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# Mandatory Defence in Albanian Criminal Procedure: Between Formal Guarantee and Effective Defence

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## Abstract

This paper examines the institution of mandatory defence of the accused in criminal proceedings as one of the fundamental guarantees of the right to a fair trial. Starting from the specific procedural position of the accused and the objective inability to exercise the right of defence effectively without professional legal assistance, the study analyses the substantive role of defence counsel as a key element in ensuring equality of arms and adversarial proceedings before an impartial court.

The analysis draws on the Albanian constitutional, conventional, and criminal procedural framework, with particular focus on Article 49 of the Criminal Procedure Code. Within this framework, the 2017 amendments are of particular importance, as they not only expanded the scope of mandatory defence but also influenced the manner in which these cases are approached and applied in practice. The paper examines in detail each case provided by law, highlighting the underlying guarantee-oriented rationale, particularly in relation to the most vulnerable subjects of criminal proceedings, the seriousness of the criminal offence, and the critical stages of the process.

A substantial part of the study examines the effectiveness of defence in cases involving court-appointed counsel, in light of the standards developed in the jurisprudence of the European Court of Human Rights and Albanian judicial practice. In this regard, the analysis underscores the distinction

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between the mere formal presence of defence counsel and the genuine exercise of effective defence. Particular attention is also drawn to the absence of clear qualitative criteria governing both the selection and the ongoing oversight of court-appointed lawyers. At the same time, it is emphasised that abuse of the right of defence by the accused or by defence counsel cannot constitute grounds for alleging a violation of the right to a fair trial, provided that the court has genuinely ensured the possibility of effective defence.

**Keywords:** Mandatory defence, right of defence, fair trial, equality of arms, effective defence

## 1. Introduction

This paper is primarily based on analytical and doctrinal methods, through a systematic examination of the constitutional, conventional, and criminal procedural normative framework governing the institution of mandatory defence of the accused. The analysis examines how the relevant provisions of the Criminal Procedure Code are interpreted, particularly in relation to the core principles of a fair trial, equality of arms, and adversarial proceedings, as reflected in legal doctrine and international standards.

It also relies on a jurisprudential perspective, drawing on case law from the Constitutional Court of Albania, the Supreme Court, and the European Court of Human Rights, in order to assess how mandatory defence is applied in practice and what criteria are used to evaluate its effectiveness. This methodological approach enables the identification of concrete issues within judicial practice and the formulation of critical conclusions regarding the relationship between formal guarantees and the actual realisation of the right of defence.

In the historical and legal context of the position of the accused or the person under investigation in criminal proceedings, it is evident that the inclusion of the figure of professional defence counsel has been the result of a gradual process of social and institutional emancipation. This development reflects the objective inability of such individuals to possess the legal knowledge and professional expertise required to engage effectively with the complexities of criminal proceedings, rendering qualified legal representation not merely necessary but indispensable. In this sense, the presence of defence counsel does not merely constitute a formal element of the process, but rather a substantive guarantee for the realisation of the right of defence.

Through the normative regulation of this figure, the legislator has sought not only to enable the informed participation of the accused or the person under investigation in the proceedings, but also to guarantee the exercise of effective defence, grounded in specialised legal knowledge. All of this aims to render “as valid as possible the reasons for any potential objections

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raised by the accused" and as regular as possible the "exercise of judicial power", or, in other words, the lawfulness of criminal proceedings. Viewed from this perspective, defence is considered effective when it ensures adversarial proceedings vis-à-vis the prosecutor before an impartial judge, thereby taking shape as an activity serving a necessary public function[1].

Constitutional[2], conventional[3], as well as criminal procedural norms[4] shape a clear normative framework to guarantee the participation of defence counsel in criminal proceedings. This framework seeks to give practical effect to the guaranteeing function of the right of defence by positioning defence counsel as an essential element in the effective implementation of the principle of equality of arms.

The Constitutional Court of the Republic of Albania has emphasised that, particularly in criminal proceedings, equality of arms, adversarial proceedings, and, closely linked thereto, the realisation of the defence of the accused, explicitly guaranteed under Article 31 of the Constitution and Article 6 of the European Convention on Human Rights, constitute the most essential elements of due process in the constitutional sense. These constitutional standards require that the arguments of the defence be presented and heard in the same manner as those of the prosecutor and presuppose that each party must be afforded reasonable opportunities to present its case under conditions that do not place it at a disadvantage vis-à-vis the opposing party. The primary aim of these principles is to ensure a genuine debate between the prosecution and the defence, which has a direct and positive impact on the establishment

[1] Dhimitër Lara, *Commentary on Criminal Procedure*, Morava Publishing House, 2019, pp. 287–288.

[2] Article 31 of the Constitution of the Republic of Albania provides that: "In criminal proceedings, everyone has the right: … (ç) to defend himself or herself in person or through the assistance of legal counsel of his or her own choosing; to communicate freely and privately with such counsel; and to be provided with free legal defence where he or she lacks sufficient financial means …".

[3] Article 6 ("Right to a Fair Trial") of the European Convention on Human Rights provides that: "…3. Everyone charged with a criminal offence has the following minimum rights: … (c) to defend himself or herself in person or through legal assistance of his or her own choosing or, if he or she does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require …".

[4] Article 6 "Provision of Defence" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. The accused has the right to defend himself or herself in person or with the assistance of defence counsel. Where the accused lacks sufficient financial means, he or she shall be provided with free legal defence by a lawyer in the cases provided for by this Code. 2. Defence counsel assists the accused in ensuring that his or her procedural rights are guaranteed and that his or her lawful interests are protected."*
*Article 34/a "Rights of the Accused" of the Criminal Procedure Code of the Republic of Albania provides that: "1. The person under investigation or the accused has the right: …(ç) to defend himself or herself in person or with the assistance of defence counsel of his or her own choosing …".*

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of the truth and on the administration of justice by the court with objectivity and impartiality[5].

Regarding the right of defence, in its consistent jurisprudence, the Constitutional Court of the Republic of Albania has held that this right must be real and effective, and not merely theoretical. Its exercise must not be hindered; on the contrary, courts of ordinary jurisdiction are required to take all legal measures which, in the interest of a fair trial, enable the individual to exercise a genuine defence, in full respect of the principle of equality of arms[6]. The role of defence counsel in criminal proceedings is technical. It is exercised through the provision of legal assistance to the defendant and representation before the court[7]. Depending on the source of authority conferring the power of representation, Albanian criminal procedural legislation recognises two types of defence counsel, namely: (i) counsel chosen by the accused (Article 48 of the Criminal Procedure Code)[8]; and (ii) counsel appointed by the prosecuting authority (court-appointed counsel), where the accused has not chosen defence counsel or has been left without one in cases of mandatory defence (Article 49 of the Criminal Procedure Code)[9], as well as in cases

[5] See the decisions of the Constitutional Court of the Republic of Albania: Decision no. 4, dated 10 February 2012; Decision no. 8, dated 28 February 2012; Decision no. 23, dated 23 July 2009; and Decision no. 19, dated 18 September 2008.

