - 4 detainees stated that the risk that they would commit further crimes was mentioned as the reason for the detention on remand
 - 1 detainee stated that the risk of escape was mentioned as the reason for the detention on remand
 - 1 detainee stated that the risk to destroy evidence was mentioned as the reason for the detention on remand
- 45% (32 detainees) stated that they had been informed of the right to appeal the remand decision
- **32% (23 detainees) stated that they had not been informed of the right to appeal the remand decision**
- 28% (20 detainees) stated that they had appealed the remand decision

Investigation

- 8% (6 detainees) stated that they had participated in an investigative action (e.g., house search, identification, witness hearing)
 - DC was present only in 1 case
- 77% (55 detainees) stated that they had not participated in an investigative action

Defendant's understanding of the proceedings
➤ The Italian detainee was provided with an interpreter and was satisfied with the translation of the proceedings and documents ➤ A Czech citizen detained in Gjirokastra, did not speak Albanian or English, and could not be interviewed due to the unavailability of anyone who could translate though the interviewers would have been able to return at any convenient time, had a translator been available. This implies that this person could not understand the proceedings
Conditions of detention and treatment
• 27% (19 detainees) stated that juveniles and adult detainees were kept together • 35% (25 detainees) stated that juveniles and adult detainees were not kept together juveniles ➤ The “not applicable” category shows that 27 detainees (38%) were not aware of this or that no juveniles were detained at their detention facility • 100% (all detainees) stated that they had the possibility to be outside every day • 31% (22 detainees) stated that they had access to adequate medical facilities • 52% (37 detainees) stated that they did not have access to adequate medical facilities • 17% (12 detainees) stated that they did not have any health concerns and that they therefore were not aware if medical facilities were adequate or not

Pre-trial detention Annex 4

Time between arrest and the moment the defendant saw a judge

				4%	
			17%		
	13%	59%			7%
Number of detainees	9	42	12	3	5
The detainee was brought in front of a judge within/after:	48 hours 2 days	72 hours 3 days	Later than 3 days	Never seen a judge	N/A

Pre-trial detention Annex 5

The tables below provide information collected from a number of prosecution files.

Total number of files consulted: 59

Number of cases where defendant detained on remand: 36

Number of cases where the defendant was not detained on remand: 23

Periods of inactivity	Detained on remand	Not detained	Total number of cases
No inactivity ⁵⁴⁷	5	3	8
2 – 4 weeks	2	4	6
1 – 2 months	5	6	11
2 – 3 months	6	4	10
3 – 4 months	6	0	6
4 – 5 months	3	3	6
5 – 6 months	2	0	2
6 – 7 months	4	0	4
7 – 8 months	1	0	1
8 – 9 months	0	0	0
9 – 10 months	0	0	0
10 – 11 months	0	1	1
11 months – 1 year	0	1	1
More than 1 year	2	1	3

Average period of inactivity in cases where the defendant was detained on remand	3,5 months
Average period of inactivity in cases where the defendant was not detained on remand	2,5 months
Average no. of actions ⁵⁴⁸ undertaken; all files	12
Average no. of actions in cases where the defendant was detained on remand	11
Average no. of actions in cases where the defendant was not detained on remand	13
Average no. of actions undertaken; Tirana Prosecution Office files	25
Average no. of actions undertaken; all, except Tirana Prosecution Office, files	9

⁵⁴⁷ The no inactivity category indicates cases where there has been no inactivity or where the total period of inactivity is not more than up to two weeks

⁵⁴⁸ Actions; any investigative actions, such as arrest of the defendant, interrogation of witnesses, house searches, sequestration of evidence, requests for expertise or for information from other authorities or decisions by the prosecution office

Pre-trial detention Annex 5



Right to an effective defence *Annex 1*

Questionnaire for Defence Counsel

I. General Information

1. Name **(optional!)**:
2. Years of practice:
3. District of practice:
4. Do you take on court appointed or only private cases?
5. Who normally appoints the lawyer (defendant or family)?
6. How much do you charge per hour or per case?
7. Is the charge dependent on the outcome of the case?
8. At what stage are you normally appointed (immediately upon arrest or later)?
9. Does it happen that you represent more than one defendant in a case?
10. How do you ensure that there is no conflict of interest?
11. When does the first personal contact with the detained client normally happen and how (telephone, personal meeting)?
12. Are you always present at the initial interrogation with the detainee?
13. Do you consult with your client prior to the detention hearing?
14. Where does this consultation take place (detention centre or at the court)?
15. What do you have to do to get access to your client in police custody or at the detention centre (e.g. permission from prosecutor or the court)?
16. Does it happen that your are denied access? If so what are the reasons given?
17. Are you able to have confidential communications with your client (identify any persons present during the communications and whether this was the result of a formal court order or whether counsel conducted group meetings with other defendants)?
18. Are any other restrictions placed upon meetings with clients (time restrictions)?
19. How long are the consultations normally?
20. Are you notified in advance of investigative actions?
21. Do you participate in other investigative actions, such as witness hearings, crime scene investigations, identifications etc.)?
22. How often/how many times before the main hearing do you normally meet your clients?
23. Do you get adequate time to familiarise yourself with the file before the main hearing?
24. Any other comments or concerns?

