INTERNATIONAL STANDARDS ON THE RIGHT TO LEGAL ASSISTANCE AND LEGAL DEFENCE OF SUSPECTED AND ACCUSED PERSONS IN CRIMINAL PROCEEDINGS

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The Bulgarian Helsinki Committee (BHC) was established on 14 July 1992 as an independent non-governmental organisation for the protection of human rights.

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This paper is dedicated to the international standards on the right to legal assistance and legal defence of suspected and accused persons in criminal proceedings, as an element of the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings (the Roadmap), adopted by Council Resolution on 30 November 2009¹.

In December 2009, the European Council included the Roadmap in the Stockholm Programme "An open and secure Europe serving and protecting citizens" (Stockholm Programme)². The right in the Roadmap is formulated as Measure C: Legal Advice and Legal Aid. It is accompanied by five other measures concerning the right to translation and interpretation in criminal proceedings (Measure A), information on rights and information about the charges (Measure B), communication with relatives, employers and consular authorities (Measure D), special safeguards for suspected or accused persons who are vulnerable (Measure E) and a Green Paper on pre-trial detention (Measure F). All these measures are aimed at the effective implementation of various provisions of the Charter of Fundamental Rights of the European Union (the Charter). The Council Resolution on the Roadmap foresees the adoption of legislative and other measures to strengthen the rights of the suspected and the accused. Such measures have already been initiated in the implementation of Measure C, as well as of other measures.

The European Parliament and the Council adopted in October 2013 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty³. This directive concerns one of the two aspects of the law under review: the right of suspected and/or accused persons to a lawyer. The other aspect, the right to legal assistance and legal aid provided by the state under certain conditions, is treated in Directive (EU) 2016/1919 of the European Parliament and the Council⁴. These two directives formulate mostly standards of general application. Article 13 of Directive 2013/48/EU and Article 9 of Directive (EU) 2016/1919 require that the particular needs of vulnerable suspects, accused persons and requested persons be taken into account in their

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¹ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. The recitals to the resolution justify the need of synchronising procedural rights in the member states. The fact that the removal of internal borders and the freedom of movement and residence in the European Union has led to “[…] an increase in the number of people becoming involved in criminal proceedings in a Member State other than that of their residence” (Recital 3), is a key factor in this respect.


³ Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty

implementation. Two other documents from the Stockholm Programme formulate additional standards concerning the right to legal assistance and legal defence with regard to two such groups. These are Directive (EU) 2016/800 of the European Parliament and the Council of May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, and the European Commission Recommendation of November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (Recommendation on vulnerable persons).

The provisions in the above-mentioned directives are of key importance in understanding the right to legal assistance and legal defence of suspected and accused persons in criminal proceedings. However, they are inevitably brief and leave a wide margin for interpretation. The directives indicate clearly the sources of interpretation: the European Court of Justice’s (ECJ) case law in interpreting the EU law, as well as the case law of the European Court of Human Rights (ECtHR, the Court) in interpreting the applicable provisions of the European Convention on Human Rights (ECHR, the Convention). ECJ’s case law is scarce in the field under discussion. Consequently, the ECtHR case law and, to a much lesser extent, that of the European Commission on Human Rights (the Commission), will be the main sources of interpretation of the scope and the content of the right to legal assistance and legal defence of suspected and accused persons in criminal proceedings. In addition, and in order to clarify the standards, we will discuss the applicable texts of several other international treaties, of documents containing “soft” human rights standards, and the related case law of several international bodies at global and regional levels.

The object and the scope of some of the directives in the Roadmap are not limited to the right to legal assistance and legal defence to suspects and accused in criminal proceedings. Directive 2013/48/EU and Directive (EU) 2016/1919 cover also the European arrest warrant proceedings. In addition, Directive 2013/48/EU deals with the information of a third party in case of detention, as well as with contacts with third persons and consular authorities during detention. Directive (EU) 2016/800 and the Recommendation on vulnerable persons

5 Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.


8 The European Commission on Human Rights was abolished following the entering into force in 1998 of Protocol No. 11 to the Convention.

9 More important “soft” standards that need to be mentioned are: HRC General Comment No. 32; United Nations Standard Minimum Rules for the Treatment of Prisoners; United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (UN Principles and Guidelines); Basic Principles on the Role of Lawyers (Havana Declaration on the Role of Lawyers); 2nd, 6th, 12th and 21st general reports of the European Committee for the Prevention of Torture (CPT) formulating standards on access to legal assistance during police custody.
establish standards on the treatment in criminal proceedings of suspected and accuses persons with specific vulnerabilities due to their age, intellectual or physical disability. This paper focuses only on the right to legal assistance and legal defence of suspected and accused persons in criminal proceedings.

1. FORMULATION AND MEANING OF THE RIGHT, SCOPE OF APPLICABLE STANDARDS

1.1. Directive 2013/48/EU

Directive 2013/48/EU obliges the member states to guarantee that the suspects and the accused “[…] have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively”\(^\text{10}\). This opportunity includes access to a lawyer before their interrogation by the police, during some investigative acts (identity parades, confrontations and crime scene reconstructions) which the suspects or the accused are required or permitted to attend\(^\text{11}\), as well as immediately after their arrest or when they are summoned to appear before a competent court, depending on which of these four events is the earliest. The lawyer must have the right “[…] to be present and participate effectively when [suspects and accused are] questioned”\(^\text{12}\). The suspects and the accused should have the right “[…] to meet in private and communicate with the lawyer representing them”, and their communication with the lawyers representing them should be confidential\(^\text{13}\). The member states should provide the necessary general information to make it easier for the suspect or the accused to find a lawyer\(^\text{14}\). Directive 2013/48/EU allows a temporary derogation of the immediate contact with a lawyer after the arrest, as well as of the presence of a lawyer in the above-mentioned three investigative acts, only in exceptional circumstances and only at the pre-trial stage\(^\text{15}\).

The scope of Directive 2013/48/EU excludes administrative penal proceedings before an administrative body for minor offences, for which the law of the member state does not impose deprivation of liberty as a sanction. In such cases, its safeguards only apply to

\(^{10}\) Directive 2013/48/EU, Article 3.1.
\(^{12}\) Directive 2013/48/EU, Article 3.3(b).
\(^{13}\) Ibid., Article 3.3a, Article 4.
\(^{14}\) Ibid., Article 3.4.
\(^{15}\) See 3.2 below.
proceedings in a court with jurisdiction in criminal matters. In addition, Recital 13 stipulates that proceedings in relation to minor offences, which take place in a prison, and proceedings in relation to offences committed in a military context should not be considered criminal proceedings. In both cases, the narrowing of the directive’s scope contradicts ECtHR’s case law which does not exclude such proceedings from the scope of Article 6, §3c of the Convention.

In defining their object and scope, Directive 2013/48/EU and the other directives in the Roadmap underline that they lay down minimum rules on the access to legal defence or legal aid in criminal proceedings, and are applied to “[...] suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty.” Such a definition of the object and the scope, if read literally, might in some cases lead to conclusions contradicting the object and the purpose of the act.

This refers in the first place to the explicit limitation of the scope to “criminal proceedings”. In the Bulgarian criminal justice, criminal proceedings exist only when they have been formally initiated in line with the requirements of the Code of Criminal Procedure (CCP). Unlike the old Code, the new one, in effect since 29 April 2006, completely excludes the figure of the suspect and includes only that of the accused. This makes some commentators conclude that Directive 2013/48/EU is applicable only to persons qualified as accused within the meaning of the CCP. According to this narrow interpretation, the directive does not apply to persons who have been detained on the grounds of Article 72, para. 1, item 1 of the Ministry of Interior Act, for whom there is information that they have committed crimes. However, under Article 5, §1c of the Convention, such persons may be detained only if there is “reasonable suspicion” that they have committed a criminal offense. Such reasonable suspicion should be based on factual information capable of convincing an objective observer that the detained person has probably committed a crime. Such a person can therefore be qualified only as a “suspect” and it would be unjustified not to have the directive’s safeguards apply in this case. The terms “criminal charges” and “criminal

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16 Ibid., Article 2.4.
17 For criticism of this approach, see Peers, S., T. Hervey, J. Kenner, A. Ward. The EU Charter of Fundamental Rights: A Commentary, Oxford and Portland: Hart Publishing, 2014, pp. 1337-1338. To avoid this contradiction, Article 14 and Recital 13 stipulate that the restrictions should be applied without prejudice to member states’ obligations under the Convention.
20 For more details on the ECtHR objective standard with multiple case law referrals, see Кънев, К. Правото на лична свобода и сигурност, София: Сibi, 2016 г., с. 151-155. [Kanev, K. The right to liberty and security of person, Sibi: Sofia, 2016, pp. 151-155].
proceedings” have autonomous meaning in the ECtHR case law. The formal initiation of criminal proceedings cannot be regarded as a starting point for the application of safeguards to suspected persons. Furthermore, Directive 2013/48/EU explicitly states that it is applied also “[…] to persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons.” This provision thus expands the scope of the directive even beyond the suspected and the accused persons although its practical implementation, especially in situations where the persons are not detained, might be problematic as it depends almost exclusively on the discretion of the law enforcement body.

### 1.2. Other acts of EU secondary legislation

Directive (EU) 2016/1919 lays down safeguards for exercising the right to legal aid provided by the state to suspected and accused persons who are detained, who have a right to legal aid in criminal proceedings under the Union or the national law or who take part in the above-mentioned investigative acts (identity parades, confrontations and crime scene reconstructions). The restrictions of the directive’s scope are the same as those of Directive 2013/48/EU. It also applies to European arrest warrant proceedings. In laying down the legal aid standards, Directive (EU) 2016/1919 generally follows the case law of the ECtHR, spread over a wider material and personal scope. Like Article 6, §3c of the Convention, it stipulates that suspected and accused persons without sufficient resources have a right to legal aid when this is in the interest of justice. The directive and its recitals define, albeit generally, the main interests of justice, as well as the powers of the law enforcement bodies to act in order to ensure compliance in specific cases.

Directive (EU) 2016/800 which concerns procedural safeguards for suspected and accused children repeats largely the standards on the access to legal aid laid down in Directive 2013/48/EU, including the limitations and the derogations. In some respects, however, it foresees additional safeguards. One of these relates to the presumption that the child is provided effective legal assistance. Consequently, where Directive 2013/48/EU speaks of “access to a lawyer without undue delay”, Directive (EU) 2016/800 requires

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21 Ibid., pp. 135-137; for a detailed discussion of Court’s case law concerning the autonomous definition of “criminal charge”, see also, ECtHR, Guide on Article 6 of the European Convention on Human Rights, Strasbourg: Right to a fair trial (criminal limb), Strasbourg: Council of Europe, 2014, §§ 1-28.
22 Directive 2013/48/EU, Article 2.3. In such cases, according to Recital 21 “[…] questioning should be suspended immediately” and may be continued only when the person is notified of his rights under the directive and is provided an opportunity to exercise them.
25 For differences in directives’ scope and the ECHR law, see below.
26 See 4.2 and 4.3 below.
member states to “[...] ensure that children are assisted by a lawyer without undue delay” (Article 6.3). Directive (EU) 2016/800 also includes a safeguard which is not found as a common standard in the 2013 directive: “Where the child is to be assisted by a lawyer in accordance with this Article but no lawyer is present, the competent authorities shall postpone the questioning of the child, or other investigative or evidence-gathering acts [...] for a reasonable period of time in order to allow for the arrival of the lawyer or, where the child has not nominated a lawyer, to arrange a lawyer for the child” 27.