[6] See the decisions of the Constitutional Court of the Republic of Albania: Decision no. 55, dated 18 December 2012; Decision no. 37, dated 19 September 2011; Decision no. 25, dated 10 June 2011; Decision no. 5, dated 17 February 2003; and Decision no. 33, dated 24 November 2003.

[7] See the Unifying Decision no. 1, dated 10 March 2014, of the Joint Chambers of the Supreme Court of the Republic of Albania.

[8] Article 48 "Defence Counsel Chosen by the Accused" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. The accused has the right to choose no more than two defence counsel. 2. The choice shall be made by a declaration before the prosecuting authority or by an act granted to defence counsel or sent to him or her by registered mail. 3. The choice of defence counsel for a detained, arrested, or imprisoned person, until such person has made the choice personally, may be made by a close relative, in the forms provided for in paragraph 2."*

[9] Article 49 "Mandatory Defence" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. The prosecuting authority shall immediately provide, at the expense of the State, defence counsel to an accused who has not chosen defence counsel or who has been left without one, where: (a) the accused is under eighteen years of age; (b) the accused is deaf and mute; (c) the accused has disabilities which prevent him or her from exercising the right of defence independently; (ç) the accused is charged with a criminal offence for which the law provides a maximum sentence of not less than fifteen years of imprisonment; (d) the accused is charged with a criminal offence under subparagraphs "a" and "b" of Article 75/a of this Code; (dh) the accused has been declared a fugitive or is tried in absentia by a court decision; (e) an arrested or detained person is questioned; (ë) in the cases provided for under paragraph 5 of Article 205 or paragraph 1 of Article 296 of this Code; (f) in any other case provided for by law. 2. Where the grounds for mandatory defence exist pursuant to this Article, the prosecuting authority shall immediately appoint defence counsel for the accused. Defence*

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where mandatory defence does not apply but the accused lacks sufficient financial means to cover the costs of defence counsel (Article 49/a of the Criminal Procedure Code)[10].

In the case of chosen defence counsel, the person under investigation or the accused exercises the right of choice, on the assumption that they are capable of selecting counsel to protect their interests and, accordingly, of ensuring and effectively realising such protection[11]. By contrast, the figure of court-appointed defence counsel is grounded in the necessity of technical defence in certain cases. In such circumstances, the right of defence prevails over the will of the accused and aims to ensure adversarial proceedings within the criminal process[12].

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*counsel shall assist the accused at all stages of the proceedings for as long as the conditions set out in paragraph 1 of this Article continue to exist. 3. Defence counsel appointed pursuant to this Article shall be selected by the prosecuting authority from the list made available by the Bar Association. 4. Where the court, the prosecutor, or the judicial police are required to carry out a procedural act for which the assistance of defence counsel is mandatory and the accused is without defence counsel, they shall notify the appointed defence counsel of such act. 5. Where the presence of defence counsel is required and the chosen or appointed defence counsel has not been secured, has failed to appear, or has withdrawn from the defence, the court or the prosecutor shall apply paragraph 4 of Article 350 of this Code. Where the absence is justified, the court or the prosecutor may appoint another defence counsel as a substitute, who shall exercise the rights and assume the obligations of defence counsel. 6. Appointed defence counsel may be replaced only for justified reasons. His or her functions shall cease once the accused chooses his or her own defence counsel. 7. Where defence cannot be ensured pursuant to this provision and paragraph 3 of Article 49, defence shall be guaranteed by the institutions administering free legal aid, in accordance with the legislation in force".*

[10] Article 49/a "Accused Lacking Sufficient Financial Means" of the Criminal Procedure Code of the Republic of Albania provides that: *"Where the cases of mandatory defence do not apply and the accused who lacks sufficient financial means requests defence counsel, the prosecuting authority shall appoint defence counsel from the list made available by the institutions administering free legal aid. The costs of the defence shall be borne by the State."*

[11] Dhimitër Lara, Commentary on Criminal Procedure, Morava Publishing House, 2019, p. 293.

[12] The European Court of Human Rights has identified three fundamental reasons which may justify the appointment of a lawyer even without the consent of the accused (see Correia de Matos v. Portugal, no. 56402/12, Grand Chamber judgment, 4 April 2018): 1) where the accused persistently insists on obstructing the normal conduct of the trial; 2) where the accused is required to answer to a serious charge but is clearly incapable of acting in defence of his or her own interests; 3) where it is necessary to protect vulnerable witnesses from further trauma that the accused might cause, or from intimidation tactics that the accused might employ against them when questioning them personally. These reasons are not exhaustive. Other typical situations may also arise; however, in all cases, court-appointed defence counsel acts under the supervision of the court, with a view to ensuring the guarantees of the right to defence.

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## 2. Cases of Mandatory Defence

In the original version of the Criminal Procedure Code of the Republic of Albania, the figure of defence counsel appointed by the prosecuting authority was regulated under Article 49, which provided that assistance by defence counsel was mandatory only in cases where: (i) the accused was under eighteen years of age; or (ii) suffered from physical or mental impairments that prevented the exercise of the right of defence independently[13]. Meanwhile, in cases where the accused had not chosen defence counsel or had been left without one, the prosecuting authority was obliged to appoint defence counsel only if the accused expressly requested such appointment.

The initial wording of Article 49 of the Criminal Procedure Code of the Republic of Albania, according to which an accused who had not chosen defence counsel or had been left without one would be assisted by defence counsel appointed by the prosecuting authority "if they so request", by conditioning the intervention of the prosecuting authority on a formal request by the accused, as well as by limiting the cases of mandatory defence, gave rise to several issues in judicial practice in Albania.