Right to an effective defence Annex 2

Information from the defence counsel survey

- 69 lawyers participated in the survey by completing the questionnaire
- The information represents the viewpoints and perceptions of those who participated in the survey and not of the OSCE
- The percentages relate only to the total number of defence lawyers who participated in the survey
- When a question could be answered with one or more set options (e.g., question 4: Do you take on court appointed or only private cases?) the question is divided into several questions e.g., 4a and 4b
- The option Y/N indicates that the respondent has answered in a way that can be interpreted as both YES and NO or as sometimes YES, sometimes No
- The option N/A stands for non-applicable
- The responses to questions 10, 16b, 18 and 22 were very varied and they are therefore represented separately in Annex 3
- For questions 11, 15 and 19 the responses were so disparate that there was no point in presenting them here

No.	Question	Yes	No	Y/N	N/A	Yes	No	Y/N	N/A
4a	Do you take on court appointed cases?	3	40	26	0	4%	58%	38%	0%
4b	Do you take on private cases?	40	3	26	0	58%	4%	38%	0%
5a	Who normally appoints the lawyer: the defendant?	12	23	33	1	17%	33%	48%	1%
5b	Who normally appoints the lawyer: the family?	23	12	33	1	33%	17%	48%	1%
6a	Fee according to time spent?	0	59	10	0	0%	86%	14%	0%
6b	Fee according to the case?	59	0	10	0	86%	0%	14%	0%
7	Is the fee dependent on the outcome of the case?	30	35	4	0	43%	51%	6%	0%

8a	Are you normally appointed immediately upon arrest?	33	25	10	1		48%	36%	14%	1%
No.	Question	Yes	No	Y/N	N/A		Yes	No	Y/N	N/A
9	Does it happen that you represent more than one defendant to a case?	43	25	1	0		62%	36%	1%	0%
12a	Are you always present at the initial interrogation with the detainee?	28	41	0	0		41%	59%	0%	0%
12b	Are you mostly present at the initial interrogation with the detainee?	33	36	0	0		48%	52%	0%	0%
12c	Are you some times present at the initial interrogation with the detainee?	4	65	0	0		6%	94%	0%	0%
12d	Are you rarely present at the initial interrogation with the detainee?	3	66	0	0		4%	96%	0%	0%
12e	Are you never present at the initial interrogation with the detainee?	1	68	0	0		1%	99%	0%	0%
13a	Do you always consult with your client prior to the detention hearing?	45	24	0	0		65%	35%	0%	0%
13b	Do you mostly consult with your client prior to the detention hearing?	18	51	0	0		26%	74%	0%	0%
13c	Do you some times consult with your client prior to the detention hearing?	2	67	0	0		3%	97%	0%	0%

13d	Do you rarely consult with your client prior to the detention hearing?	2	67	0	0	3%	97%	0%	0%
No.	Question	Yes	No	Y/N	N/A	Yes	No	Y/N	N/A
13e	Do you never consult with your client prior to the detention hearing?	2	67	0	0	3%	97%	0%	0%
14a	Where does this consultation take place: detention centre?	38	9	19	3	55%	13%	28%	4%
14b	Where does this consultation take place: at the court?	9	38	19	3	13%	55%	28%	4%
16a	Does it happen that you are denied access?	30	36	1	2	43%	52%	1%	3%
17a	Are you able to have confidential communications with your client?	60	4	2	3	87%	6%	3%	4%
18	Are any other restrictions placed upon meetings with clients (time restrictions)?	27	40	1	1	39%	58%	1%	1%
20	Are you notified in advance of investigative actions?	30	31	7	1	43%	45%	10%	1%
21a	Do you always participate in other investigative actions, i.e. witness hearings, crime scene investigations, etc.	5	64	0	0	7%	93%	0%	0%

21b	Do you mostly participate in other investigative actions, i.e. witness hearings, crime scene investigations, etc.	14	55	0	0	20%	80%	0%	0%
No.	Question	Yes	No	Y/N	N/A	Yes	No	Y/N	N/A
21c	Do you some times participate in other investigative actions, i.e. witness hearings, crime scene investigations, etc.	18	51	0	0	26%	74%	0%	0%
21d	Do you rarely participate in other investigative actions, i.e. witness hearings, crime scene investigations, etc.	13	56	0	0	19%	81%	0%	0%
21e	Do you never participate in other investigative actions, i.e. witness hearings, crime scene investigations, etc.	19	50	0	0	28%	72%	0%	0%
23	Do you get adequate time to familiarize yourself with the file before the main hearing?	55	10	4	0	80%	14%	6%	0%

Right to an effective defence Annex 3

Question 10: How do you assure that there's no conflict of interests?