The Recommendation on vulnerable persons does not contain many specific procedural safeguards in the area under discussion. Two of them are especially important. Section 2.7 establishes a presumption of vulnerability in relation to suspected and accused persons with severe psychological, intellectual, physical or sensory impairments, mental illnesses or cognitive disorders hindering them to understand and effectively participate in the proceedings. Section 3.11 stipulates that if a vulnerable person is unable to understand and follow the proceedings, the right to access to a lawyer in accordance with Directive 2013/48/EU should not be waived28.

1.3. ECHR and ICCPR law

The material and the personal scope of the directives in the Roadmap seems wider that the scope of the similar provisions of Article 6, §3c of the European Convention on Human Rights and Article 14, §3d of the International Covenant on Civil and Political Rights (ICCPR, the Covenant). These provisions stipulate:

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<tr>
<th>Article 6, §3c of the Convention:</th>
<th>Article 14, §3d of the Covenant:</th>
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<tr>
<td>Everyone charged with a criminal offence has the following minimum rights [...] c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.</td>
<td>In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.</td>
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27 Directive (EU) 2016/800, Article 6.7. See also Recital 27.
28 Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, Section 2.7 and Section 3.11.
The two texts are generally identical, except in two aspects: the addition in the Covenant that the person should be tried in his/her presence and that he/she should be informed of his/her right to legal assistance. As to the right to legal assistance and legal defence, both provisions differentiate three elements: the right to personal defence, the right to legal assistance and legal defence by own choice, and right to free legal aid. To these the right to practical and effective defence should be added; albeit not explicitly formulated in the texts of the two treaties, it has been consecrated already with the earliest case law of the bodies established by them.

The provisions in the Roadmap directives follow to a large degree the case law of the Convention organs. Nevertheless, the differences with regard to the scope of the directives’ provisions and those of the two international treaties are evident already in the respective texts. The rights guaranteed by Article 6, §3c of the Convention and Article 14, §3d of the Covenant are formulated as rights of the accused. The directives, however, speak of rights of both the accused and the suspected. True, the ECtHR case law expands the meaning of the term “suspected person”, as well as that of “criminal charge”. For example, in the cases of Shabelnik v. Ukraine of 2009 and Brosco v. France of 2010, it held that the safeguards under Article 6, §3 should apply before the person is formally charged when he/she had made a statement before a law enforcement body which has had sufficient grounds to suspect him/her of committing a crime. On the other hand, however, in its judgment in the case Hovanesian v. Bulgaria of 2010, the Court did not find a violation of Article 6, §3c when the self-incriminating statements made by the applicant (a foreigner with poor knowledge of the language of the proceedings) in the absence of a lawyer and without any indication that he had been informed of his rights during police detention were deemed invalid in further pre-trial proceedings under the Bulgarian Code of Criminal Procedure, even though they were repeated at a later stage in the presence of a lawyer when pre-trial proceedings had been initiated on the basis of the applicant’s statements and he had formally been qualified as accused. In the Court’s opinion, in this case “[p]olice questioning was used only to determine the necessity of initiating criminal proceedings”. There is no doubt, however, that in the Hovanesian case the second self-incriminating statement of the accused was a consequence of the first one and occurred immediately after it. In a similar case, Missouri v. Seibert of 2004, the United States Supreme Court held that the second statement, although made after the accused was appropriately informed and warned as required by the decision in Miranda v. Arizona, should not be allowed in the criminal proceedings as “it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as

30 CEDH, Hovanesian c. Bulgarie, n° 31814/03, Arrêt du 21 décembre 2010, § 37. The review of the material facts and of the national legal framework in this judgment is quite unsatisfactory.
independent interrogations subject to independent evaluation simply because Miranda warnings formally punctuate them in the middle." 31

Even if we accept that the decision in the Hovanesian case is inconsistent with the preceding and the subsequent case law of the Court, it creates a standard, which has not been explicitly altered so far. On the other hand, it is obvious that the applicant, who was formally detained at the police station for 24 hours on information that he had committed a serious crime, was a suspected person both in the sense of article 5, §1c of the Convention and in the sense of the Roadmap directives. Their safeguards should therefore be applicable in this situation.

The independent status of the right to legal assistance and legal defence in the directives is another important difference between the standards of the Convention and those of the directives. In a series of judgments starting with Imbroscia v. Switzerland of 1993, the Court held that:

"[...] Article 6 – especially paragraph 3 – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions" 32.

The Court often interprets this standard in its case law, finding as a rule violations of Article 6, §3c not independently but in conjunction with Article 6, §1, and refusing to find an independent violation of Article 6, §3c when it considers that, although Article 6, §3c had not been respected, the trial of the accused had been fair as a whole. 33 The cases Sarikaya v. Turkey of 2004 and Mamac and Others v. Turkey of 2004 34 are typical examples of this

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31 US Supreme Court, Missouri v. Seibert, 542 U.S. 600 (2004), at 12. In the case Mirana v. Arizona the US Supreme Court held that self-incriminating statements made by the suspect/accused during police questioning may be allowed as evidence in the criminal proceedings only if the prosecution could prove that he has been informed of his right to consult a lawyer, an ex officio one if necessary, and that both before and during the questioning he has been warned of the possibility self-incriminating statements to be used against him, as well as that the suspect/accused understands the information and, in case he has waived his rights, he has done so voluntarily. (US Supreme Court, Miranda v. Arizona, 384 U.S. (1966), at 467-491.


33 In its recent judgment in the case of Ibrahim and Others v. the United Kingdom of 2016 the Grand Chamber comes up with a “non-exhaustive list” of ten factors to be taken into account in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings (ECtHR, Ibrahim and Others v. the United Kingdom, Nos. 50541/08 et al., Grand Chamber judgment of 13 September 2016, § 274). These include a number of aspects of the proceedings, including the collection, the possibility to challenge and the use of evidence, but not whether a lawyer had taken part in all that.

34 CEDH, Sarikaya c. Turquie, § 67; CEDH, Mamaç et autres c. Turquie, n° 29486/95, 29487/95 et 29853/96, Arrêt du 20 avril 2004, § 48. In both cases, the applicants were questioned by the police and have made self-incriminating statements after being arrested for heavy crimes under the jurisdiction of the special state security court, although they had requested a lawyer. At that time, the law did not provide for access to a lawyer.
approach of the Court prior to the Grand Chamber judgment in the case of *Salduz v. Turkey*. After the *Salduz* judgment, a typical example is the Grand Chamber judgment in *Simeonovi v. Bulgaria* of 2017. Compared to the standards in the Roadmap directives, this approach of the Court lowers the level of protection. Those who argue in its support claim that it is unjustified to give the means a greater significance than the more general goal, which is the fair trial. It does not become clear, however, why the means has to be confronted with the goal, or whether it is possible in principle and *post factum* to determine whether a trial had been fair when one of its main components, the right to legal assistance, had been violated. This approach thus grounds the fairness of the trial on the factual circumstances produced as a result of the initial failure to guarantee a fundamental right of the accused. It consequently does not allow finding a violation of Article 6, §3c if the applicant had been acquitted. However, if the right to legal assistance and legal defence is to be granted independent status, this should not be a barrier to finding a violation. In such case it, justifiably, would have a significance not only for the fairness of the trial as a whole, but also for other purposes related to the criminal proceedings: the right to appeal the detention, the prevention of ill-treatment by law enforcement officials, and the unlawful interference in the right to respect for private and family life during criminal proceedings. Directive 2013/48/EU explicitly states that the right of access to a lawyer in criminal proceedings promotes not only the application of Article 6 of the Convention and of the corresponding provisions of the Charter, but also that of articles 3, 5 and 8 of the Convention.

immediately after the arrest for crimes under the jurisdiction of this Turkish court. The ECtHR did not find a violation of Article 6, §3c in either case.

35 The applicant in this case claimed that for three days after his initial arrest as an accused in a serious crime he was questioned in the absence of a lawyer, although he had asked for one, which is denied by the government. The Court held that it could not decide who was right but nevertheless ruled that however that might be it would ascertain whether there was a violation of Article 6, §3c on the basis of whether the trial of the applicant had been fair as a whole. In the end, the Court found that there was no violation because the trial had been fair even though the national law regulating the informing of the accused about their rights and their access to a lawyer had been or could have been violated on a number of occasions.

36 See Lemmens, P. “The right to a fair trial and its multiple manifestations”, in: Brems E. and J. Gerards. *Shaping Rights in the ECHR*, Cambridge: Cambridge University Press, 2013, p. 311-313. The author, a judge at the ECtHR, considers the rights under Article 6, §3c to be of equal significance to those under Article 6, §3d (right to participate in the questioning of witnesses). In the EU law, which generated detailed standards on the right to legal assistance and legal defence and no secondary legislation related to the questioning of witnesses in criminal proceedings, they however don’t seem to be equal.


1.4. The turning point: Salduz v. Turkey

The judgment of the Grand Chamber of the ECtHR in the case of Salduz v. Turkey of 2008 is the Court’s most decisive step towards emancipating the right to legal assistance in criminal proceedings, as well as towards expanding its scope. This is the most important case related to Article 6, §3c in the history of the Convention organs. The applicant is a minor who was detained by police officers on suspicion that he had taken part in an anti-government demonstration of the Kurdish Workers Party. He was questioned on the next day in the absence of a lawyer. Before the questioning, he filled in a form containing some explanations of the charges against him and his right to remain silent. During the questioning, he confessed his participation in the demonstration, as well as in other unlawful activities. Later, including before the trial court where he had a lawyer, he renounced his confessions. Nevertheless, he was convicted based on his initial confessions and some other evidence. The Court found a violation of Article 6, §3c in conjunction with Article 6, §1 of the Convention. With this case, the Court set up for the first time a standard to be repeated in many subsequent cases:

“[…] The Court finds that in order for the right to a fair trial to remain sufficiently practical and effective […] Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right”39.

Laying down a requirement to provide access to a lawyer starting from the very first questioning of the suspect by the police “as a rule” undoubtedly gives this right an independent status40. Following the principles of the European Committee against Torture, the Court underlines both the significance for the fair trial of the early access to a lawyer and its importance for the prevention of ill-treatment41. The Court points out also that “[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction”42.


40 See also Lemmens, P. “The right to a fair trial and its multiple manifestations”, p. 312.

41 ECtHR, Salduz v. Turkey, § 54.

42 Ibid., § 55.
The judgment in the *Salduz* case played a major role in providing in Directive 2013/48/EU for the right of the defence lawyer to be present and to effectively participate in the questioning of the suspect/accused\(^{43}\). The right of access to legal assistance, however, does not arise only in relation to the eventual questioning of the suspected person by the police and the risk of him/her making self-incriminating statements. In the case *Dayanan v. Turkey* of 2009, the ECtHR held:

“[…] A[n] accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned […]. Indeed, the fairness of the proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person’s defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.”\(^ {44}\)

The applicant in this case remained silent during the whole period of his police detention, as well as during his trial. He was found guilty of belonging to a terrorist group based on other evidence. The Court nevertheless found a violation of Article 6, §3c in conjunction with Article 6, §1 of the Convention due to the fact that he had no access to a lawyer during the police detention.