In response to the problems identified in practice, the amendments introduced to Article 49 of the Criminal Procedure Code of the Republic of Albania by Law No. 35/2017[14] provided for additional cases of mandatory defence beyond those previously existing. Specifically, mandatory defence was extended to cases where the accused: (i) is charged with a criminal offence for which the law provides a maximum sentence of not less than fifteen years of imprisonment; (ii) is charged with a criminal offence under subparagraphs

[13] Article 49 of the Criminal Procedure Code of the Republic of Albania (initial version) provided that: *"1. An accused who has not chosen defence counsel or who has been left without one shall be assisted by defence counsel appointed by the prosecuting authority, provided that he or she so requests. 2. Where the accused is under eighteen years of age or has physical or mental impairments which prevent him or her from independently exercising the right of defence, assistance by defence counsel shall be mandatory. 3. The Governing Council of the Bar Association shall make available to the prosecuting authorities the lists of lawyers and shall establish the criteria for their appointment. 4. Where the court, the prosecutor, or the judicial police are required to carry out a procedural act for which the assistance of defence counsel is prescribed and the accused is without defence counsel, they shall notify the appointed defence counsel of such act. 5. Where the presence of defence counsel is required and the chosen or appointed defence counsel has not been secured, has failed to appear, or has withdrawn from the defence, the court or the prosecutor shall appoint another defence counsel as a substitute, who shall exercise the rights and assume the obligations of defence counsel. 6. Appointed defence counsel may be replaced only for justified reasons. His or her functions shall cease once the accused chooses his or her own defence counsel. 7. Where the accused lacks sufficient financial means, the costs incurred for the defence shall be borne by the State".*

[14] See Law no. 35/2017, dated 30 March 2017, "On Certain Additions and Amendments to Law no. 7905, dated 21 March 1995, 'The Criminal Procedure Code of the Republic of Albania', as amended."

ISSN: 1857-7881 (Print)
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"a" and "b" of Article 75/a of the Criminal Procedure Code; (iii) has been declared a fugitive or is tried in absentia by a court decision; (iv) is questioned as an arrested or detained person; (v) falls within the cases provided for in paragraph 5 of Article 205 or paragraph 1 of Article 296 of the Criminal Procedure Code; or (vi) in any other case provided for by law.

According to the explanatory report accompanying the 2017 amendments to the Criminal Procedure Code, Article 49 was reformulated to provide for mandatory defence only where such a guarantee is indispensable[15]. Accordingly, these amendments contributed in two main respects: (i) the strengthening of the guaranteeing role of defence counsel by providing for mandatory defence in cases involving the most "vulnerable" accused persons, taking into account the seriousness of the criminal offence, as well as the condition or status of the person under investigation or the accused; and (ii) the reduction of unnecessary costs borne by the State budget as a result of avoiding the automatic appointment of court-appointed counsel in every case where the person under investigation or the accused merely requests such appointment.

The cases in which defence is mandatory may be exhaustively identified as follows.

### 2.1 The Person under Investigation or the Accused Is under Eighteen Years of Age

As mentioned above, this case of mandatory defence was provided for from the very first version of the Criminal Procedure Code in 1995. The provision of mandatory defence in cases where the person under investigation or the accused is under eighteen years of age stems from the specific legal

[15] According to the explanatory report: *"…The draft law provides for a change in the right to defence ex officio from a universal right applicable in every case to a right enjoyed by the accused only in the cases expressly provided for by law. This aims, on the one hand, to reduce unnecessary costs borne by the State budget and, on the other hand, to enhance the discipline of judicial proceedings. The European Court of Human Rights, in its case-law, as well as Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings, establish the obligation of Member States to provide defence counsel to the accused where this is required "in the interests of justice". The interests of justice are defined by the seriousness of the criminal offence or by the condition or status of the accused. Accordingly, this right is afforded to certain categories of accused persons who are more vulnerable and who cannot validly waive this right. For this reason, Article 49 has been reformulated so as to provide for mandatory defence only in cases where the guarantee of the accused is indispensable. Furthermore, newly introduced Article 49/a regulates cases where the accused lacks the financial means to retain defence counsel, by providing for the application of the relevant procedures before the State Commission for Legal Aid."* See: https://share.google/AsVRThFt8Lm88wWQR

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

status[16] and the heightened vulnerability of minors in relation to criminal proceedings. The lack of full intellectual and emotional maturity, as well as the objective inability to understand and autonomously exercise procedural rights, underscores the indispensable role of professional defence counsel as a substantive guarantee for the effective realisation of the right of defence.

International instruments also support this approach,[17]which requires that every child involved in criminal proceedings receive appropriate legal assistance.

In this sense, mandatory defence does not constitute a procedural privilege, but rather a guaranteeing instrument, dictated by the principle of the best interests of the child and by the necessity of ensuring compliance with due process standards.

### 2.2 The Person under Investigation or the Accused Does Not Hear or Speak

The provision of mandatory defence in cases where the person under investigation or the accused does not hear or speak stems from the particular vulnerability of this group in relation to criminal proceedings. The inability to communicate directly and effectively with the prosecuting authorities substantially restricts the exercise of procedural rights, including the understanding of the charge, the giving of statements, and related procedural acts[18]. In this context, the mandatory presence of defence counsel serves as a guaranteeing mechanism for the effective exercise of the right of defence and for ensuring the genuine participation of the individual in the proceedings by compensating for communication barriers.

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[16] Article 54 of the Constitution of the Republic of Albania provides that: *"1. Children, young people, pregnant women and new mothers have the right to special protection by the State …"*.

[17] See the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules, 1985); the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules, 1990); and the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules, 1990).

[18] In this context, reference is made to Article 8 "Use of the Albanian Language" of the Criminal Procedure Code of the Republic of Albania, which provides that: *"…2. Persons who do not know the Albanian language shall use their own language and, through the assistance of an interpreter, have the right to speak and to be informed of the evidence and procedural acts, as well as of the conduct of the proceedings. Persons who are deaf and mute have the right to use sign language. 3. The costs of translation and interpretation shall be borne by the State."*

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

### 2.3 The Person under Investigation or the Accused Has Disabilities That Prevent the Autonomous Exercise of the Right of Defence

The guarantee of the right of defence and legal representation for a person with disabilities (primarily a person who is mentally incapacitated) must be mandatorily ensured by the prosecuting authority as an essential element of due process and of respect for the procedural status of such individuals in criminal proceedings. In this regard, attention should be drawn to important international standards and instruments that emphasise the necessity of protecting the rights and dignity of persons with mental health disorders[19].

Accordingly, from the very moment of the detention or arrest of a person with mental health disorders[20], two fundamental procedural rights must be guaranteed: (i) the right of that person to be assisted by a representative or defence counsel throughout the proceedings; and (ii) the prompt expert assessment of the person's mental condition, as soon as possible, not only to determine criminal responsibility, but also to identify the appropriate medical treatment in accordance with their needs.

It should be noted that the procedural rights and guarantees provided for under Articles 5 and 6 of the European Convention on Human Rights must also be applied in cases involving persons with mental health problems. This issue has likewise been addressed in the jurisprudence of the European Court of Human Rights[21].