Responses	No. of responses	Percentage
After consulting the file	13	19%
After discussing with the defendant	10	14%
After consulting the file and discussing with the defendant	6	9%
I follow the law	5	7%
It becomes clear during the pre-trial investigation	4	6%
It depends on how the defendants plead [guilty or not guilty]	3	4%
Depending on the case	1	1%
I consider the evidence	1	1%
After consulting and asking permission from the co-defendants	1	1%
N/A (DC have never represented co-defendants)	25	36%

Question 11: When does the first personal contact with the detained client normally happen and how (telephone, personal meeting)?

Responses	No. of responses	Percentage
During a personal meeting	38	55%
By telephone	1	-
During a personal meeting at the detention facility	10	14%
After the defendant has been informed about the charges	7	10%
After the arrest	6	7%
Some hours before the detention hearing	1	-
After the detention hearing	6	7%

Question 15: What do you have to do to get access to your client in police custody or at the detention centre (e.g. permission from prosecutor or the court)?

Responses	No. of responses	Percentage
Authorization from the prosecutor	37	54%
Authorization from the prosecutor and the court	2	3%
Power of attorney and authorization by the prosecution	6	7%
Power of attorney	3	4%
No permission, just license from the Chamber of Advocates	12	17%

Responses	No. of responses	Percentage
We are not allowed meetings	2	3%
N/A	2	3%

Question 16b: Why you are denied access to the arrested?

Responses	No. of responses	Percentage
For unlawful reasons	8	12%
Access is denied by police officers	5	7%
Access is denied during holidays/weekends	3	4%
Access is denied when the police is on alert	2	3%
Access is denied when the police is questioning the arrested	2	3%
Access is denied if you don't have authorization from the prosecution/court	2	3%
Access is denied because prisons staff and police officers are not familiar with the law	1	1%
Access is denied because you are not allowed to meet your client before the detention hearing	1	1%
Access is denied when it is considered that a lawyer might hinder the ongoing investigations	1	1%
Access is denied when there is unrest at the detention facility	1	1%
Access is denied when the meeting time with the client is over	1	1%
Access is denied after 15.00	1	1%
Access is denied until the defendant has been identified	1	1%
Access is denied for personal reasons	1	1%
N/A (DC always have access)	39	57%

Question 18: Are any other restrictions placed upon meetings with clients (time restrictions)?

Responses	No. of responses	Percentage
There are time restrictions	9	13%
Meetings can only take place between 08:30 and 13/14/15:00. After those hours as well as during weekends access is denied	8	12%
Sometimes there are time restrictions	3	4%
Meetings can not last longer than 30 minutes	2	3%

Responses	No. of responses	Percentage
We face difficulties with the police	2	3%
Access is denied during cleaning and meal times	1	1%
Access is denied when the police carries out different actions	1	1%
N/A (DC does not experience any restrictions)	43	62%

Question 19: How long are the consultations normally?

Responses	No. of responses	Percentage
0 – 15 min	7	10%
15-30 min	14	20%
30-45 min	3	4%
45-60 min	3	4%
30-60 min	14	20%
1-2 hours	5	7%
Depends on case	17	24%
No limitations	6	9%

Question 22: How many times you meet your client before the main hearing?

Responses	No. of responses	Percentage
Depends on the case	19	28%
Whenever I consider it necessary	15	22%
1-2 times	8	12%
Several times	8	12%
2-3 times	6	9%
3-4 times	4	6%
At least 1 time	2	3%
Once in 10 days	2	3%
Anytime the client asks	2	3%
5-6 times	1	1%
Once a week	1	1%
Depending on police permission	1	1%

Right to an effective defence Annex 4

Fees to state appointed lawyers Durrës <i>Chair of the District Court</i> Fees for state appointed lawyers are based only on the 1996 regulation. The Court is aware of the 2005 joint order, but the fees envisaged in this order are not feasible due to the very limited budget of the court. Lawyers are reluctant to accept to take on cases where they are appointed by the state. <i>Chair of the Durrës Chamber of Advocates</i> The Court applies the 1996 regulation. Defence lawyers prefer not to take on state-paid cases due to difficulties in getting paid. The Court delays the payment so much that many lawyers choose to give up on receiving payment. Gjirokastra <i>District Court Finance Office</i> The 1996 regulation and the 2006 Budget Office Instruction are used as a basis to calculate fees for state appointed lawyers. The 2005 joint order is not applied. Lawyers are paid in accordance with the 2006 instruction. <i>Members of Gjirokastra Chamber of Advocates</i> <u>Member 1</u> is hardly accepting court-appointed cases due to poor payment. Moreover the members of the Gjirokastra Chamber of Advocates have agreed not to accept state-appointed cases, as the 2005 joint order is not being applied by Gjirokastra district court. <u>Member 2</u> is accepting state-appointed cases. Until January 2006, this member was paid according to the 1996 regulation. Since February 2006, the member has been paid in accordance with the 2006 instruction. The member is paid without delay. According to this member the joint order was just signed “to satisfy the ego of the high officials, but with no possibility of being applied”. Korça <i>Chair of the District Court</i> Despite the 2005 joint order, the court only applies the 1996 regulation. Due to the limited budget, state-appointed lawyers are paid only 5,000 ALL per case. During 2005, state-appointed counsel were paid in 30 of a total of 80 cases. <i>Members of the Korça Chamber of Advocates</i> <u>Member 1</u> has been informed by the District Court that state-appointed counsel will be paid 5,000 ALL per case during 2006. Payment will be available only at the end of 2006.
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Member 2 states that at Kolonja District Court, fees for state-appointed counsel are calculated based on the 2005 joint order and paid at the end of each trial, whereas state-appointed counsel at Korça District Court are paid 5,000 ALL per case at the end of the year. The calculation is based upon the number of sessions in which the lawyer participated.