The judgment in the *Dayanan* case marked a decisive step towards the emancipation of the right to legal assistance and legal defence in the ECtHR’s case law. It implies that for a violation of Article 6, §3c to be found, it is not necessary to prove that the absence of a lawyer during the initial police detention has affected adversely the interest of the accused, e.g. by resulting in his making a self-incriminating statement\(^ {45}\). It therefore is not necessary to study the effect of the initial absence of a lawyer on the subsequent fairness of the proceedings. Thus, Article 6, §3c acquires independent significance. In this respect, however, the ECtHR case law after *Dayanan* is inconsistent. On the one hand, the Court maintains the *Dayanan* standard, reiterating it in a number of judgments\(^ {46}\). In its judgment in the case of *Aras v. Turkey (No. 2)* of 2014 the Court goes even farther, finding a violation of Article 6, §3c in a situation in which the applicant was questioned in the absence of a lawyer, made a statement which was not self-incriminating and which he consistently maintained during the

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\(^{43}\) See 1.1 above.


trial, when he already had the opportunity to benefit from the assistance of a lawyer\textsuperscript{47}. On the other hand and at the same time, in a series of other judgments the Court continues to insist in the indelible connection between this right and the fairness of the trial as a whole. The departure from the standard of the \textit{Dayanan} and \textit{Aras} judgments is most evident in the Grand Chamber judgment in the case of \textit{Simeonovi v. Bulgaria}\textsuperscript{48}. This judgment, which is rather problematic in terms of justification, brings the Court’s standards back to the pre-\textit{Salduz} case law. It signifies the ultimate submission of the right of legal assistance and legal defense in the pre-trial stage to the “fairness of the process as a whole” by allowing for the possibility for unlawful restrictions of the access to a lawyer and for subsequent unlawful actions by law enforcement officials at the national level if the Court decides that the proceedings as a whole had been fair. The Court also refused to impose a requirement for positive obligations on the states and to reverse the burden of proof in the proceedings before the Court\textsuperscript{49}.

2. RIGHT TO PERSONAL DEFENCE

2.1. \textit{The standards of the Convention and of the Covenant}

Both Article 6, §3c of the Convention and Article 14, §3d of the Covenant guarantee two main types of legal defence in criminal proceedings: personal defence of the accused or defence through a lawyer. The second type can in turn be exercised through a lawyer hired by the accused, through a lawyer appointed by competent authorities under certain conditions, or through a combination of hired and appointed lawyer.

General Comment No. 32 of the United Nations Human Rights Committee underlines that the two main types of legal defence are “not mutually exclusive”\textsuperscript{50}. The United States Supreme Court on its part gives significant weight to the right to personal defence. In its decision in the case of \textit{Faretta v. California} of 1975, the Supreme Court points out that “[…] forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so”. The Court also states that the lawyer, as well as the other defence tools guaranteed by the Sixth Amendment of the Constitution of the United States

\textsuperscript{47} ECtHR, \textit{Aras v. Turkey (No.2)}, No. 15065/07, Judgment of 18 November 2014. See the dissenting opinion in this case of judges Spano and Lemmens, which clearly indicates the split in the Court. The approach underlying this dissenting opinion will become the dominant standard of the Court two and a half years later in the Grand Chamber judgment in the case of \textit{Simeonovi v. Bulgaria} of 2017.

\textsuperscript{48} See footnote 35 above.

\textsuperscript{49} See the strong dissenting opinions of five of the 17 judges of the Court.

\textsuperscript{50} HRC, \textit{General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial}, CCPR/C/GC/32, 23 August 2007, § 37.
“[…] shall be an aid to a willing defendant - not an organ of the State interposed between an unwilling defendant and his right to defend himself personally”\textsuperscript{51}.

In its early case law, in Pakelli v. Germany of 1983, the ECtHR held that the provisions of Article 6, §3c of the Convention require that the accused “[…] who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing; if he does not have sufficient means to pay for such assistance, he is entitled under the Convention to be given it free when the interests of justice so require”\textsuperscript{52}.

On its part, the European Commission on Human Rights held that “[…] when an accused person is represented by a lawyer, he should as a rule exercise his procedural rights through his lawyer”\textsuperscript{53}. Some commentators accept uncritically this stress on the mutual exclusivity instead of the complementarity of the two rights and even reinforce it. For example, according to J. Fawcett, when the accused is represented by a lawyer, he “[…] cannot claim under Article 6 a right to attend the hearing in person at any stage”\textsuperscript{54}. However, this approach has its critics, some of whom even call it a “misunderstanding” and underline that the request to involve a defender is not a waiver of the right to personal defence but a need for the defence to be led by a professional defender\textsuperscript{55}. Others deduct the right to personal presence and defence during trial from Article 6, §3d which guarantees the accused the right to take part in the questioning of witnesses\textsuperscript{56}. When at the trial the defence position of the defendant contradicts that of his/her legal representative, the national court should give precedence to the defendant’s position\textsuperscript{57}.

So far, the ECtHR case law on the right to personal defence seems more restrictive than that of the HRC. This is most evident in the case of Correia de Matos v. Portugal, which was reviewed by both the Court and the Committee. It concerns a refusal confirmed at several levels of jurisdiction to allow the applicant, a qualified auditor and a lawyer, to defend himself against a charge in insulting a judge. Instead, the court of first instance appointed for him a lawyer against his will whom he did not trust. The ECtHR found the application inadmissible as manifestly ill-founded and held that the decision to allow the defendant, even where he is a lawyer, to defend himself or through a defender is within the margin of

\textsuperscript{51} US Supreme Court, Faretta v. California, 422 U.S. 806 (1975), at 807.
\textsuperscript{52} ECtHR, Pakelli v. Germany, § 31.
\textsuperscript{53} ECmHR, X. v. Austria, No. 7138/75, Decision of 5 July 1977.
\textsuperscript{57} Trechsel, S. Human Rights in Criminal Proceedings, p. 264.
appreciation of the member states who are best positioned to judge whether this is required by the interests of justice\textsuperscript{58}.

After the decision of the ECtHR, the case was referred to the HRC. Contrary to the ECtHR, the Committee ruled in favour of Matos. Above all, it found the appointment of a lawyer whom the defendant did not trust unacceptable and potentially detrimental to the interest of the defendant\textsuperscript{59}. Moreover, while in some cases the appointment of a defender against the will of the defendant may be acceptable, such an act that results in restricting his right to personal defence should be justified by an objective and sufficiently serious purpose. The Committee found no such justification in this case. The Committee considered \textit{inter alia} the relatively trivial character of the offence, as well as the defendant’s qualifications\textsuperscript{60}.

Despite the differences in the standards of the ECtHR and the CHR, in principle the Committee does not rule out the possibility of appointing a lawyer in criminal proceedings against the will of the accused. The International Criminal Tribunal for Former Yugoslavia adopts the same approach. Contrary to the will of the defendants who wanted to defend themselves personally, the tribunal appointed lawyers where this was required in the interests of justice, for example due to the ill health of the defendant, or where the defendant substantially and persistently obstructed the proper and expeditious conduct of the trial\textsuperscript{61}.

\textbf{2.2. The right to participation in the trial proceedings}

The right to personal defence is indelibly related to the right of the defendant to take part in the proceedings at all stages. In some cases, this right is an integral part of the right to public hearing of the case under Article 6, §1 of the Convention. The ECtHR defines as a general principle that “[...] the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing”\textsuperscript{62}. Nevertheless, even in their earliest case law, the Convention organs allow restrictions of the right to personal participation and personal defence in the proceedings. These include situations where the defendant does not respect the rules in the courtroom, appears intoxicated or shows aggression to the other participants. In such cases, the case law of the

\textsuperscript{60} \textit{Ibid.}, § 7.5. Currently an application to the ECtHR filed by the same applicant and involving similar facts has been referred to the Grand Chamber.
Strasbourg organs allows removal of the defendant from the courtroom and the continuation of the proceedings in his/her absence.\textsuperscript{63} The trial \textit{in absentia} is another example of an admissible restriction of the right to personal defence. Both in the case law of the ECtHR and in that of the HRC it is allowed in the interest of justice, which in national criminal justice systems usually relates to respecting statutes of limitations and danger of loss of evidence.\textsuperscript{64} Nevertheless, these may be carried out under certain conditions, summarised in General Comment No. 32 as follows:

“Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, §3d if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance”\textsuperscript{65}.

The ECtHR adds also the obligation of the courts to provide legal aid to the accused during the trial \textit{in absentia}.\textsuperscript{66} Preventing the defence lawyer from participating in the proceedings due to the accused person’s refusal to appear in court is inadmissible.\textsuperscript{67} In its case law, the Court also requires that a person convicted in proceedings held in his/her absence be consequently given the opportunity to re-initiate the proceedings in his/her presence, with all fair trial guarantees. The contrary would constitute denial of justice.\textsuperscript{68}

However, there would be no denial of justice and consequent violation of Article 6 of the Convention when the accused person has taken part in pre-trial proceedings, including after their completion, and he/she was aware of the charges, refused to participate in the following trial \textit{in absentia} and was later refused retrial. In the Court’s opinion, in such a case “[...] the applicant had brought about a situation that made him unavailable to be informed of and to participate in, at the trial stage, the criminal proceedings against him.”\textsuperscript{69}

\section*{2.3. The right to participation in appeal proceedings}

\textsuperscript{63} See, for example ECmHR, \textit{X. v. the United Kingdom}, No. 8386/78, Decision of 9 October 1980.
\textsuperscript{64} ECtHR, \textit{Colozza v. Italy}, § 29.
\textsuperscript{65} HRC, \textit{General Comment No. 32}, § 36.
\textsuperscript{66} ECtHR, \textit{Sejdovic v. Italy}, No. 56581/00, Grand Chamber judgment of 1 March 2006, § 93.
\textsuperscript{67} ECtHR, \textit{Van Geyczegem v. Belgium}, No. 26103/95, Grand Chamber judgment of 21 January 1999, § 34.
\textsuperscript{69} ECtHR, \textit{Demebukov v. Bulgaria}, § 57.
The positive obligations of the states to provide personal participation and personal defence of accused differ at the different stages of the judicial phase of the criminal proceedings. They are the strongest at the trial stage, where both factual and legal issues are reviewed. Nevertheless, the ECtHR has stressed on several occasions that “[...] the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing [...] as it does for the trial hearing” ⁷⁰. In determining the necessity of the accused’s participation in the appeal proceedings, the Court takes into consideration the type of the proceedings, the comprehensiveness of the review at the first instance, the possibility for a full review of the case during the appeal ⁷¹; what is at stake for the applicant; the possibility for the worsening of the accused’s situation during the appeal (reformatio in peius); and the participation of the prosecution in the appeal ⁷². In its decision on *Monnell and Morris v. the United Kingdom* of 1987, the ECtHR justified the lack of violation of Article 6, §3c by studying the type of proceedings and applicants’ chances of success. The Court concluded that “[...] the interests of justice and fairness could, in the circumstances, be met by the applicants being able to present relevant considerations through making written submissions” ⁷³.

The above factors may, or may not, justify a violation of Article 6, §3c of the Convention, both separately and cumulatively. Thus, in the case of *Kremzow v. Austria* of 1993, the ECtHR found a violation only because the applicant did not have the opportunity to defend himself personally in an appeal before the Supreme Court, which concerned the severity of the punishment, despite the fact that it involved also other issues for the resolving of which his presence was deemed unnecessary ⁷⁴. On the other hand, in the case of *Belziuk v. Poland* of 1998 the Court found a violation of Article 6, §3c because the applicant was not given the possibility of defending himself personally before the appellate court on three grounds: because the appellate court was reviewing both legal and factual matters; because of the applicant’s stake in the proceedings, a sentence involving several years of imprisonment; and because of the participation of the prosecution in the proceedings before the appellate court.

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⁷¹ In case that the national legislation allows the review of both factual and legal issues by the higher court, the personal participation of the accused would be necessary. Cases of minor offences, which “[...] did not raise any questions of fact or questions of law which could not be adequately resolved on the basis of the case-file” (ECtHR, *Fejde v. Sweden*, No. 12631/87, Judgment of 29 October 1991, § 33) constitute an exception of this requirement in the Court’s case law.