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[19] Within the framework of the Council of Europe, particular importance should be attached to Recommendation Rec(2004)10 of the Committee of Ministers of the Member States, an instrument which, together with the standards of the World Health Organization (WHO), aims to protect the dignity, rights and fundamental freedoms of persons with mental health disorders, especially those who are subjected to involuntary treatment.

[20] The European Court of Human Rights, within the framework of the right to liberty and security of person under Article 5 of the European Convention on Human Rights, has developed extensive case-law concerning the detention of persons suffering from mental disorders. An individual may be regarded as "a person of unsound mind" and may be subjected to deprivation or restriction of liberty only where at least the following three conditions are satisfied (see Stanev v. Bulgaria [GC], § 145; D.D. v. Lithuania, § 156; Kallweit v. Germany, § 45; Varbanov v. Bulgaria, § 45; and Winterwerp v. the Netherlands, § 39): i. the existence of a mental disorder must be convincingly established by means of an objective medical expert assessment, except in cases where an urgent compulsory placement is required; ii. the mental disorder of the person concerned must be of a kind or degree warranting compulsory confinement; it must be demonstrated that deprivation of liberty was necessary, having regard to the circumstances of the case; iii. the mental disorder established by an objective medical expert assessment must persist throughout the entire period of compulsory confinement.

[21] In this regard, the European Court of Human Rights has identified several rights that must be guaranteed to a person detained with mental health disorders, such as the holding of a hearing (Nikolova v. Bulgaria [GC], § 58), the right to be heard either in person or through a representative (Kampanis v. Greece, § 47), including at reasonable intervals during the period of confinement (Çatal v. Turkey, § 33; Altınok v. Turkey, § 45), as well as respect for the

ISSN: 1857-7881 (Print)
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It must further be emphasised that, where it appears that the mental condition of the accused is such as to prevent their conscious participation in the proceedings, thereby placing them in a position where they are unable to choose their own defence counsel, the prosecuting authority (the Prosecution Office or the Court, depending on the stage of the proceedings), pursuant to Article 44 of the Criminal Procedure Code[22]. The court must appoint a special guardian for the accused, who shall be vested with the rights of a legal representative.

In respect of the right of defence, where the legal capacity of the accused has not been previously removed and no legal guardian has been appointed by the court, representation solely by defence counsel is not sufficient to guarantee the effective exercise of that right, since there is no lawful representation by a person vested with decision-making authority on behalf of the accused[23].

*The Criminal Chamber of the Supreme Court of the Republic of Albania, in Decision No. 00-2025-1284 (202), dated 29 July 2025, found a violation of the right to effective defence, as in that case the person had been represented by defence counsel authorised by his father, who held the status of victim of the criminal offence ("domestic violence", provided for under Article 130/a of the Criminal Code), thereby resulting in invalid representation. According to the Criminal Chamber of the Supreme Court:"(...) in the present case, there is an infringement of the right to effective defence, as the person under investigation, R.T., is represented not only by a non-guardian, but also by a representative chosen by his father, who holds the status of the victim and has a criminal interest contrary to that of the accused (...)"[24].*

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adversarial principle and the "equality of arms" between the parties during such proceedings (Reinprecht v. Austria, § 31; A. and Others v. the United Kingdom [GC], § 204).

[22] Article 44 of the Criminal Procedure Code of the Republic of Albania provides that: *"1. Where it appears that the mental condition of the accused is such as to prevent conscious participation in the proceedings, the prosecuting authority shall decide to suspend the proceedings, provided that a decision of acquittal or dismissal is not required. By the decision on suspension, the prosecuting authority shall appoint a special guardian for the accused, who shall be vested with the rights of a legal representative. 2. Repealed. 3. The suspension shall not prevent the prosecuting authority from taking evidence that may lead to the acquittal of the accused and, where delay entails a risk, any other evidence requested by the parties. In procedural acts that must be carried out in relation to the person of the accused, as well as in those acts in which the accused has the right to be present, the special guardian shall participate on his or her behalf".*

[23] See Decision no. 00-2025-1284 (202), dated 29 July 2025, of the Criminal Chamber of the Supreme Court of the Republic of Albania.

[24] On the basis of Article 128/a of the Criminal Procedure Code, which provides for the absolute nullity of procedural acts where, inter alia, provisions relating to the presence of defence counsel in cases where such presence is mandatory are violated (subparagraph "c" of

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e-ISSN 1857-7431 (Online)

### 2.4 The Person under Investigation or the Accused Is Charged with a Criminal Offence Punishable by a Maximum Sentence of Not Less than Fifteen Years of Imprisonment

An examination of the Criminal Code of the Republic of Albania for the purpose of identifying criminal offences for which the law provides a maximum sentence of not less than fifteen years of imprisonment reveals, in an exhaustive manner, ninety-four (94) such offences[25].

Considering the seriousness of the penalties involved, the legislator has deemed it necessary for the accused to be assisted by defence counsel. This reflects the need to safeguard adversarial proceedings, which, in practice, depend to a large extent on the effective involvement of legal representation.

In its Decision No. 00-2024-1073 (143), dated 11 June 2024, the Criminal Chamber of the Supreme Court of Albania concluded that a violation had occurred, given that the accused had been left without legal representation during both the preliminary investigation and the preliminary hearing, at a time when the assistance of defence counsel was required by law. This was because the accused had been charged with and found guilty of the criminal offence provided for under Article 283/2 of the Criminal Code, which prescribes a penalty of "imprisonment from seven to fifteen years"; consequently, Article 49 of the Criminal Procedure Code, which establishes the cases of mandatory defence, was applicable[26].

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Article 128/a of the Criminal Procedure Code of the Republic of Albania), the Criminal Chamber of the Supreme Court decided to quash the decision of the Court of Appeal of the General Jurisdiction and the decision of the Court of First Instance of the General Jurisdiction of Fier, and to remit the case for retrial before the latter, composed of a different panel of judges.

[25] "Genocide" (Article 73 of the Criminal Code); "Crimes against humanity" (Article 74 of the Criminal Code); "War crimes" (Article 75 of the Criminal Code); "Intentional homicide" (Article 76 of the Criminal Code), etc.