Kukës

Chancellor of the District Court

The 1996 regulation and the 2006 Budget Office Instruction are used as a basis for the calculation of fees for state-appointed lawyers. The court is rarely appointing defence counsel, but when this does happen, the lawyers are being paid 5,000 ALL per case.

Members of the Kukës Chamber of Advocates

Member 1: Fees are based on the 1996 regulation. For court-appointed cases, the member receives 3,000 ALL to represent a defendant accused of a crime and 2,000 ALL to represent a defendant accused of a criminal contravention. The member has not received the 2005 joint order.

Member 2: For court-appointed cases, the member is paid 1,000-3,000 ALL. The payment is always delayed, allegedly due to lack of funds. During 2005, the members was appointed 30 times by Kukës District Court, but was paid in only 10 cases. For prosecution-appointed cases and when the defendant is tried in absentia, the lawyers are not paid at all. The member is not aware of the 2005 joint order.

Shkodra

Acting Chair of the District Court

Payment to state-appointed counsel is based on the 2005 joint order but it may be that they do not receive the minimum outlined in the joint order. So far, however, there have been no complaints. Due to the fact portion of the court's budget being spent on per diem payments for judges' travel, fuel for the generator and telephone bills, there are limited funds for state-appointed counsel.

Member of the Shkodra Chamber of Advocates

The 2005 joint order is the basis for calculating fees for state-appointed counsel, but lawyers are not paid in accordance with the order. To be paid as a state-appointed counsel, a lawyer has to be registered for taxes, which only well-established lawyers are. Thus, less experienced lawyers take on state-appointed cases to gain experience and become known, but they are not paid at all.

Tirana

Chair of District Court⁵⁴⁹

Tariffs for state-appointed defence lawyers are based mainly on the 1996 regulation. After the conclusion of a case, the judge certifies the sum to be paid to the defence lawyer depending on the number of hearings and the type of case.

Vlora*District Court Finance Office*

The 1996 regulation and the 2006 Budget Office Instruction are used as a basis to calculate fees for state-appointed lawyers. The 2005 joint order would be difficult to implement. As a consequence of fees for state-appointed lawyers being budgeted as operational costs and of the reduced budget for state-appointed counsels, lawyers are paid only if there are funds left when all other operational costs have been paid. If they are paid, they receive 2,000 ALL per case. Thus, from 2004 to 2006, no more than 170,000 ALL have been spent to pay the defence lawyers working at Vlora DC.

Chair and member of the Vlora Chamber of Advocates

The fees state appointed counsels are paid are irregular and have been gradually reduced since 1999. In 1999 they were paid 5,000 ALL for up to three session, 1999-2000 they were paid 3,000 ALL for up to three session, from 2003 this was reduced to 2,000 ALL for up to two sessions and 1,000 if there was only one session. The calculations are based on the 1996 regulation. As of 2004, they are not paid at all and as a result, they are increasingly refusing to take on state-appointed cases.

Some further examples⁵⁵⁰

DC 3: When I am appointed by the Serious Crimes Prosecution, I am mostly not paid. The prosecution also orders payment per case, not per client. I am not aware how the calculations are made and the court does not explain how they calculate. Sometimes I am paid 3,000 ALL, sometimes 4,000 ALL and sometimes not more than 1,500 ALL. You cannot survive on these kinds of fees and everyone is asking for extra payment from the defendants when they are state-appointed. In order to facilitate things, we advise the defendants to tell the court that they lack financial means.

DC 4: When we are state-appointed, we should be paid in accordance with the tariffs approved by the Minister of Justice but we are in fact not paid in accordance with those tariffs.

DC 5: When we are appointed by the prosecutor, we are not paid at all, while when we are appointed by the courts we are paid with a one-year delay.

⁵⁴⁹ Letter from the chair of Tirana District Court, Albert Meça, 2 June 2006

⁵⁵⁰ Statement of DC 3 is from an interview on 29 March 2006 while the statements by DC 4 and 5 are citations from the defence counsel survey