⁷² For a good and comprehensive summary of the relevant factors based on Strasbourg organs’ case law, see Trechsel, S. *Human Rights in Criminal Proceedings*, pp. 257-261.


court\textsuperscript{75}. And, on the third hand, in the case of \textit{Meftah and Others v. France} of 2002 the ECtHR did not find a violation of Article 6, §3c where the applicants were not allowed to personally address the Court of Cassation after their case was reviewed by two courts with due respect to all principles of fair trial in proceedings in which the Court of Cassation could review legal matters only, through representation by specialist lawyers. In the Court’s opinion, the special nature of the proceedings before the Court of Cassation may justify specialist lawyers being reserved a monopoly on making oral pleadings\textsuperscript{76}. When the national criminal justice systems require that the accused be represented by a lawyer and he/she cannot afford one, the interest of justice requires that one be provided for free\textsuperscript{77}.

\textbf{2.4. Restrictions on the use of arguments in defence}

In its judgment in the case of \textit{Brandstetter v. Austria} of 1991, the ECtHR held that the right to personal defence does not include the right to use any arguments while exercising it, including such that are abusive or libellous to the opposing party or to other participants in the proceedings. The case is related to the applicant being convicted of defamation while exercising his right to personal defence. The Court did not find a violation of Article 6, §3c, noting:

“\text{It would be overstraining the concept of the right of defence of those charged with a criminal offence if it were to be assumed that they could not be prosecuted when, in exercising that right, they intentionally arouse false suspicions of punishable behaviour concerning a witness or any other person involved in the criminal proceedings}” \textsuperscript{78}.

Of course, restricting the right to defence to the use of lawful means does not apply only to personal defence. It applies also to the procedural representatives. Nevertheless, the sanction for the use of unlawful means should be proportionate\textsuperscript{79}. Otherwise, this would affect both the accused’s defence rights and potentially his/her other human rights (the right to freedom of expression, for example).

\textsuperscript{76} ECtHR, \textit{Meftah and Others v. France}, Nos. 32911/96, 35237/97 and 34595/97, Grand Chamber judgment of 26 July 2002, § 47.
\textsuperscript{79} Ibid., § 53.
3. THE RIGHT TO LEGAL ASSISTANCE AND LEGAL DEFENCE BY A DEFENDER OF OWN CHOICE

3.1. The meaning of right and admissible restrictions

The right to legal assistance and legal defence by a defender of own choice includes the possibility for the accused person to hire, at own expense or at the expense of relatives, a defender who would take part in the proceedings on his/her behalf. In the European countries, the defender is most often a lawyer although other persons may also play this role. The focus on legal assistance means that the defender should possess sufficient legal knowledge to effectively participate in the specific proceedings. It is therefore legitimate to prevent a person without the appropriate legal qualifications from taking part in the proceedings, when that person is the only choice of defender of the accused.

The HRC case law includes a series of cases in which state-appointed lawyers were forced upon accused persons who had the means of hiring their own, both at the court of first instance and during the appeal. In such cases, the Committee as a rule finds a violation of Article 14, §3d of the Covenant. In its decision in the case of Domukovsky et al. v. Georgia of 1998, the Committee even goes so far as to state that in a trial in which the death sentence may be imposed the accused person cannot be forced to accept ex-officio counsel. And although the Committee is not consistent in adhering to this view, this decision underlines the significance that it gives to the right to assistance by a defender chosen by the accused.

Approaches similar to this one have probably made Stefan Trechsel call the right to legal defence by a counsel of one’s own choice “a practically absolute right” and definitely the best of the three alternatives available under Article 6, §3c of the Convention. Nevertheless, the case law of the Strasbourg organs seems more restrictive in this respect too, in comparison to that of the Committee. Already in their early decisions, they foresee a possibility of significant restriction of the accused person’s choice of a lawyer in the interest of justice. In the case of Engel and Others v. the Netherlands of 1976 the ECtHR held that the

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81 ECtHR, Mayzit v. Russia, No. 63378/00, Judgment of 20 January 2005, § 68. In this case the applicant, in the capacity of accused, asked to be defended by his mother and his sister, both without legal training. The request was denied at the national level and the ECtHR did not find a violation of Article 6, §3c.
85 Trechsel, S. Human Rights in Criminal Proceedings, p. 266.
legal assistance provided to the applicants in disciplinary proceedings in the armed forces, which could be regarded as criminal under the Convention, meets the requirements of Article 6, §3c even when limited to legal matters only, while the clarification of facts is left to the applicants with the argument that these were “very simple”. This restrictive approach was met with deserved criticism. In another case the Commission found compatible with Article 6, §3c the restriction to three of the number of lawyers in a case of well-known leaders of the terrorist Red Army Faction. It justified this restriction and the exclusion of some lawyers from the trial with the need to balance between the two opposing parties in the proceedings, as well as with the fact that some of the excluded lawyers were indicted on criminal charges as accomplices of the accused. The Commission also takes into account the fairness of the trial as a whole and finds that it was not unfair despite the restrictions.

Already in its early case law, the Commission rejects the possibility for the lawyer to act as a blind agent of his client in the proceedings. In the case of X. v. Switzerland of 1981 it held that the Convention does not guarantee the accused the right to require from their lawyers a defence position that the latter considers unacceptable, especially in view of the fact that during the proceedings the client has had the opportunity to personally address the court.

The judgment in the case of Croissant v. Germany of 1992 is key in ECtHR’s approach to restricting the choice of lawyer. The applicant is a lawyer who in 1976 was accused of supporting the Red Army Faction. The case was reviewed by the Stuttgart Regional Court. Initially the applicant chose two lawyers who did not practice in Stuttgart as his representatives. The court later appointed them as his ex officio defenders. In addition, the court appointed a third lawyer who had a practice in Stuttgart. The applicant objected this appointment from the very beginning, on the grounds of political differences with him, and asked that another lawyer be appointed in his place. The third ex officio lawyer in turn also asked to be relieved of the obligation to represent him. The court rejected both requests. Its grounds, as well as those of the higher courts to which the rejection was appealed, were that given the qualifications of the third lawyer and the fact that he had his office in Stuttgart, the home of the trial court, his appointment was necessary in the interest of the effective defence of the accused and the expeditious conduct of the proceedings. There was no evidence that either the accused or the lawyers he had chosen were trying to manipulate the proceedings. The applicant was found guilty and was sentenced to two years and six months of imprisonment, as well as to pay the expenses for the three ex officio lawyers.

86 ECtHR, Engel and Others v. the Netherlands, Nos. 5100/71 et al., Judgment of 8 June 1976, § 91.
87 Velu, J., R. Ergec. Convention européenne des droits de l’homme, p. 606. In the authors’ opinion, “[i]t’s like saying that the accused loses his right to be represented by a lawyer every time the authorities deem him able to defend himself”. For similar criticism, see also Trechsel, S. Human Rights in Criminal Proceedings, p. 267.
88 ECmHR, Enslin, Baader and Raspe v. Germany, Nos. 7572/76, 7586/76 and 7587/76, Decision of 8 July 1978.
89 ECmHR, X. v. Switzerland, No. 9127/80, Decision of 6 October 1981.
including the one appointed against his will. The ECtHR did not find a violation of Article 6, §3c neither with regard to the appointment of an *ex officio* lawyer against the will of the accused, not with regard to him being sentenced to pay for his services. In the Court’s opinion, the arguments of the national courts in support of the appointment of a third lawyer were relevant and sufficient. It also held that the requirement that the accused pay all fees of the *ex officio* lawyers has not in any way affected the fairness of the proceedings under Article 6 of the Convention.

The Court’s approach in the case of *Croissant* defines two aspects of the right to defence by a lawyer of one’s own choice: the **subjective** trust of the client in the lawyer and his/her confidence that the chosen lawyer is capable of providing appropriate defence, and the **objective** interest of justice which includes the assessment of the appointing body of the necessary qualifications of the lawyer in view of the complexity of the case, as well as of the requirements on the speediness of the trial and the appropriate organisation of the proceedings. In the case of *Croissant*, the Court disregarded largely the first aspect, thus affecting the very essence of the right: the choice of lawyer by the client. Moreover, the client himself was a qualified lawyer who was therefore probably capable of making an informed choice both in terms of his own needs in the proceedings and in terms of the qualifications of the lawyer of his choosing. If it is possible, as in the *Croissant* case, that the interest of justice as interpreted by the body appointing the lawyer in such a categorical manner would take precedence over the right of the accused to a lawyer of his own choice, especially in a case in which the stake for the accused, judged by the severity of the imposed sanction, is high, it would be logical to ask what is the meaning of the existence of this right for the ordinary accused person.

**3.2. Possibility to restrict the right to legal assistance after detention**

In its judgment in the *Salduz* case the ECtHR stressed out that the right to access to a lawyer after the initial detention may be restricted if in the light of the particular circumstances of each case there are “compelling reasons” to do so. Such possibility is foreseen also by Directive 2013/48/EU. According to the directive, the access may be restricted in two situations: to avert serious adverse consequences for the life, liberty or

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91 Ibid., § 36.
92 See 1.4 above.
physical integrity of a person, and when immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.\(^{93}\)

The ECtHR clarified its approach to restricting the right to access to a lawyer immediately upon detention in several judgments. The most important of these is the Grand Chamber judgment in the case of *Ibrahim and Others v. the United Kingdom* of 2016. The case is related to the questioning in the absence of a lawyer of four persons. Some of them were arrested on suspicion that they had planted bombs in the London underground, as well as in two other locations in London, two weeks after the suicide bombing in that city on 7 July 2005. Three of them were subjected to “safety interviews” upon detention and were denied access to a lawyer for periods from four to eight hours after being arrested. During the interviews, all three denied involvement in the bombing attempt. Later, during the trial, they confessed to having participated in the events and were convicted. The fourth applicant was not arrested and was not a suspect, but was questioned as a witness. During the questioning, he made self-incriminating statements on the grounds of which he was later convicted. The ECtHR did not find a violation of Article 6, §3c of the Convention with regard to the first three applicants. The Court accepted that the “safety interviews” had a specific purpose: to prevent potential serious consequences for the life and the physical integrity of other persons through an attempt to urgently collect information about planned attacks, as well as about the identity of the persons involved in the conspiracy. The Court gave weight to the fact that the restrictive measures were clearly prescribed by the national legislation.\(^{94}\) With regard to the fourth applicant, the Court found a violation of Article 6, §3c. The Court’s arguments drew on the fact that the questioning was not interrupted when he started making self-incriminating statements as a witness; he was not warned about the possible consequences and was not provided opportunity to access a lawyer. The decision to continue his questioning had no basis in domestic law, and the initial procedural deficiency was not dealt with in the subsequent judicial proceedings, which were not fair as a whole.\(^{95}\)

Subsequently, in its judgment in the case of *Artur Parkhomenko v. Ukraine* of 2017, the Court allowed a restriction of the right to legal assistance, which seems to go far beyond the possible restrictions under the directive. The applicant, who was arrested and charged with robbery, initially waived his right to a lawyer on several occasions during the pre-trial stage. He was questioned without a lawyer and made self-incriminating statements. At some point, however, he asked for a lawyer; his request was refused and he was again questioned in the absence of a lawyer. During the questioning, he made self-incriminating statements, which were later taken into account for his conviction. The ECtHR notes that “[…] after the applicant lodged his request for a lawyer, his earlier legal assistance waivers could no longer

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93 Directive 2013/48/EU, art. 6.6(b).
94 ECtHR, *Ibrahim and Others v. the United Kingdom*, §§ 276-277.
95 Ibid., §§ 301-311.
be considered valid”\(^96\). The Court also considered that “[f]rom the material in the case file it does not follow that there were any compelling reasons to justify this restriction”\(^97\).