[26] In this case, the Criminal Chamber of the Supreme Court of the Republic of Albania stated as follows: *"(...) 21. With regard to the claims raised by the convicted persons that the procedural acts carried out against the accused Alije Nazo—namely, the decision to take the person as an accused and the notification of the charge dated 5 October 2017, the record of questioning of the accused dated 17 October 2017, the notification of the completion of the investigations dated 17 October 2017, as well as the decision of the preliminary hearing judge no. 39, dated 1 November 2017—are absolutely null acts pursuant to Article 128/a, paragraph 1, subparagraph ç, of the Criminal Procedure Code, on the grounds that defence counsel should have been mandatorily appointed for the accused Alije Nazo, it follows that these claims are well founded. From the content of the acts of the preliminary investigation, namely the decision to take the person as an accused and to notify the charge dated 5 October 2017, the record of questioning of the accused dated 17 October 2017, and the notification of the completion of the investigations dated 17 October 2017, it appears that these acts were signed by the accused, the judicial police officer, and the prosecutor.*

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

Likewise, the Criminal Chamber of the Supreme Court, in Decision No. 00-2024-807 (114), dated 2 May 2024, further reinforced the guarantees of defence in criminal proceedings. In the context of review proceedings, it found that the trial against the applicant failed to respect the principle of due process, as the accused had not been assisted by defence counsel, even on an ex officio basis, despite being charged with criminal offences punishable by life imprisonment.

### 2.5 The Person under Investigation or the Accused Is Charged with a Criminal Offence under Subparagraphs "a" and "b" of Article 75/a of the Criminal Procedure Code

Following the amendments introduced by Law No. 76/2016, dated 22 July 2016[27], the Constitution of the Republic of Albania, in addition to allowing for the establishment of special jurisdictions by law under the amended Article 135(3), expressly provided for the criminal jurisdiction of the Special Courts in paragraph 2 of the same provision.[28].

Accordingly, the subject-matter jurisdiction of the Special Courts is regulated by Article 75/a of the Criminal Procedure Code,[29] which establishes their

*Likewise, during the examination of the prosecutor's request at the preliminary hearing, in which the preliminary hearing judge rendered decision no. 39, dated 1 November 2017, it does not appear that the accused Alije Nazo was represented by defence counsel …".*

[27] See Law no. 76/2016, "On Certain Additions and Amendments to Law no. 8417, dated 21 October 1998, 'The Constitution of the Republic of Albania', as amended."

[28] Article 135 of the Constitution of the Republic of Albania provides that: *"1. Judicial power is exercised by the Supreme Court, as well as by the courts of appeal and the courts of first instance, which are established by law. 2. The Special Courts adjudicate criminal offences of corruption and organised crime, as well as criminal charges against the President of the Republic, the Speaker of the Assembly, the Prime Minister, members of the Council of Ministers, judges of the Constitutional Court and of the Supreme Court, the Prosecutor General, the High Inspector of Justice, Mayors, Members of Parliament, Deputy Ministers, members of the High Judicial Council and of the High Prosecutorial Council, and the heads of central or independent institutions provided for in the Constitution or by law, as well as charges against former officials of the above-mentioned categories. 3. The Assembly may establish by law other courts for specific fields, but in no case extraordinary courts".*

[29] Article 75/a "Jurisdiction of the Court against Corruption and Organised Crime" of the Criminal Procedure Code of the Republic of Albania provides that: *"The Court against Corruption and Organised Crime adjudicates: (a) the criminal offences provided for under Articles 230, 230/a, 230/b, 230/c, 230/ç, 231, 232, 232/a, 232/b, 233, 234, 234/a, 234/b, 244 paragraph 2, 244/a, 245, 245/1 paragraphs 2 and 4, 257, 258 paragraph 2, 259 paragraph 2, 259/a, 260, 312, 319, 319/a, 319/b, 319/c, 319/ç, 319/d, 319/dh, 319/e, 328 and 328/b of the Criminal Code; (b) any criminal offence committed by a structured criminal group, a criminal organisation, a terrorist organisation, or an armed gang, as defined by the Criminal Code; (c) criminal charges against the President of the Republic, the Speaker of the Assembly, the Prime Minister, members of the Council of Ministers, judges of the Constitutional Court and of the Supreme Court, the Prosecutor General, the High Inspector of Justice, Mayors, Members of Parliament, Deputy Ministers, members of the High Judicial Council and of the*

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

competence to adjudicate criminal offences related to terrorism, corruption, and organised crime, as well as charges against high-ranking public officials. From the wording of Article 75/a of the Criminal Procedure Code of the Republic of Albania, it may be observed that mandatory defence is not provided for in respect of every criminal offence falling within the jurisdiction of the Special Courts, but is limited solely to the cases regulated under subparagraphs "a" and "b" of this provision. The legislator has not adopted an all-encompassing approach whereby every proceeding within the jurisdiction of the Special Courts would necessarily require the guarantee of defence counsel for the person under investigation or the accused. Instead, a selective model has been chosen, primarily based on the severity of the statutory sanction attached to the criminal offence. As may be inferred, a substantial number of these criminal offences also fall within the category of offences punishable by a maximum sentence of not less than fifteen years of imprisonment (subparagraph "ç" of Article 49 of the Criminal Procedure Code of the Republic of Albania, discussed above).

### 2.6 The Accused Has Been Declared a Fugitive or Is Tried in Absentia by a Court Decision

The accused's participation in the trial constitutes a fundamental procedural right and is a necessary condition for the effective exercise of their other rights throughout the proceedings. As an integral element of due process, this right imposes a corresponding obligation on the court to ensure that the accused is properly notified and afforded a genuine opportunity to participate in the trial.

Nevertheless, according to the case law of the European Court of Human Rights, although proceedings conducted in the absence of the accused are not per se incompatible with Article 6 of the Convention, a denial of justice arises where a person convicted in absentia is unable to obtain from the court that heard the case a fresh determination of the merits of the charge, in both law and fact, where it has not been established that they waived the right to appear and to defend themselves in person[30].

The provisions of the Criminal Procedure Code of the Republic of Albania recognise several situations in which trial in absentia may occur, including:

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*High Prosecutorial Council, and the heads of central or independent institutions provided for in the Constitution or by law; (ç) criminal charges against former officials of the above-mentioned categories, where the offence was committed in the exercise of their official duties".*

[30] The general principles relating to proceedings conducted in absentia are set out in Sejdovic v. Italy (no. 56581/00, 2006-II) and Hokkeling v. the Netherlands (no. 30749/12, 14 February 2017).