Court decisions on domestic violence

No ⁵⁵¹	Offence CC	Private prose- cution	Evidence	Defen-dant pleadedguilty	Found guilty	Accele- rated trial => 1/3 red- uction	Sentence/ After red- uction Year (Y) Month (M) Day (D)	Mitigating Circumstances (M)
		Comp- laint						Aggravating circumstances (A)
								Comments (C)
1.	84 ⁵⁵² & 278/2 ⁵⁵³	No	Minutes (min.) of sequestering (seq.) of weapons; min. house inspection; technical expertise on weapon; Min. of arrest.	Yes	Yes	Yes	Imprisonment (Impr): 10 M/ 6 M, 20 D	M: Deep repentance; Social reasons related to defendants family that led to the crime.
								A: Crime committed using weapons.
2.	112/2	No	Statements by accused admitting crime; Min. of police complaint by victim; Min. crime scene investigation (CSI).	Yes	Yes	Yes	Fine ⁵⁵⁴ 60,000/ 40,000	M: Deep repentance.
								C: Legal definition changed from art. 84 to article 112

No	Offence CC	Private prose- cution	Evidence	Defen-dant pleaded guilty	Found guilty	Accele- rated trial => 1/3 red- uction	Sentence/ After red- uction Year (Y) Month (M) Day (D)	Mitigating Circumstances	
		Comp- laint						Aggravating circumstances (A)	Mitigating Circumstances (M)
								Comments (C)	
3.	76 ⁵⁵⁵ -22 ⁵⁵⁶	No	Statement of accused admitting crime; Min. CSI; Min. seq. evidence; Forensic expertise; Ballistic expertise.	Yes	Yes	Yes	Impr.: 8 Y/ Y, 4 M	M: Deep repentance; Defendant was drunk.	
4.	84	No	Statement of victim; Statement of witness.	No	Yes	No	Fine: 50,000	M: Defendant not sentenced before.	
5.	84	No	Testimony victim; Min. arrest flagrancy; Min. seq. evidence; Forensic expertise.	Yes	Yes	No	Fine: 50,000	M: Defendant was drunk.	

No	Offence CC	Private prose- cution		Evidence	Defen-dant pleadedguilty	Found guilty	Accele- rated trial => 1/3 red- uction	Sentence/ After red- uction Year (Y) Month (M) Day (D)	Mitigating Circumstances	
		Comp- laint	M) (A)						Comments (C)	
6.	89 ⁵⁵⁷	No	Yes	Min. of police complaint; Min. statements victim; Forensic expertise.	Yes	Yes	Yes	Fine: 60,000/ 40,000	M: Deep repentance.	
7.	84 & 90/2 ⁵⁵⁸	No		Statements of several witnesses; Forensic expertise; Min. of police complaint.	Yes	Yes	Yes	Fine: 150,000/ 100,000	M: Deep repentance; Defendant not sentenced before.	
8.	84	No		Statement of victim; Witness statements; Forensic expertise; Affirmative statement of def.	Yes	Yes	Yes	Impr.: 3 M, 24 D*	M: Deep repentance; Defendant has compensated for damage caused by crime ⁵⁵⁹ ; Defendant turned himself over to police ⁵⁶⁰ .	A: Sentenced before.

No	Offence CC	Private prose- cution	Evidence	Defen-dant pleadedguilty	Found guilty	Accele- rated trial => 1/3 red- uction	Sentence/ After red- uction Year (Y) Month (M) Day (D)	Mitigating Circumstances	
		Comp- laint						(M)	Aggravating circumstances (A)
								Comments (C)	
9.	90	Yes	Forensic expertise; Affirmative statement of defendant.	Yes	Yes	Yes	Fine: 50,000/ 33,334	M: Deep repentance.	
10.	89	No Yes	“The defendant admits the charge, which is proved also by the written evidence in the judicial file.”	Yes	Yes	Yes	Fine: 60,000/ 40,000		
11.	84	No	Witnesses testimony; min. of sequestering the material evidence; forensic expertise	Yes	Yes	Yes	Impr.: 5 M, 20 D*	M: Deep repentance; Relationship between parties normalized ⁵⁶¹ .	

No	Offence CC	Private prose- cution	Evidence	Defen-dant pleadedguilty	Found guilty	Accele- rated trial => 1/3 red- uction	Sentence/ After red- uction Year (Y) Month (M) Day (D)	Mitigating Circumstances	
		Comp- laint						Aggravating circumstances (A)	Comments (C)
12.	84	No	Statement of victim; Witness statement; Affirmative statement of defendant.	Yes	Yes	Yes	Impr.: 3 M/2 M => 18 M suspended sentence	M: Deep repentance; Difficult family situation.	
13.	84	No	Min. of victim's police complaining and statement.	Yes	Yes	No	Impr.: 3 M=> 2 Y suspended	M: Deep repentance; Relationship between parties normalized; Difficult family situation.	
14.	84	No	Affirmative statement of defendant.	Yes	Yes	Yes	Fine: 110,000/ 75,000	M: Deep repentance.	

No	Offence CC	Private prose- cution		Evidence	Defen-dant pleaded guilty	Found guilty	Accele- rated trial	Sentence/ After red- uction Year (Y) Month (M) Day (D)	Mitigating Circumstances (M)	
		Comp- laint							Aggravating circumstances (A)	
									Comments (C)	
15.	90	Yes	Injured testimony, witnesses testimony, forensic expertise act.	No	Yes	No	Fine: 50,000	M: The decision reads “When imposing the measure of punishment, the court considers the little dangerousness of the offence, of the person, the fact that they [the injured accuser and the defendant] are spouses,[⁵⁶²] they have a child, the defendant has not been sentenced before, he is an intellectual, etc.”		
16.	112/1 ⁵⁶³ & 90/1	Yes		No	No	-	-		C: The case was dismissed because of lack of evidence. The injured did not carry out the medical examination.	