Nevertheless, it did not find a violation of Article 6, §3c of the Convention, as in its view the criminal proceedings were fair as a whole: the statements made by the applicant in the absence of a lawyer were obtained after similar previous statements; although the statement was taken into account for the conviction, it did not have a decisive role in that regard; the other requirements for fair trial derived from the case law of the Convention organs were respected\(^98\).

### 3.3. Significance of detention

Both in Directive 2013/48/EU and in the ECtHR case law, the assessment of the necessity of access to legal assistance in criminal proceedings seems to be strongly dependent on whether the suspect/accused had been arrested. Such a dependency is also established by the United States Supreme Court in the case of *Miranda v. Arizona*, as well as in the case law following this decision\(^99\).

According to recitals 27 and 28 of Directive 2013/48/EU, the member states are not obliged to take active steps to ensure that suspects or accused persons who are not deprived of liberty will be assisted by a lawyer. In case of detention, however, they have certain positive obligations to guarantee that the suspected or accused persons are able to effectively exercise their right to access to a lawyer. These include the provision of *ex officio* defence when necessary or the provision to the detained person of a list of lawyers to choose from\(^100\). Other positive measures include the actions of the authorities under Article 3 of the directive with regard to the provision of information and immediate access to a lawyer “without undue delay”, and with regard to the effective participation of the lawyer in the questioning and in the investigative acts.

The ECtHR also gives key importance in its case law to detention for the activation of the obligation to provide legal advice to the suspected or the accused person. Such is for example the case in the judgment *Aleksandr Zaichenko v. Russia* of 2010. The applicant was a driver in a private company whose manager suspected the workers of stealing fuel from vehicles. The manager asked the police to check. On his way from work to home, the applicant was stopped by police officers who found in his car two cans full of diesel. During the inspection in the street, he made self-incriminating statements, which were noted in the

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\(^97\) Ibid., § 82.

\(^98\) Ibid., §§ 83-91.


protocol of the inspection. He was later handed down a suspended sentence of six months of imprisonment. During the trial, the applicant denied to have poured out fuel from service vehicles and submitted a fuel purchase receipt, which was however not admitted as evidence. He complained that during the inspection on the street, in which he had made self-incriminating statements, he was questioned in the absence of a lawyer. The ECtHR did not find a violation of Article 6, §3c of the Convention. The Court compared the applicant’s situation with that in the *Salduz* case and concluded that the difference was in the fact that the applicant had not been detained. This fact proves decisive for the Court’s final conclusion:

“Although the applicant in the present case was not free to leave, the Court considers that the circumstances of the case as presented by the parties, and established by the Court, disclose no significant curtailment of the applicant’s freedom of action, which could be sufficient for activating a requirement for legal assistance already at this stage of the proceedings” 101.

In this case, however, the Court does not elaborate in the name of what prevailing interest of justice has the applicant been deprived of his rights and, more specifically, what has prevented the police officers to explain to the applicant his rights during the inspection on the street and to take him to the police precinct in order to take his statements there after providing appropriate guarantees for the exercise of his rights 102.

### 3.4. **Waiver of the right to a lawyer**

Article 9 of Directive 2013/48/EU allows a waiver of the right to legal assistance and legal defence to suspected and accused persons, except in cases of mandatory presence of a lawyer, in which a waiver is now allowed. The conditions are that the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in understandable language about the content of the right and the possible consequences of waiving it. It should also be ensured that the waiver is given voluntarily and unequivocally, as well as that it has been recorded in an appropriate and lawful manner 103. The waiver may be withdrawn at any stage of the criminal proceedings 104.

The ECtHR accepts in its case law that nothing in Article 6 of the Convention excludes the possibility for the suspected or accused person to waive, either expressly or tacitly, some of the procedural safeguards, as long as this waiver has been established in an unequivocal

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102 See in this respect the convincing partly dissenting opinion of judge Spielmann.
104 *Ibid.*, Article 9.3.
manner and be attended by minimum safeguards commensurate to its importance. Of all safeguards under Article 6, the Court deems the one under Article 6, §3c especially important and key to ensuring the other fair trial guarantees. It did this for the first time in its decision on the case of *Pishchalnikov v. Russia* of 2009:

“The Court considers that the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard. […] However, the Court strongly indicates that additional safeguards are necessary when the accused asks for counsel because if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected.

The requirement of “additional safeguards” makes the ECtHR review with special care the manner in which the suspected or accused person has waived his right to be defended by a lawyer of his own choice. This requirement prompts the Court to make a careful assessment of all subjective and objective factors, which have influenced his/her choice. In the *Pishchalnikov* case, the Court held that when the accused has stated that he wants to be assisted by a lawyer during the questioning, his tacit waiver of the right to a lawyer could not be deducted only from the fact that he has been answering the questions during the interrogation even after being informed about his rights. And when the accused has stated that he wanted to take part in the investigative acts only with a lawyer, he should not have been subjected to questioning until he was provided access to a lawyer, except if the suspect himself initiates a conversation. In the case of *Dvorski v. Croatia* of 2015 the Grand Chamber held that even where during the detention the accused had signed a power-of-attorney to the lawyer suggested to him by the investigator and had made a statement in his presence, it could not be accepted that he had refused to use the services of the lawyer chosen by him and his family in a situation in which this lawyer was refused access to the

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107 In his comments on the ECHR K. Grabenwarter, disregarding the explicit instruction in *Pishchalnikov*, claims without sufficient arguments that the conditions on waiving the right to a lawyer are the same as those on the right of the accused to participate in the trial (Grabenwarter, Ch. *European Convention on Human Rights – Commentary*, München/Oxford/Baden-Baden/Basel: C.H. Beck, Hart, Nomos and Helbing, 2014, p. 160).

accused in the police station where he had been detained\textsuperscript{109}. In another case in which an accused had signed an initial statement that he wanted a lawyer, and had subsequently signed several other papers stating that he did not want one, the ECtHR held that his waiver was not made in an unequivocal manner\textsuperscript{110}.

The ECtHR case law includes also cases in which the Court has held that the applicants’ waiver of the right to a lawyer had been valid. Such is, for example, the case of \textit{Galstyan v. Armenia} of 2007. The applicant was sentenced to three days of administrative detention in administrative penal proceedings related to a violation of public order during an anti-government demonstration. He waived his right to a lawyer by personally writing, “I do not wish to have a lawyer” in the police minutes and confirmed his waiver later, at the start of the trial. He asked for a lawyer after the judge handed down the verdict. The Court found no violation, considering the lack of evidence of coercion, the two explicit waivers of the applicant of his right to a lawyer, the fact that Article 6, §3c allows the accused person to defend himself personally, as well as the relatively minor nature of the offence\textsuperscript{111}.

The Court’s judgment in the case of \textit{Yoldaş v. Turkey} of 2010 is more questionable in terms of argumentation. The Court did not find a violation of Article 6, §3c in a case in which the accused was arrested on suspicion of participating in the activities of a terrorist organization, a crime, which may be punished by a life sentence. He was informed of his rights and then signed a form of which he was given a copy. Subsequently the applicant repeated his waiver if his right to a lawyer before an investigating officer and a prosecutor, but later, in court, he claimed that he had been deprived of this right. The ECtHR held with a fragile majority that the waiver of the right to a lawyer in these circumstances was made freely and voluntarily\textsuperscript{112}. In a strong dissenting opinion, three judges state that given the severity of the charge, as well as considering the fact that the applicant had been arrested and had not been informed by a lawyer about the consequences of his waiver, his waiver should not be deemed free and voluntary, and that it was unacceptable to allow him to take part in the pre-trial proceedings without a lawyer\textsuperscript{113}.

\textsuperscript{109} ECtHR, \textit{Dvorski v. Croatia}, § 102.
\textsuperscript{110} ECtHR, \textit{Saranchov v. Ukraine}, § 46.
\textsuperscript{111} ECtHR, \textit{Galstyan v. Armenia}, No. 26986/03, Judgment of 15 November 2007, § 91.
\textsuperscript{113} \textit{Ibid.} Opinion partiellement dissidente des juges Tulkens, Zagrebelsky et Popović.
4. FREE LEGAL AID

4.1. Meaning of the right to free legal aid

Apart from the import addition of the “suspected persons” in Directive (EU) 2016/1919, Article 4.1 of the directive, Article 6, §3c of the Convention and Article 14, §3d of the Covenant formulate the right to free legal assistance identically: every suspected or accused person has the right to free legal assistance in criminal proceedings, if he/she has no sufficient means to pay for a lawyer and if the interests of justice so require.

This wording is not without its problems. At the time of the preparatory discussions in the Commission, the French and the Italian delegates considered it discriminatory against those who did not have sufficient means to pay for legal assistance, as they would get such assistance only if the interests of justice required this, while the more affluent persons would get legal assistance in all cases.\(^\text{114}\)

Another problem with the wording are the complex relations between the two conditions. Its literal interpretation leads to the conclusion that for the person to receive legal assistance both conditions must be met. However, there is no European legislation nowadays that does not give greater weight to the “interests of justice” than to the material status of the person concerned. If the interests of justice require that the person have a lawyer, then his/her material status is irrelevant. It would be the same even where the person has sufficient means but simply does not wish to hire a lawyer.\(^\text{115}\) The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems stipulate that legal aid should be provided regardless of the means at the disposal of the person, if this is required by the interests of justice. According to the UN Principles and Guidelines, such interests include the urgency of the case, its complexity and the severity of the potential penalty.\(^\text{116}\) Both the ECHR case law and Directive (EU) 2016/1919 introduce several presumptions of situations in which legal aid in the interest of justice is mandatory regardless of the material status of the suspected or the accused.\(^\text{117}\) Member states’ national laws introduce even more such presumptions. It is obvious that the condition of sufficient means is only applicable to cases not covered by them.

Directive (EU) 2016/1919 repeats largely the provisions of Directive 2013/48/EU with regard to the scope. It refers to the persons who are initially not questioned as suspects or


\(^{115}\) Garlicki, L. (red.). *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, s. 437.

\(^{116}\) UN Principles and Guidelines, Principle 3, § 21. In line with this, Guideline 1 states that persons whose means exceed the limits stipulated by national law should be granted legal aid if it is in the interests of justice to provide such aid and if the person cannot get such aid in another way.

\(^{117}\) See 4.3 below.
accused but later become such; the minor offences which are not punished by deprivation of liberty; and to the European arrest warrant proceedings. As with Directive 2013/48/EU, the directive on legal aid requires its application in all cases where a decision is made to detain a suspected or accused person, as well as during the detention and at all stages of the criminal proceedings. In line with the latter requirement, the ECtHR accepts in its case law that the member states should ensure to the accused person a realistic chance of effective defence at all stages of the proceedings, including, where necessary, by providing free legal assistance.

Directive (EU) 2016/1919, the Convention and the Covenant refer to “free” legal aid. Similarly, Article 6, §3e of the Convention and Article 14, §3f of the Covenant guarantee the right of the accused to use an interpreter free of charge if he/she does not understand or speak the language used in court. The ECtHR offers different interpretations of the two provisions in its case law. While the right to a free interpreter should be guaranteed unconditionally, in the Court’s opinion nothing in the Convention excludes the possibility for the member states to require that the accused pay partially or in full the means paid for his legal aid during its provision or subsequently, if his/her material status improves and he/she can already pay for such aid, under the condition that the expenses are not excessive. Such a possibility is justified by the fact that Article 6, §3c makes the provision of free legal assistance dependent on the material status of the accused, while Article 6, §3e does not include such a condition. Directive (EU) 2016/1919 also allows member states to require that suspected or accused persons partially pay the legal assistance costs depending on their financial resources.