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

i. Voluntary absence of the accused *(where the accused, despite having been duly notified of the trial and in the absence of any objective impediment to appearing before the court, voluntarily waives participation in the proceedings)*[31]*;*
*ii.* Trial in absentia following the exclusion of the accused from the hearing *(relating to the removal of the accused from the hearing by order of the court where their conduct obstructs the orderly conduct of the trial)*[32]*;*
iii. Where the accused is unaware of the conduct of the trial[33];

[31] Article 351 "Failure to Appear or Voluntary Withdrawal of the Accused" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. Where an accused who is at liberty or in pre-trial detention fails to appear at the hearing, despite having been duly notified and in the absence of lawful reasons for non-appearance, the court shall adjourn the hearing and order compulsory escort, except where the accused has declared, before a notary or the competent State authority, his or her intention not to participate in the trial. In such a case, the trial shall continue without his or her participation. 2. Where an accused who is present at the hearing clearly waives the right to participate in the trial, the trial shall continue without his or her participation. 3. In the cases provided for in paragraphs 1 and 2 of this Article, the accused shall be deemed to be present, provided that the trial is conducted in the presence of defence counsel. 4. The same rules shall apply where the accused absconds at any stage of the judicial examination or during its intervals".*

[32] Another instance of the conduct of hearings in the absence of the accused is that provided for under Article 344(2) of the Criminal Procedure Code of the Republic of Albania, which states: *"(...) 2. Where the accused, through his or her conduct, obstructs the orderly conduct of the hearing, notwithstanding the measures taken pursuant to paragraph 3 of Article 341 of this Code, the court may order his or her removal from the courtroom for a specified period of time. Where the accused continues to obstruct the normal conduct of the trial even after being readmitted, the court may order his or her removal until the pronouncement of the judgment."* Prior to issuing an order for removal from the hearing, the measures provided for under Article 341(3) of the Criminal Procedure Code must be exhausted, namely:
1) it must be established that the accused has failed to comply with the court's orders aimed at maintaining order and decorum, has insulted the authority of the court, or has engaged in conduct that undermines the solemnity of the proceedings; 2) the accused must have been warned and informed of the consequences should such conduct continue; 3) in the event of repetition, a fine must have been imposed, accompanied by a further warning that continued misconduct may result in removal from the courtroom. After these measures have been exhausted, if the conduct is repeated and is of such a nature as to obstruct the orderly conduct of the trial, the court may proceed with the temporary removal of the accused from the courtroom, removal for one or several hearings, or removal until the pronouncement of the judgment.

[33] Article 352 "Trial in Absentia" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. Where an accused who is at liberty, despite the search measures carried out in accordance with Articles 140–142 of this Code, fails to appear at the hearing and it is established that he or she has not been personally informed of the trial, the court shall order the suspension of the proceedings and instruct the judicial police to continue searching for the accused. Upon the lapse of one year from the date of suspension of the trial on this ground, as well as at any time when information becomes available regarding the whereabouts of the accused, the court shall resume the proceedings, ordering that notification be repeated.*

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

iv. Where it is established that the accused is evading justice[34];

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*Where, following renewed search efforts, the accused is still not located, the court shall declare the accused absent. In such a case, the trial shall be conducted in the presence of defence counsel….".*

[34] Article 352 "Trial in Absentia" of the Criminal Procedure Code of the Republic of Albania provides that: *"…2. Where it is established that the accused is evading justice, the court shall declare the accused absent. In such a case, the trial shall be conducted in the presence of defence counsel …".* Pursuant to Article 247(3)(1) of the Criminal Procedure Code of the Republic of Albania, a person is considered a fugitive where, despite having knowledge, he or she deliberately avoids the enforcement of security measures provided for under Articles 233, 235, 237 and 238 of this Code, or the execution of a custodial sentence. In its case-law, the European Court of Human Rights does not equate knowledge of criminal proceedings with knowledge of the trial or of a specific court hearing, but rather with knowledge of the proceedings as a whole. The Court has held that knowledge of the proceedings is linked to the possession of necessary and sufficient information regarding the charges and the proceedings brought against the person concerned, as well as to the objective possibility of foreseeing the course of those proceedings (that is, where the person is objectively able to understand that he or she should expect to be summoned before a court). The European Court of Human Rights has further reasoned that informing a person of the criminal proceedings instituted against him or her constitutes a legal act of such importance that it must be carried out in compliance with proper and genuine procedural requirements, capable of ensuring the effective exercise of the rights of the accused. Vague or irregular forms of knowledge are insufficient (Somogyi v. Italy, no. 67972/01, 18 May 2004). Nevertheless, the Court has acknowledged that it cannot exclude the possibility that certain established facts may constitute clear indications that the accused was aware of the existence of criminal proceedings against him or her, as well as of the nature and cause of the accusation, and that he or she did not intend to participate in the trial or sought to evade the criminal proceedings. This may occur, for example, where the accused publicly or in writing declares that he or she does not intend to comply with summonses to appear, of which he or she has been informed through sources other than the authorities, or continues to evade attempts at arrest (Iavarazzo v. Italy, no. 50489/99, 4 December 2001), or where the authorities are presented with material clearly demonstrating that the accused is aware of the pending proceedings against him or her and of the charges faced. In these circumstances, it is appropriate to identify certain conditions, the verification of which may lead to the conclusion that the accused is evading justice, namely: (a) it must be established that the accused has knowledge of the criminal proceedings conducted against him or her; such knowledge must include information concerning the criminal act, its legal characterisation, and the objective possibility of perceiving that the case will proceed to trial; (b) a security measure imposing obligations restricting the accused's movement must have been ordered against him or her, with the aim of ensuring participation in the proceedings (under Albanian criminal procedural law, such measures include pre-trial detention, house arrest, prohibition on leaving the country, and the obligation to remain in a designated place, pursuant to Articles 233, 235, 237 and 238 of the Criminal Procedure Code). It must be established that the accused was aware that such a measure had been imposed (for example, where enforcement had commenced and the accused subsequently absconded, where an appeal was lodged against the measure by the accused or by defence counsel appointed through a specific power of attorney, etc.); (c) the accused evades attempts to arrest him or her or departs in breach of the obligations arising from the imposed security measures; (d) the accused is able to foresee the consequences of his or her departure or evasion. Such knowledge may be inferred from various circumstances, such as, inter alia: (i) the content of a power of

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

v. Where it is established that the accused is abroad and extradition is not possible[35].

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attorney drawn up after the charges have been brought; (ii) an act evidencing the exercise of the right of appeal (personally or through the specific appointment of defence counsel) against decisions relating to the security measures imposed; (iii) information demonstrating that the accused departed after having acquired knowledge of the criminal proceedings (at the investigation or trial stage);
(iv) information showing the discontinuation of compliance with obligations arising from the enforcement of security measures, for example failure to appear before the judicial police despite having been duly informed of the decision, or departure abroad in breach of a prohibition on leaving the country imposed as a security measure; (v) notification of the charges at the conclusion of the investigation; (vi) presence at a preliminary hearing or at another hearing related to the case at an advanced stage of the proceedings, etc.