No	Offence CC	Private prose- cution	Evidence	Defen- dant pleaded guilty	Found guilty	Accele- rated trial	Sentence/ After red- uction Year (Y) Month (M) Day (D)	Mitigating Circumstances (M)
								Aggravating circumstances (A)
		Comp- laint						Comments (C)
17.	76-22	No	Minutes and pictures CSI; Min. seq. evidence; Forensic expertise.	Yes	Yes	Yes	Impr.: 5 Y/ 3 Y, 4 M	M: Deep repentance; Defendant turned himself over to police.
								A: Common offence.
18.	89	No	Affirmative statement of defendant; Forensic expertise; Other acts in judicial file.	Yes	Yes	Yes	Impr.: 6 M/ 4 M => 18 M suspended	M: Deep repentance.
		Yes						A: Sentenced before.
19.	84 & 278/3 ⁵⁶⁴	No	Witness statements; Min. arrest flagrancy; Technical expertise; Affirmative statement of defendant; Acts in investigation file.	Yes	Yes	Yes	Impr.: 2 M, 15 D/ 1 M, 20 D	M: Deep repentance; Defendant compensated for damage caused by crime; Defendant turned himself over to police; Relationship between parties normalized.

No	Offence CC	Private prose- cution	Evidence	Defen- dant pleaded guilty	Found guilty	Accele- rated trial	Sentence/ After red- uction Year (Y) Month (M) Day (D)	Mitigating Circumstances	
								(M)	(A)
		Comp- laint						Comments (C)	
20.	84	No	Min. victim and witness statements; Acts in investig. file.	No	Yes	No	Impr.: 1 M	M: Article 48 and 49 of CC	A: Sentenced before
21.	76-22	No	Forensic expertise; Pictures of victim's wounds; Medical examination; Witness statements.	Yes	Yes	No	Impr.: 8 Y	M: Deep repentance.	
22.	76	No	Forensic expertise; Min. of seq. evidence; Toxicologic expertise; Min. of conversations recorded at police; Witness statements; Defendant's affirmative statement.	Yes	Yes	Yes	Impr.: 12 Y/ 8 Y	M: Repentance.	C: Fem ale defendant.

No	Offence CC	Private prosecution	Evidence	Defendant pleaded guilty	Found guilty	Accelerated trial	Sentence/ After red-uction Year (Y) Month (M) Day (D)	Mitigating Circumstances		
								(M)	(A)	(C)
		Complaint								
23.	84 & 278/2	No	Min. victim statements; Min. of police complaint; Min. seq. evidence; Technical expertise.	Yes	Yes	Yes	Impr.: 15 M/ 10 M	M: Deep repentance; Relationship between parties normalized; Defendant drunk.	A: Holding of weapons, a common offence	
24.	90	Yes		?	No			C: Injured accuser withdraw accusation, case dismissed.		
25.	84 & 119/1 ⁵⁶⁵	No	Min. of seq. evicence; Graphical expertise.	Yes	Yes	Yes	Fine: 90,000/ 60,000	M: Deep repentance; Difficult economic, educational and social family situation.	A: Common offence.	
26.	85 ⁵⁶⁶	No	Technical-ballistic expertise; Forensic expertise; Psychiatric-legal expertise; Min. CSI.	Yes	Yes	Yes	Impr.: 2 Y, 3 M / 1 Y, 6 M	M: Repentance; Defendant is a police employee; Difficult economic and social situation of family.		

No	Offence CC	Private prose- cution	Evidence	Defen- dant pleaded guilty	Found guilty	Accele- rated trial	Sentence/ After red- uction Year (Y) Month (M) Day (D)	Mitigating Circumstances	
								(M)	Aggravating circumstances
		Comp- laint						Comments (C)	
27.	82 ⁵⁶⁷ & 278/2	No	Technical-chemical expertise; Min. & pictures CSI; Min. seq. evidence; Ballistic expertise; Psychiatric expertise.	Yes	Yes	Yes	Impr.: 4 Y, 6 M/ 3 Y	M: Difficult economic situation of family; Defendants is the mother of a newborn baby. C: Female defendant.	
28.	88/1 ⁵⁶⁸ & 278/2	No	Min. CSI; Technical expertise, weapon; Forensic expertise; Psychiatric expertise; Statements by defendant and witnesses.	Yes	Yes	No	Impr.: 6 Y	M: Repentance; Relationship between parties normalized A: Common offence C: The court changed charge from 76-22 (attempted murder) to art. 88/1, reasoning that intention to murder was not proven. ⁵⁶⁹	
29.	84 & 278/2	No	Evidence implicating defendant is not analysed.	Yes	Yes	No	Impr.: 1 Y => 8 M, 12 D suspended	M: Relationship betw. parties normalized; Deep repentance; Difficult economic situation family; Defendant was drunk. A: Threat in front of the children.	