In its case law, the ECtHR discusses also the issue of the standards in assessing the merit of legal aid provision from the point of view of the possible outcome of the proceedings. The Court accepts that national bodies should be guided not by whether the denial of provision has infringed the interests of the accused person, but by whether the aid provided has been of any help to him/her.

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118 See 1.1 above.
120 ECtHR, Wersel v. Poland, No. 30358/04, Judgment of 13 September 2011, § 50.
121 See, for example, CEDH, Işyar c. Bulgarie, n° 391/03, Arrêt du 20 novembre 2008, §§ 48-49.
122 ECtHR, Croissant v. Germany, §§ 36-37; ECtHR, Morris v. the United Kingdom, No. 38784/97, Judgment of 26 February 2002, § 89.
4.2. Means test

As a whole, so far the “insufficient means” criterion has not played a significant role in the case law of the Convention organs under Article 6, §3c. This is yet another evidence of the subordinate role of this criterion to “the interests of justice”. The ECtHR holds that the burden of proof of insufficient means should be on the applicant. In reality, however, in the proceedings before the Convention organs both the Commission and the Court adopt a relatively low standard of proof. It does not entail proof “beyond all doubt”. It is sufficient for them to have “some indications” or even “absence of clear indications to the contrary”.

Directive (EU) 2016/1919 allows wide-ranging tests at national level of the income, capital and family situation of the person concerned, as well as of the costs of the assistance of a lawyer and the standard of living in the country, in order to determine whether ex officio defence should be provided. Such tests, however are resource and time intensive by their nature, and if necessary to be carried out before the decision to grant ex officio defence is made, could in urgent cases hinder the effective defence and assistance to the persons concerned, as well as lead to other violations of the Convention, such as arbitrary detention, for example. Therefore, some member states define at the legislative level the need for legal assistance only with regard to the interests of justice, leaving the assessment of the accused’s means to the potential execution proceedings which may follow the final act by which he/she was found guilty and at the same time charged with the costs involved in the trial, including for a court-appointed lawyer. It seems that the ECtHR accepts that such assessment could be made as part of the execution proceedings, regardless of the grounds on which the court-appointed lawyer was appointed. In this respect, what is decisive for assessing whether the accused person has “sufficient means to pay for legal assistance” is not his/her material status at the time when the lawyer was appointed, but at the time of the execution of the judgment for reimbursement of the costs.

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127 See, for example, ECtHR, Ognyan Asenov v. Bulgaria, No. 38157/04, Judgment of 17 February 2011, § 47.
129 Directive (EU) 2016/1919, Article 4.3. The directive, however, does not define the moment in which member states may conduct such tests.
130 See, for example, ECtHR, Pakelli v. Germany, § 34.
4.3. The interests of justice

The provision of free legal assistance when this is required by the interests of justice benefits the specific person suspected or accused of a specific crime. The interests of justice require above all a fair trial in which the defence of the rights and the interests of the participants is an indelible part. The attempts to juxtapose the interests of justice with those of the concerned person are therefore hard to justify, although the ECtHR case law provides some evidence for such an approach\(^{132}\). Both Directive (EU) 2016/1919 and the Court’s case law formulate specific conditions, which require the provision of free legal aid in the interest of justice. It should be noted, however, that in both cases these conditions are less than those stipulated by member states’ national laws. With regard to the ECtHR case law, this is understandable: the Court has ruled only on cases that have been referred to the Convention organs. However, the fact that in this respect Directive (EU) 2016/1919 does not go beyond the standards derived from the Court’s case law, too generalized at that\(^ {133}\), is a weakness and a missed opportunity to create a more comprehensive approach to the requirements for the provision of free legal aid in criminal proceedings. It is therefore necessary to once again point out that the directive provides for minimum standards and that its implementation does not prejudice member states’ obligation to guarantee the respect of the right to free legal aid as guaranteed by the Convention\(^ {134}\).

The severity of the crime and of the related sanction as a criterion defining whether the accused should be granted free legal aid is the most discussed criterion in ECtHR case law\(^ {135}\). The requirement that free legal aid be provided at all stages of the proceedings in cases where the statutory penalty involves deprivation of liberty is currently solidly rooted in the Court’s case law. According to some comments\(^ {136}\), this standard was established with the judgment in the case of Quaranta v. Switzerland of 1991. The applicant is a young, emotionally unstable Italian accused of use of and trafficking in drugs, a crime penalised by up to three years of imprisonment. He asked for a court-appointed lawyer on several occasions but his requests were rejected. In the end, he appeared in court alone and was sentenced to six months of imprisonment. The ECtHR found a violation of Article 6, §3c of the Convention, pointing out not the sentence actually imposed, but the possible sentence. In the Court’s opinion, “[…] free legal assistance should have been afforded by reason of the

\(^{132}\) For a more detailed discussion on this issue, see Trechsel, S. Human Rights in Criminal Proceedings, p. 272.

\(^{133}\) In fact, as will become clear below, the directive does not distil completely the requirements arising from the newest ECtHR case law.

\(^{134}\) Directive (EU) 2016/1919, recitals 2, 23 and 30.

\(^{135}\) According to Karen Reid, this is a major criterion in the Court’s case law, while the other ones are complementary. See Reid, K. A Practitioner’s Guide to the European Convention on Human Rights, p. 193.

\(^{136}\) See, for example, ECtHR, Guide on Article 6 of the European Convention on Human Rights, Strasbourg: Right to a fair trial (criminal limb), § 291.
mere fact that so much was at stake”\footnote{ECtHR, \textit{Quaranta v. Switzerland}, No. 12744/87, Judgment of 24 May 1991, § 33.}. In fact, however it does not become clear in this case whether the interests of justice would require the provision of free legal aid if the stake for the applicant were lesser but still involved deprivation of liberty. In its older case law, the Commission as a rule accepted that member states do not have such an obligation in cases where the penalties might reach up to nine months of effective imprisonment\footnote{For a brief review, see Reid, K. \textit{A Practitioner’s Guide to the European Convention on Human Rights}, p. 195.}. Furthermore, in \textit{Quaranta} the Court pointed out other significant factors: the complexity of the case and the personal situation of the applicant\footnote{\textit{Ibid.}, §§ 34-35.}.

The real beginning of the application of the requirement to provide free legal aid in the interest of justice where the law foresees deprivation of liberty is the Grand Chamber judgment in the case of \textit{Benham v. the United Kingdom} of 1996. The case concerns the refusal to provide free legal aid to the applicant who owed a small local fee and was sentenced to 30 days of imprisonment for failing to pay it. The ECtHR found a violation of Article 6, §3c of the Convention and concluded: “[...where deprivation of liberty is at stake, the interests of justice in principle call for legal representation”\footnote{ECtHR, \textit{Benham v. the United Kingdom}, No. 19380/92, Grand Chamber judgment of 10 June 1996, § 61.}. The Court will later repeat this in many other judgments\footnote{See, for example, ECtHR, \textit{Hooper v. the United Kingdom}, No. 42317/98, Judgment of 16 November 2004, § 20; ECtHR, \textit{Beet and Others v. the United Kingdom}, Nos. 47676/99 et al., Judgment of 1 March 2005, § 38; ECtHR, \textit{Lloyd and Others v. the United Kingdom}, Nos. 29798/96 et al., Judgment of 1 March 2005, § 134; ECtHR, \textit{Prežec v. Croatia}, No. 48185/07, Judgment of 15 October 2009, § 29; ECtHR, \textit{Zdravko Stanev v. Bulgaria}, No. 32238/04, Judgment of 6 November 2012, § 38; ECtHR, \textit{Mikhaylova v. Russia}, No. 46998/08, Judgment of 19 November 2014, § 82.}. Directive (EU) 2016/1919 does not explicitly require the provision of free legal aid where the law foresees deprivation of liberty. The UN Principles and Guidelines in turn require the states to guarantee that every person charged with a criminal offence for which a term of imprisonment or capital punishment may be imposed by a court of law has access to legal aid in all proceedings at court\footnote{UN Principles and Guidelines, Guideline 5, § 45.}.

The complexity of the case is another criterion for the provision of free legal aid to the suspected or the accused person in the interest of justice. In one of its early judgments in the case of \textit{Artico v. Italy} of 1980, the ECtHR held that proceedings related to clarifying statutes of limitation before the Court of Cassation is sufficiently complex to require \textit{per se} legal representation, and that the authorities have had to replace the applicant’s court-appointed lawyer who could not represent him\footnote{ECtHR, \textit{Artico v. Italy}, § 34.}. This criterion is often applied along with other criteria in the ECtHR case law, and it is difficult to distil its relative weight from the arguments of the Court. On the other hand, in its decision in the case of \textit{Barsom and Varli v. Sweden} of 2008, the ECtHR found the application manifestly ill-founded in a case of administrative proceedings for the collection of additional taxes from two restaurant co-
owners. In the opinion of the Court, which accepts that the case involves criminal charges according to its autonomous definition of this term, the case is relatively simple from factual point of view, and the applicants were not under threat of deprivation of liberty. Furthermore, the Swedish administrative courts were under the statutory obligation to assist the parties in their preparation for the hearing and to clarify different circumstances insofar as this was required by the nature of the case. The HRC adopts a similar approach in its decision in the case of O.F. v. Norway of 1984. The applicant complained of not being granted free legal aid in proceedings consolidating two cases concerning the imposing of a small fine. The trivial nature of the accusations and the light penalties gave the Committee grounds to declare the application inadmissible.

What the Court denotes as “personal situation of the accused” is an important criterion in granting free legal aid. This criterion applies to persons who, due to their age, professional background, disability, citizenship, belonging to a vulnerable minority, etc., are unable to defend themselves. In some comments, these circumstances are sometimes integrated under the criterion of case complexity. Undoubtedly, some personal characteristics of the accused might make for him/her the case more complex beyond its objective complexity. In its case law, however, the Court provides sufficient grounds to distinguish the personal situation of the accused as an independent criterion. Mixing this criterion with the complexity of the case does not allow assessing the weight of certain personal characteristics of the accused, which by themselves render him/her incapable of effective participation in the proceedings and of defending him/herself beyond the complexity of the case. The case of Zdravko Stanev v. Bulgaria of 2012 is typical. In it, the personal situation of the applicant has an independent role in determining whether he has had to be granted free legal aid. The applicant was found guilty of using a counterfeit document in judicial proceedings, thus tarnishing the reputation of a judge. He was however relieved of criminal liability and was fined BGN 500; he also had to pay a significant amount of money to satisfy the civil claim filed against him in the course of the criminal proceedings. At the same time, he was refused free legal aid despite the fact that he had no means to pay a lawyer. The ECtHR found a violation of Article 6, §3c with the following arguments:

“[A]lthough it is not in dispute that the applicant had a university degree, there is no suggestion that he had any legal training, and while the proceedings were not of the highest level of complexity, the relevant issues included the rules on admissibility of evidence, the rules of procedure, and the meaning of intent. [...] As such, a qualified

144 ECtHR, Barsom and Varli v. Sweden, Nos. 40766/06 and 40831/06, Decision of 4 January 2008.
147 See ECtHR, Guide on Article 6 of the European Convention on Human Rights, Strasbourg: Right to a fair trial (criminal limb), § 292.
lawyer would undoubtedly have been in a position to plead the case with greater clarity and to counter more effectively the arguments raised by the prosecution. The fact that the applicant, as an educated man, might have been able to understand the proceedings does not alter the fact that without the services of a legal practitioner he was almost certainly unable to defend himself effectively.\(^{148}\)