[35] Article 352 "Trial in Absentia" of the Criminal Procedure Code of the Republic of Albania provides that: *"(...) 3. The court shall also declare the accused absent where it is established that the accused is outside the country and his or her extradition is not possible ..."*. In such circumstances, it must be established that: (i) the accused is located outside the territory of the Republic of Albania; and (ii) his or her surrender to the Albanian authorities by means of extradition is not possible, a fact which must be proven either by an extradition procedure concluded with a refusal by the requested State or, at a minimum, by an official notification reflecting the impossibility of extradition (such as a notification issued by Interpol). In such a situation, it is essential that the accused has been duly informed of the judicial proceedings conducted against him or her, while his or her absence from trial must be shown to stem exclusively from the objective circumstance of the impossibility of extradition and not from a voluntary intention to evade justice. Given that, as a rule, the practice followed in the context of initiated extradition proceedings reveals a known location of the accused, the procedural authorities must follow the notification procedure provided for by the Criminal Procedure Code, in compliance also with the Council of Europe Convention on Mutual Assistance in Criminal Matters and its two Additional Protocols. With regard to accused persons who are Albanian nationals with a known residence abroad, notification may be effected by sending a registered letter with acknowledgement of receipt, accompanied by the letter of rights, pursuant to Article 142 of the Criminal Procedure Code of the Republic of Albania, which provides that: *"1. Where the residence or place of stay of the accused abroad is known, the prosecuting authority shall send him or her a registered letter with acknowledgement of receipt, informing the accused of the criminal offence with which he or she is charged and requesting him or her to declare or choose a domicile within the territory of Albania. If, within three days from receipt of the registered letter, no declaration or choice of domicile is made, or where such domicile is not notified, service shall be effected through defence counsel. 2. Where the accused is notified in accordance with paragraph 1, he or she shall be invited to declare or choose a domicile within the territory of Albania. Notification carried out at the declared address shall be deemed effective. 3. Where it appears that there are insufficient data to proceed in accordance with paragraph 1, the prosecuting authority, prior to issuing a decision declaring the accused not found, shall order that searches also be carried out outside the territory of the State in accordance with the rules laid down in international agreements."*. In the judicial practice of the Special Court of First Instance, this form of notification has proved effective, as in several cases, following receipt of the notification, the accused have submitted powers of representation to the court, appointing defence counsel and designating the address of the chosen defence counsel as the address for service of documents.

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

In cases of trial in absentia, the presence of defence counsel becomes essential to compensate for the physical absence of the accused and to ensure the effective exercise of the right of defence. Since the accused is not present to exercise procedural rights in person, defence counsel serves as the primary guarantor of compliance with the principles of adversarial proceedings and equality of arms vis-à-vis the prosecuting authority.

### 2.7 Cases Concerning the Questioning of an Arrested or Detained Person

During the first questioning, defence by counsel is mandatory pursuant to Article 49(1)(e) of the Criminal Procedure Code; accordingly, an arrested or detained person may not waive this right.

It should be noted that, in the original version of the Criminal Procedure Code of the Republic of Albania, this situation was not regulated as one requiring the mandatory appointment of defence counsel where the arrested or detained person had not chosen one. In such cases, the intervention of the prosecuting authority in appointing defence counsel was conditional upon a formal request by the individual, a solution that proved problematic in practice[36].In conditions of arrest or detention, the person is usually placed in a situation of psychological stress which, combined with a lack of legal knowledge and with notifications that are often carried out in a formalistic or mechanical manner by the prosecuting authorities regarding the right to request the appointment of a lawyer, renders it necessary to provide for

[36] In this regard, reference should be made to Decision no. 42, dated 18 December 2007, of the Constitutional Court, in which the applicant alleged a violation of the right to defence by counsel, on the grounds that during the preliminary investigations he had been questioned without the presence of a lawyer. This claim was found to be unfounded by the Constitutional Court, which stated as follows: *"(...) Article 296(1) of the Criminal Procedure Code provides that: 'Judicial police officers shall collect information from the person against whom investigations are being conducted, with the mandatory presence of defence counsel.' By analysing and assessing jointly Articles 49(1) and 296(1) of the Criminal Procedure Code, the Constitutional Court considers that the purpose of this provision is to guarantee mandatory defence where it is requested by the person against whom investigations are being conducted. However, this obligation to guarantee defence to the accused party is not categorical where the person against whom investigations are being conducted does not request it. Conversely, where such a request is made, the prosecuting authority must ensure defence in accordance with the requirements of Article 296(1) of the Criminal Procedure Code. Therefore, this right is not equivalent to mandatory defence, since it may be waived by the person of his own free will ...".* This decision of the Constitutional Court paved the way for the established practice of questioning persons under investigation without the presence of defence counsel.

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

mandatory defence in such cases, without linking it to a formal request by the individual[37].

Consequently, the provision of mandatory defence at this stage aims to guarantee the effective exercise of the right of defence from the very outset of criminal proceedings, by avoiding the consequences of a merely formal or unconscious waiver by the arrested or detained person, and by strengthening due process standards. In this context, the 2017 amendments to the Criminal Procedure Code of the Republic of Albania expressly established, under Article 49(1)(e), that defence is mandatory during the questioning of an arrested or detained person.

### 2.8 Cases Provided for under Paragraph 5 of Article 205 or Paragraph 1 of Article 296 of the Criminal Procedure Code

The situation regulated under paragraph 5 of Article 205 of the Criminal Procedure Code of the Republic of Albania[38] refers to cases of search where the owner or possessor of the object is unknown or cannot be located. Meanwhile, the situation regulated under paragraph 1 of Article 296 of the Criminal Procedure Code of the Republic of Albania[39] concerns the questioning of a person against whom investigations are being conducted.

[37] In this regard, account should also be taken of the case-law of the European Court of Human Rights, which in Öcalan v. Turkey considered it a violation of Article 6 § 3 (c) of the European Convention on Human Rights that the accused had not been assisted by defence counsel during questioning while in pre-trial detention.

[38] Article 205 "Search of Premises" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. Where present, the accused and the person who has control over the premises shall be served with a copy of the search warrant and informed of the right to request the presence of a trusted person who is present and suitable, pursuant to Article 108 of this Code, or of defence counsel. 2. Where the accused requests the presence of defence counsel during the conduct of the search, the prosecuting authority shall postpone the search until the arrival of defence counsel, but for no longer than two hours from the moment the defence counsel has been notified of the search. During this time, the prosecuting authority may restrict the movement of the person concerned and of other persons present at the premises to be searched. 3. The postponement of the search pursuant to paragraph 2 of this Article shall extend the relevant time-limit provided for in paragraph 4 of Article 202/a of this Code. 4. The prosecuting authority may search the persons present where it considers that they may conceal material evidence or items related to the criminal offence. It may order that those present not leave before the search is completed and may forcibly return those who leave. 5. Where the owner or possessor of the item is unknown or cannot be located, the prosecuting authority shall conduct the search in the mandatory presence of defence counsel appointed ex officio".*

[39] Article 296 "Information on the Person against whom Investigations are Conducted" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. Judicial police officers shall obtain information from the person against whom investigations are being conducted in the mandatory presence of his or her defence counsel, with the exception of cases involving a person arrested in flagrante delicto or detained, who shall be questioned in accordance with the rules set out in Article 256. Where defence counsel cannot be found or fails to appear, the*

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

In both situations, the legislator has intervened to ensure the mandatory presence of defence counsel in high-sensitivity procedural actions, where the individual's absence or vulnerable position poses a real risk of infringing their procedural rights.