No	Offence CC	Private prose- cution	Evidence	Defen- dant pleaded guilty	Found guilty	Accele- rated trial	Sentence/ After red- uction Year (Y) Month (M) Day (D)	Mitigating Circumstances		
								(M)	Aggravating circumstances (A)	Comments (C)
		Comp- laint								
30.	89	No	Witnesses testimony.	No	Yes	No	Impr.: 5 M	C: On appeal, the defendant was found guilty of other intentional harm, CC art. 90/2		
31.	76	No	Min. & pictures CSI; Autopsy; Forensic expertise; Statements by defendant.	Yes	Yes	Yes	Impr.: 15 Y/ 10 Y	M: Repentance; Defendant turned himself over to police; Defendant cannot remember the crime due to mental instability; Difficult economic situation.		
32.	76-22 & 278/2	No	Min. CSI; ballistic expertise act; Medical examination of victim; Witness statements.	Yes	Yes	Yes	Impr.: 6 Y/ 4 Y	A: Sentenced before M: Guilty plea; Deep repentance; Defendant's health; Relationship between parties normalized.		
33.	88/1	No	The decision does not describe what happened.	Yes	Yes	Yes	Impr.: 3 Y/ 2 Y	C: Female defendant		

No	Offence CC	Private prose- cution	Evidence	Defen- dant pleaded guilty	Found guilty	Accele- rated trial	Sentence/ After red- uction Year (Y) Month (M) Day (D)	Mitigating Circumstances	
								(M)	(A)
		Comp- laint						Comments (C)	
34.	83 ⁵⁷⁰ & 278/2	No	Autopsy; Psychiatric expertise; Min. seq. weapon; Min. CSI.	Yes	Yes	No	Impr.: 5 Y => 5 Y suspended	M: Crime caused by provocation/unfair acts of victim ⁵⁷¹ ; Repentance; Relationship between defendant and victim's family normalized; Mother of 7; Difficult economic situation.	
35.	84 & 278/2	No	Technical expertise - weapon; Witness statements; Min. - house inspection.	Yes	Yes	Yes	Impr.: 1 Y, 6 M/ 1 Y	C: The court changed charge from 76 (murder) to 83; Female defendant	
36.	84 & 278/2	No	Min. police complaint; Min. - house inspection; Technical expertise ammunition; Other acts in prosecution file.	Yes	Yes	Yes	Impr.: 7 M/ 4 M, 20 D	M: Health of defendant; Economic difficulties of defendant. A: Crime within family common phenomenon; Continuous disputes	

No	Offence CC	Private prose- cution	Evidence	Defen- dant pleaded guilty	Found guilty	Accele- rated trial	Sentence/ After red- uction Year (Y) Month (M) Day (D)	Mitigating Circumstances	
								(M)	Aggravating circumstances
		Comp- laint						Comments (C)	
37.	76 & 278/4 ⁵⁷²	No	Ballistic expertise; Forensic expertise; Technical expertise; Witness statements; Min. & pictures CSI; Autopsy; Min. seq. evidence.	Yes	Yes	Yes	Impr.: 15 Y/ 10 Y	M: Deep repentance; Defendant turned himself over to police; The defendant was drunk	
38.	84 & 89	No	Forensic expertise; Affirmative statement of defendant.	Yes	Yes	Yes	Impr.: 3 M/ 2 M	M: Deep repentance.	
39.	84	No	Affirmative statement of defendant; Min. seq. evidence; Decision to evaluate sequestered evidence; Witness statements; Act in prosecution file	Yes	Yes	Yes	Impr.: 1 Y/ 8 M		

No	Offence CC	Private prose- cution		Evidence	Defen- dant pleaded guilty	Found guilty	Accele- rated trial	Sentence/ After red- uction Year (Y) Month (M) Day (D)	Mitigating Circumstances (M)
		Comp- laint							Aggravating circumstances (A)
									Comments (C)
40.	82	No		Min. & pictures CSI; Autopsy; Forensic expertise; Psychiatric expertise; Affirmative statement of defendant; Witness statements	Yes	Yes	No	Impr.: 10 Y	M: Deep repentance. A: Common offence.

⁵⁵¹ Nos. 1-23: Tirana District Court (DC); No. 24: Vlora DC; No. 25: Kukës DC; Nos. 26-38: Shkodra DC; No. 39: Fier DC; No. 40: Durrës DC

⁵⁵² Threat

⁵⁵³ Keeping weapons without authorization

⁵⁵⁴ Fines are indicated in ALL

⁵⁵⁵ Intentional murder

⁵⁵⁶ Attempt

⁵⁵⁷ Non-serious intentional injury

⁵⁵⁸ Assault

⁵⁵⁹ Article 48/d of the Criminal Code

⁵⁶⁰ Article 48/dh of the Criminal Code

⁵⁶¹ Article 48/e of the Criminal Code

⁵⁶² Indeed, the fact that the victim and the defendant were divorced is mentioned repeatedly in the decision