In a notable recent development of its case law, in the case of Mikhaylova v. Russia of 2014, the ECtHR gives special significance to the fact that criminal proceedings against the applicant have affected her fundamental human rights guaranteed by the Convention: the right to freedom of peaceful assembly under Article 11 and the right to freedom of expression under Article 10. In the opinion of the Court, this in itself is a high stake justifying the provision of free legal aid in the criminal proceedings. The Court required the analysis of the pertinent factual and legal elements related to the assessment of the accused person’s material status at the national level to be conducted with regard to the possibility of restricting his/her fundamental human rights through the outcome of the criminal proceedings.\(^{149}\)

Both Directive (EU) 2016/1919 and the ECtHR case law allow the use of merits tests in the provision of free legal aid. The test involves an assessment of the merits and the chances of success of the potential legal actions. The implementation of a merits test with the purpose of providing free legal aid has a more limited use in criminal proceedings than in civil or administrative proceedings. Article 4 of the directive requires the member states to consider the seriousness of the offence, the severity of the potential sanction and the complexity of the case in applying a merits test. It establishes two presumptions that the test has been satisfied: when a suspect or an accused person is brought before a court in order to decide on detention at any stage of the proceedings, and during detention.\(^{150}\) Both situations are evidence of the independent nature of the right to access to legal assistance and legal defence in criminal proceedings under the directive. On the other hand, the directive grants member states the discretion to exclude from the possible provision of free legal aid the perpetrators of minor offences because the merits test would not be met, under the condition that this is consistent with the right to a fair trial.\(^{151}\)

The ECtHR allows the use of a merits test in appeal proceedings. A leading case in the Court’s case law in this respect is Monnell and Morris v. the United Kingdom of 1987. The two applicants were sentenced to several years of imprisonment, for burglary and sale of drugs. The lawyers who represented them at the trials advised them not to appeal the sentences for lack of any prospect whatsoever for the success of the appeal and because

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149 ECtHR, Mikhaylova v. Russia, §§ 99-101.
151 Ibid., Recital 13.
under the leave of appeal procedure at the time they risked a prolongation of their actual (not the imposed with the sentence) imprisonment if the appeal were rejected on the grounds of merit. Nevertheless, they appealed, asking to be granted legal assistance to appear before court. Their requests were rejected. The ECtHR did not find a violation of Article 6, §3c. In the Court’s opinion, “[t]he interests of justice cannot, however, be taken to require an automatic grant of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6” 152. Given the specific circumstances in this case, the arguments of the Chamber are questionable. Still, the Commission would use this finding to declare inadmissible the applications in several other cases 153. On the other hand, in a series of cases the Court subjected to independent review the use of merits test in appeal proceedings and found violations where the interests of justice were not satisfied 154.

General Comment No. 32, as well as the case law of the United Nations Human Rights Committee, also allow the use of merits tests for the provision of free legal aid. In General Comment No. 32, the Committee notes that the “objective chance of success at the appeals stage” should be considered in deciding whether the accused should be appointed a lawyer in the interest of justice 155. In its case law on individual applications, the HRC allows free legal assistance to be refused due to absence of objective chances of success of the appeal, even with regard to harsh criminal sentences. This, however, does not apply to crimes for which the death penalty may be imposed, where the accused should be guaranteed the participation of counsel, including through the provision of free legal aid at all stages of the proceedings, regardless of the chances of success at the appeals stage 156.

4.4. Waiver of free legal assistance and appointment of counsel against the will of the accused

Legal aid beneficiaries, regardless of their procedural capacity, may waive this right under certain conditions related to the fair trial. In its decision on the case of Raykov v. Bulgaria of 2009, the ECtHR underlines that, as in the case of the right to access to a lawyer, “[...] neither the letter, nor the spirit of the article 6 of the Convention may prevent the

152 ECtHR, Monnell and Morris v. the United Kingdom, § 67.
155 HRC, General Comment No. 32, § 38.
person to waive, explicitly or tacitly, his right to court-appointed counsel" 157. The Court adds, however, that such waiver is admissible only if unequivocal and if not contradicting some significant public interest 158. Today all European jurisdictions accept that in certain situations the interest of justice requires legal defence even if the accused has waived its right to such, for example when the charges are severe, when the person belongs to a vulnerable group (minor, foreigner, suffering from mental or physical disability, does not know the language of the proceedings, etc.) 159. In the decision on Padalov v. Bulgaria of 2006, the Court stated that given the severe penalty that threatened the applicant the interests of justice required that for the purpose of fair trial he be granted free legal assistance in the criminal proceedings against him 160.

In its earlier case law, the Strasbourg bodies accepted that with regard to a defender appointed under a legal aid system Article 6, §3c does not guarantee the accused either the right to have a lawyer of his/hers own choosing appointed, or the obligation of the authorities to consult him/her 161. This rigid approach seems to mellow in later ECtHR case law. In Croissant and in other later cases, the Court instructs:

“When appointing defence counsel the national courts must certainly have regard to the defendant’s wishes [...] However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice” 162. In reality, as becomes clear from Croissant, the Court’s interpretation of what is necessary in the interest of justice might go too far in disregarding the wishes of the accused 163. The unclear messages of the Court in various cases demonstrate a need for further clarification of its standards.

158 CEDH, Raykov c. Bulgarie, § 63.
160 CEDH, Padalov c. Bulgarie, § 55.
161 See, for example, ECmHR, X. v. Germany, No. 6946/75, Decision of 6 July 1976.
162 ECtHR, Croissant v. Germany, § 29; ECtHR, Lagerblom v. Sweden, No. 26891/95, Judgment of 14 January 2003, § 54; ECtHR, Mayzit v. Russia, § 66; ECtHR, Vozhigov v. Russia, No. 5953/02, Judgment of 26 April 2007, § 41; ECtHR, X. v. Finland, No. 5953/02, Judgment of 26 April 2007, § 183; ECtHR, Breukhoven v. the Czech Republic, No. 44438/06, Judgment of 21 July 2011, § 60; ECtHR, Karpyuk and Others v. Ukraine, Nos. 30582/04 and 32152/04, Judgment of 6 October 2015, § 144.
163 See 3.1 above.
5. RIGHT TO PRACTICAL AND EFFECTIVE DEFENCE

5.1. Meaning of the right to practical and effective defence

The access to a lawyer, even when guaranteed and exercised immediately after detention or after bringing the charges, cannot in itself ensure effective defence of the suspected or the accused if the lawyer is not provided the opportunity to participate effectively in the proceedings. Already since their earliest case law, the Convention organs focused on the need of providing certain minimum guarantees as a pre-condition for the provision of effective legal assistance. In the case of Artico, the Commission and the Court deduce this need from the overall objective of the Convention to guarantee not rights that are theoretical or illusory but rights that are “practical and effective” 164. The set of such guarantees, as distilled from the Strasbourg bodies’ case law, is currently not exhaustive. Apart from the obligation of the competent authorities to react adequately to flagrant violations, such as the failure of the lawyer to attend court hearings or his/her cooperation with the investigative bodies against the interests of the accused, it also covers: ensuring sufficient contacts, time and means to carry out all defence activities; the confidentiality of client-lawyer communication; and the lawyer’s freedom to act, including his/her protection against possible unjustified sanctions 165.

Article 3.3 and Article 4 of Directive 2013/48/EU require that the member states guarantee certain rights to the suspected and the accused persons, as well as to their lawyers, which as a whole follow the case law of the Convention organs 166. These provisions are criticised for their failure to transform the active participation of the lawyer in criminal proceedings into a universal right, for their failure to formulate specific standards in this respect, and for leaving too much of the content of this right to be regulated by national law 167. This criticism, justified insofar as it targets the minimalistic approach of the directive, still does not recognise its progressive content. While the ECtHR case law does not clarify whether the right to contact with a lawyer at the first questioning also includes the right of the lawyer to be present and to participate effectively in the questioning 168, Article 3.6 of the directive guarantees this right, albeit with a reference to procedures in national law 169.

164 ECtHR, Artico v. Italy, § 33. See also in the earlier case law of the Court ECtHR, Goddi v. Italy, No. 8966/80, Judgment of 9 April 1984, § 27.
165 For more details, see 5.3 below.
166 See 1.1 above.
169 Similarly, the CPT requires the right to access to a lawyer to include “[t]he right to have the lawyer
5.2. Limits to the state responsibility

The Strasbourg organs accept in their case law that the national criminal justice bodies, as well as the state in general, cannot be held responsible in all cases in which the defence was not sufficiently practical and effective. In the case of *Kamasinski v. Austria* of 1989, the Court held:

“It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The Court agrees with the Commission that the competent national authorities are required under Article 6 § 3 (c) (art. 6-3-c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way”\(^{170}\).

In its subsequent case law, the Court has found violations of Article 6, §3c accepting that the state is responsible for the failure of the lawyer to ensure effective defence when:

- the Supreme Court did not provide effective defence to the accused when the lawyer appointed under a legal aid system did not appear at the hearing, especially given the presence of the prosecutor and his request for reclassification of the charges\(^ {171}\);
- the national court did not examine the failure of the lawyer to perform his obligations and did not replace him quickly and, when finally replaced him, did not delay the hearing to give the new lawyer time to get acquainted with the case file\(^ {172}\);
- the national court did not ensure that the lawyers appointed under a legal aid scheme perform their duties when they did not appear in any of the hearings during the trial\(^ {173}\);
- the investigators tolerated and made use of the lawyer’s inaction\(^ {174}\);
- the national court appointed two lawyers to the accused but did not provide him phone numbers to contact them, and they did not meet him to discuss the defence strategy\(^ {175}\).

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\(^{174}\) ECtHR, *Pavlenko v. Russia*, No. 42371/02, Judgment of 1 April 2010, §§ 112-114.

\(^{175}\) ECtHR, *Prežec v. Croatia*, § 31.
In the Court’s opinion, even if the accused has contributed to the ineffective defence with his behaviour, when the defence has deficiencies, this does not relieve the competent authorities of the responsibility to guarantee its effectiveness.\(^{176}\)

In its early case law the HRC accepts that the standards of assessing the responsibility of the state for ineffective defence are different in cases of privately hired as compared to appointed lawyers. The Committee declared inadmissible an application concerning serious deficiencies of the defence before the trial court where the applicant was sentenced to 20 years of imprisonment and, in addition, his privately hired lawyer did not appear at the appeal hearing. In the Committee’s opinion, the failure of the legal defence cannot be attributed to the state, because the applicant’s lawyer was hired privately.\(^{177}\) Later, however, the Committee modified its approach, accepting that the state is responsible for the failure to provide effective legal defence even of a privately hired lawyer, if the pertinent facts were brought to the attention of the competent state body.\(^{178}\)

**5.3. Conditions for practical and effective defence**

**5.3.1. Sufficient contacts, time and means to carry out the defence**

Restricting the contacts between the lawyer and the suspected or the accused person, especially during detention, may have fatal consequences on the effectiveness of the defence. The same holds true for ensuring sufficient time and means necessary for the specific work on carrying it out. When deciding whether the restrictions had been justified, the ECtHR takes into consideration the complexity of the case, the severity of the charges, as well as all accompanying circumstances that could affect the effectiveness of the defence. In the case of Öcalan v. Turkey of 2005 the Court found a violation of Article 6, §3c of the Convention due to the restrictions on the number and the duration of the meetings between the applicant and his lawyers. Since during the pre-trial stage he was detained on a remote island for security reasons, his meetings with his lawyers were dependent on the schedule of the ferry to the island. They were therefore limited to two one-hour visits per week. Given the complexity of the case, this was insufficient and had an adverse impact on the effectiveness of the defence.\(^{179}\) In the case of Bogumil v. Portugal of 2008 the Court found a

\(^{176}\) ECtHR, Sannino v. Italy, No. 30961/03, Judgment of 27 April 2006, § 51.