⁵⁶³ CC article 112 - Violating someone's house

⁵⁶⁴ Keeping military ammunition without any authorization of the competent state authorities

⁵⁶⁵ Threat and insult

⁵⁶⁶ Murder upon negligence

⁵⁶⁷ Homicide committed in the state of profound psychiatric distress

⁵⁶⁸ Serious intentional injury

⁵⁶⁹ On appeal, however, the defendant was found guilty of attempted murder and illegal weapons possession, as originally charged. The sentence was not changed

⁵⁷⁰ Homicide committed in excess of the limits of necessary self-defence

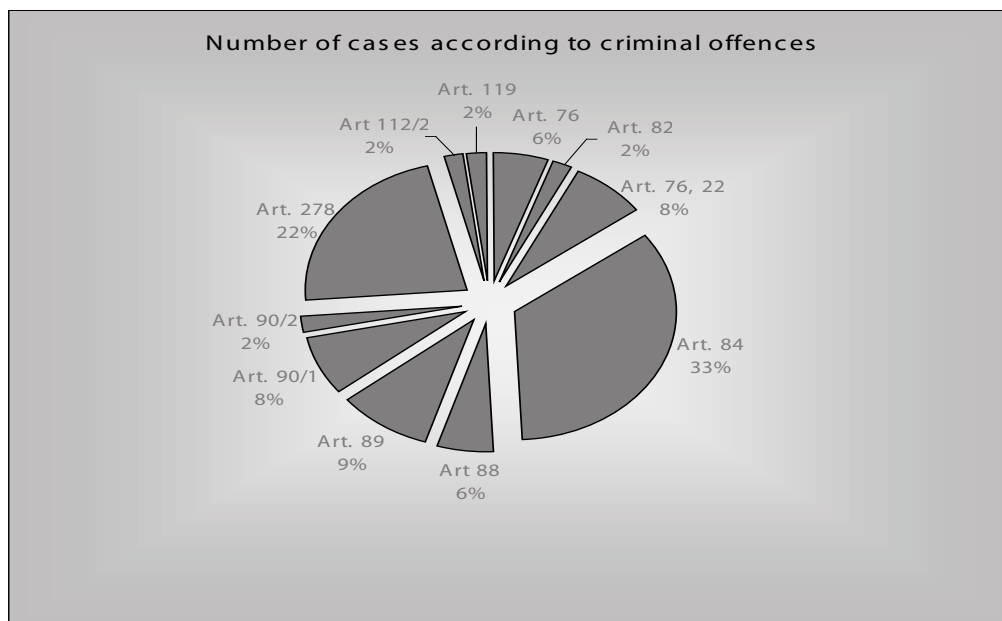
⁵⁷¹ Article 48/b of the Criminal Code

⁵⁷² Illegal manufacturing and keeping of military weapons, causing serious consequences

Crimes appearing in court decisions on domestic violence

The table and the graphic below show the distribution of crimes in the 40 court decisions on domestic violence covered by the study.

Crimes committed, either alone or in combination with other crimes, in the 40 cases concerning domestic violence
Article 76 - Intentional murder; 3 cases
Articles 76 & 22 - Attempted murder; 4 cases
Article 82 - Homicide in a state of profound distress; 1 case
Article 84 - Threat (criminal contravention) ; 18 cases
Article 88 - Serious intentional injury; 3 cases
Article 89 - Non-serious intentional injury; 5 cases
Article 90/1 - Other intentional harm, assault or any other violent act; 4 cases
Article 90/2 - Other intentional harm, causing up to 9 days work incapacity; 1 case
Article 112/2 - Violation of someone's house; 1 case
Article 119 - Insult; 1 case
Article 278 - Illegal weapons possession; 12 cases
Crimes committed in combination with illegal weapons possession (12)
3 intentional murders (CC article 76) 2 in combination with <i>illegal weapons possession</i> (CC article 278). The defendant was a woman in one case
1 case of <i>homicide in a state of a profound distress</i> (CC article 82) in combination with <i>illegal weapons possession</i> (CC article 278). The defendant was a woman.
4 cases of <i>attempted murder</i> (CC articles 76 & 22) 1 in combination with <i>illegal weapons possession</i> (CC article 278)
18 cases of <i>threat</i> (CC article 84) 6 in combination with <i>illegal weapons possession</i> (CC article 278). In these cases, threats were committed with the weapons 3 threats in combination with other offences; 1 - <i>other intentional harm</i> ; 1 - <i>insult</i> ; 1 - <i>light bodily injury</i>
3 cases of <i>serious intentional injury</i> (CC article 88). The defendant was a woman in 2 cases 2 in combination with <i>illegal weapons possession</i> (CC article 278)
Crimes committed in combination with other offences (4)
4 cases of <i>other intentional harm</i> (CC article 90/1) 1 in combination with <i>violation of the house</i> (CC article 112)
1 case of <i>other intentional harm</i> (CC article 90/2) in combination with <i>threat</i> (CC article 84)
1 case of insult (CC 119) was committed in combination with threat (CC article 84)



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Roos, Mari-Ann

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