\(^{179}\) ECtHR, Öcalan v. Turkey, No. 46221/99, Grand Chamber judgment of 12 May 2005, § 135.
violation of Article 6, §3c in a case in which the lawyer of the applicant, accused of selling drugs, was appointed on the day of the hearing and was given five hours to get acquainted with the case file. In the Court’s opinion, this time was too short. In such a situation the national court could, and should have, delayed the hearing, despite the fact that the lawyer had not asked for this.  

The issue of the duration and the quality of the contacts with the lawyer, as well as that of the existence of sufficient means to carry out the defence, is especially important where the contact occurs by videoconferencing. This problem is treated in the Grand Chamber judgment in the case of Sakhnovskiy v. Russia of 2010. The applicant was in Novosibirsk at the time his case was being reviewed by the Supreme Court in Moscow. He was appointed a new lawyer and was given the opportunity to talk to her in a videoconference for 15 minutes immediately before the start of the hearing. The Court held that this period was too short given the complexity and the importance of the case. It also held that the videoconference, which was set up and operated by the state and was not protected against wiretapping, did not provide sufficient guarantees for the confidentiality of the conversation between the accused and his lawyer. The Court therefore found a violation of Article 6, §3c of the Convention.

5.3.2. Confidentiality of communication

Respecting the confidentiality of the communication between the lawyer and the suspected or accused person is the most important condition for practical and effective defence. Directive 2013/48/EU treats it in a special provision. It stipulates that communication includes meetings, correspondence, telephone conversations and other means allowed by national law. Some “soft” international standards are also dedicated to the privacy of the communication between the detained person and his/her lawyer. Thus Rule 61 of the new Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) requires that the prisoners “be provided with adequate opportunity, time and facilities to be visited by and to communicate and consult with a legal adviser of their own choice or a legal aid provider, without delay, interception or censorship and in full confidentiality, on any legal matter, in conformity with applicable domestic law. Consultations may be within sight, but not within hearing, of

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181 ECHR, Sakhnovskiy v. Russia, No. 21272/03, Grand Chamber judgment of 2 November 2010, §§ 103-104. For a violation under similar circumstances, see ECHR, Gorbunov and Gorbachev v. Russia, Nos. 43183/06 and 27412/07, Judgment of 1 March 2016. In the case of Marcello Viola v. Italy of 2006, however, the Court did not find a violation when in a videoconference hearing the applicant had sufficient time to communicate with his lawyer over a phone line, which was protected against wiretapping. (CEDH, Marcello Viola c. Italie, n° 45106/04, Arrêt du 5 octobre 2006, §§ 75-77).
prison staff” 183. The Havana Declaration on the Role of Lawyers provides for a similar requirement 184.

The ECtHR in turn has generated significant case law on the confidentiality of lawyer-client communication. As a rule, the infringement of this right results in a violation of Article 6, §3c of the Convention. According to one interpretation of Court case law, the accused should be able to demonstrate that his/her right to defence was violated because of the restriction, but does not need to prove that the restriction has resulted in an unfair trial 185. In reality, however, the ECtHR’s case law seems contradictory in this respect: in a recent judgment related to unlawful restriction of the privacy of communication, the Court held that the restriction results in a violation of Article 6, §3c only if the applicant could show how it has breached the fairness of the trial 186. If there is no direct link between the violation of the privacy of the correspondence with the lawyer and the actions of the lawyer with regard to a specific criminal case, the Court reviews this issue under Article 8, as related to the respect for the privacy of the correspondence with the lawyer 187.

In its judgment on the case of S. v. Switzerland of 1991, the Court underlines:

“The Court considers that an accused’s right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3 (c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective” 188.

In some subsequent case law, the Court reaffirms this approach in other cases 189. The Court found violations of the Convention due to violations of the confidentiality of lawyer-client communication in a series of cases in a variety of contexts. In both cases, when

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185Cf. Van Dijk, P., F. van Hoof, A. van Rijn, L. Zwaak (eds.). Theory and Practice of the European Convention on Human Rights, p. 639. The authors refer to § 58 of the judgment in Brennan v. The United Kingdom where this is claimed.
186 ECtHR, Moroz v. Ukraine, No. 5187/07, Judgment of 2 March 2017, § 73.
187 See, for example, ECtHR, Niemietz v. Germany, No. 13710/88, Judgment of 16 December 1992. The Court does not always make this distinction in its case law and sometimes finds a violation of Article 8 in cases where the purpose of the intervention was to prevent the accused from exercising his rights in the trial or to relieve the lawyer in his capacity of procedural representative in criminal proceedings from documents incriminating a specific offender (See, for example, ECtHR, Schönberger and Durmaz, No.11368/85, Judgment of 20 June 1988, §§ 23-30; ECtHR, André and Another v. France, No. 18603/03, Judgment of 24 July 2008, § 46).
reviewing the restriction under Article 6, §3c and when reviewing it under Article 8, it allows such restrictions on certain grounds. More specifically, the confidentiality of communication does not cover the lawyer’s potential complicity in criminal activities, as well as the situations in which the lawyer is unaware of being involved in such activities\textsuperscript{190}.

In the case of *Brennan v. the United Kingdom* of 2001 the Court found a violation of Article 6, §3c in a case in which a police officer was present at the first meeting between the applicant – detained on suspicion of complicity in terrorist acts – and his lawyer, in order to prevent the communication of information to suspects who were still at large. In the Court’s opinion, however, the investigating officers had no information that the lawyer was willing to cooperate even if there had been such intentions\textsuperscript{191}.

In the case of *Lanz v. Austria* of 2002 the Court held that the monitoring for a period of two months of the communication between the applicant and his lawyer, who was appointed by an investigative judge, was not proportional to the objective of preventing influencing of witnesses and hiding documents. This risk had justified placing the applicant in detention on remand but “[t]he restriction on contacts with defence counsel for a person who is already placed in detention on remand is an additional measure which requires further arguments”\textsuperscript{192}. In another case, the Court found that restricting the contacts between a lawyer and a detained person suspected of being a gang member for the purpose of ensuring strict confidentiality in order to arrest the other gang members was justified\textsuperscript{193}.

In several cases the ECtHR found violations of Article 6, §3c due to the fact that the applicants were held in metal cages during the judicial hearing, which were surrounded by security staff. In the Court’s opinion, the verbal communication between the accused and their lawyers could thus be overheard by the security staff, which would be inadmissible, even if it had occurred occasionally\textsuperscript{194}. The key to finding a violation in such a situation is the possibility for the conversation to be overheard, not the holding of the accused in a metal cage, which is allowed by the Court under certain conditions, albeit with questionable arguments\textsuperscript{195}.

The ECtHR finds separate violations of Article 6, §3c in cases of searches of law offices and seizure of case documents from them. Such is for example the case of *Khodorkovskiy and Lebedev v. Russia* of 2013. The authorities searched the office of one of the applicants’

\textsuperscript{190} For the case law of the Strasbourg organs in this respect, see Emmerson, B., A. Ashword et al. *Human Rights and Criminal Justice*, p. 429.

\textsuperscript{191} ECtHR, *Brennan v. the United Kingdom*, § 59.

\textsuperscript{192} ECtHR, *Lanz v. Austria*, § 52.

\textsuperscript{193} Ibid., § 52. Such is the case of *Kempers v. Austria* in which the Commission declared the application inadmissible. In the light of the standards of *Brennan*, however, it is not quite clear to what extent such actions of the investigators would be justified.


lawyers and seized documents related to the criminal case against one of the applicants, without the lawyer being a suspect and in the absence of guarantees against arbitrariness stipulated by Russian law\textsuperscript{196}.

\section*{5.3.3. Freedom of action of the lawyer and protection against unjustified sanctions}

The effective legal defence requires the lawyers to have sufficient freedom of action in the proceedings, and that both they and their clients to be protected against unjustified sanctions in the course of the proceedings in a manner that would adversely affect the defence of the accused.

In the case of \textit{Poitrimol v. France} of 1993, the applicant absconded before the hearing of his case by the Court of Cassation. He was therefore sanctioned by not admitting his application and by preventing his lawyer from pleading before the Court of Cassation. The ECtHR found a violation of Article 6, §3c of the Convention with the argument that the sanction was not proportional, undermined the rights of the defence and the rule of law in a democratic society\textsuperscript{197}.

In the case of \textit{Panovits v. Cyprus} of 2008, the ECtHR found a violation of Article 6, §1 of the Convention in a case in which the applicant’s lawyer was sanctioned with five days of deprivation of liberty for contempt of court. In another case, in which the lawyer was applicant, the Court found that this sanction was not justified. The lawyer himself addressed the national court with a request to be allowed to withdraw as defender in the case due to the worsening of his relations with the court. His request was denied by the court. In the ECtHR’s opinion, although the contempt proceedings were held apart from the main trial, the fact that the judges have felt insulted by the applicant’s lawyer had an adverse effect on his defence. Furthermore, the refusal to allow him to withdraw from the case was a disproportional reaction, which also had an adverse effect on the applicant’s right to defence. As a whole, the Court is of the opinion that “[...] the sentence imposed on the applicant’s lawyer had been capable of having a “chilling effect” on the performance of the duties attached to lawyers when acting as defence counsel”\textsuperscript{198}.

\textsuperscript{196} ECtHR, \textit{Khodorkovskiy and Lebedev v. Russia}, §§ 632-634.
\textsuperscript{198} ECtHR, \textit{Panovits v. Cyprus}, No. 4268/04, Judgment of 11 December 2008, § 99. The Court does not explain why it has chosen to look at this issue in the light of Article 6, §1 instead of Article 6, §3c.
6. CONCLUSION

The development of the international standards on the right to legal assistance and legal defence of suspected and accused persons in criminal proceedings has achieved a significant progress in the last decade. This is due to two factors: the progressive development of the ECtHR’s case law with the 2008 Grand Chamber judgment the case of *Salduz v. Turkey* and the Roadmap directives within the Stockholm Programme, adopted after 2009. Creating an obligation for the presence of a lawyer in the proceedings, not only from the moment of the formal presentation of the charge but also from the moment when the person concerned becomes suspected of committing a crime, will probably cause a profound reform of the criminal procedure in the European countries. This requirement will have effect not only on the fairness of the proceedings, but also on the still widely used in many countries practices of ill-treatment and arbitrary detention of criminal suspects, as well as on the infringement of their right to private life and communication.

Currently, it seems that the emancipation of the right to legal assistance and legal defence from the overall assessment of the fairness of the proceedings would be a key issue in the future development of the standards. While the Roadmap directives end the debate by giving this right independent status, the ECtHR case law with the *Simeonovi* judgment continued to maintain its subordinate role. There is however no such alternative for the EU member states. They are obliged to transpose the right as an independent one in their national legal systems and practices in accordance with the requirements of the directives.

Apart from this key issue, there are some other issues related to the synchronisation and clarification of the international standards in areas, such as the right to personal defence, the restriction of the choice of a lawyer, including the possibility to impose a court-appointed lawyer against the will of the accused person, the restriction of the right to legal assistance after detention, the expansion of the scope of “the interests of justice” for the purposes of granting free legal aid, as well as the conditions of practical and effective defence. The expansion of the standards on the right to legal assistance and legal defence to cover the suspected persons (in addition to the accused) in a meaningful and effective manner poses a serious challenge to the ECtHR case law. All these fields are likely to see further initiatives aimed at establishing legally binding and “soft” standards, as well as developments in the case law of international bodies at the global and at regional levels.