### 2.9 Other Cases Provided for by Law

By providing, under subparagraph "f" of Article 49 of the Criminal Procedure Code of the Republic of Albania, for "any other case provided for by law," the legislator has enabled the extension of the cases of mandatory defence beyond those expressly listed under subparagraphs "a"–"ë" (discussed above), insofar as other provisions of the Criminal Procedure Code require the mandatory presence of defence counsel at different stages of the proceedings.

Among such cases, the following may be mentioned: **i)** the questioning of a person during the hearing for the verification of a security measure *(Article 248(3) of the Criminal Procedure Code)*[40]; **ii)** the hearing on the validation of arrest or detention *(Article 259 of the Criminal Procedure Code)*[41]; **iii)** identification procedures *(Article 171(4)–(5) of the Criminal Procedure Code)*[42]; **iv)** the questioning of a person taken as an accused in

*judicial police shall request the prosecutor to appoint another defence counsel. In all cases, prior to questioning, the person shall be provided with the letter of rights. The rules laid down in Articles 34/a and 38 of this Code shall apply. 2. At the scene of the incident or immediately after the fact has been ascertained, judicial police officers may, even in the absence of defence counsel, obtain from the person against whom investigations are being conducted—whether arrested in flagrante delicto or detained—information necessary for the continuation of the investigations. Such information shall not be recorded and its use as evidence is prohibited. 3. Where the person against whom investigations are being conducted appears voluntarily and requests to make statements, the judicial police shall proceed to take such statements. Their use at trial shall not be permitted, except where the content of statements made before the court is contested".*

[40] Article 248 "Questioning of the Arrested Person" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. No later than three days from the enforcement of the measure, the court shall question the person in respect of whom it has ordered detention in prison or house arrest. With regard to other coercive or prohibitive security measures, the court shall proceed with the questioning within five days from the enforcement of the measure. The defence shall have the right to acquaint itself with the case file and to obtain copies thereof … 3. The questioning of the arrested person shall be attended by the prosecutor and defence counsel, who shall be notified by the registry of the court".*

[41] Article 259 "Validation Hearing" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. The validation hearing shall be conducted with the mandatory participation of the prosecutor and defence counsel. Where the defence counsel chosen by the accused or appointed ex officio cannot be found or fails to appear, the court shall appoint another defence counsel as a substitute …".*

[42] Article 171 "Identification of Persons" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. Where it becomes necessary to proceed with the identification of a person, the prosecuting authority shall invite the person who is to carry out the identification to describe the person to be identified, indicating all distinguishing features remembered, and*

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

related proceedings *(Article 167(3) of the Criminal Procedure Code)*[43]; **v)** remote questioning of a person taken as an accused in related proceedings or serving a sentence abroad *(Article 167/a of the Criminal Procedure Code)*[44]; **vi)** the compulsory taking of biological samples or the carrying out of mandatory medical procedures *(Article 201/a(12) of the Criminal Procedure Code)*[45]; **vii)** the hearing for the taking of evidence *(Article 321(1), (3) of the Criminal Procedure Code)*[46]; **viii)** the preliminary hearing where referral of the case for trial has been requested *(Article 332(1) of the Criminal Procedure Code)*[47]; **ix)** the special procedure of trial by agreement *(Article 406/d of the*

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*shall ask whether he or she has previously been summoned to carry out an identification, as well as about any other circumstances that may affect the reliability of the identification …3. Where the identification is carried out by a minor or in respect of a minor, the presence of a psychologist is mandatory. The prosecuting authority shall conduct the identification in such a manner that the person to be identified cannot see or hear the minor. 4. The identification shall be carried out in the presence of defence counsel…".*

[43] Article 167 "Questioning of a Person Charged in a Related Proceeding" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. Persons charged as accused in a related proceeding, against whom proceedings are being conducted or have been conducted separately, shall be questioned upon the request of a party or ex officio… 3. The persons referred to in paragraph 1 shall be assisted by defence counsel of their own choosing, and, in the absence thereof, by defence counsel appointed ex officio …".*

[44] Article 167/a "Remote Questioning of a Person Charged in a Related Proceeding or Serving a Sentence Abroad" of the Criminal Procedure Code of the Republic of Albania provides that: *"An accused person in a related proceeding, who is being prosecuted or is serving a sentence abroad for another criminal offence, where his or her extradition has been refused, may be questioned remotely by means of an audiovisual link, in accordance with international agreements, provided that the foreign State guarantees the participation of the accused's defence counsel at the place where the questioning is conducted".*

[45] Article 201/a "Compulsory Taking of Biological Samples or Performance of Mandatory Medical Procedures" of the Criminal Procedure Code of the Republic of Albania provides that: *"…12. Where a biological sample is taken from, or a medical procedure is performed on, a suspect or the accused, the presence of defence counsel is mandatory."*

[46] Article 321 "Taking of Evidence" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. The hearing for the taking of evidence shall be conducted with the mandatory participation of the prosecutor and the defence counsel of the accused. The representative of the victim shall also have the right to participate …3. Evidence shall be taken in accordance with the rules established for the judicial examination, by the same court that will adjudicate the case. Except for the cases provided for in paragraph 1 of this Article, the taking of evidence concerning facts relating to persons who are not represented by defence counsel at the hearing is prohibited…".*

[47] Article 332 "Scheduling of the Preliminary Hearing" of the Criminal Procedure Code of the Republic of Albania provides that: *"…1/1. Within five days from the filing of the request for referral of the case for trial, the preliminary hearing judge shall set the date for its conduct. In cases where the accused has not chosen defence counsel, the rules laid down in Article 49 of this Code shall apply …".*

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

*Criminal Procedure Code)*[48]; **x)** proceedings before the Supreme Court *(Article 437(3) of the Criminal Procedure Code)*[49]; **xi)** proceedings before the court at the enforcement stage *(Article 471(4) of the Criminal Procedure Code)*[50]; **xii)** extension of pre-trial detention *(Article 264(1), (2) of the*

[48] Article 406/d "Content of the Agreement" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. From the moment the name of the person to whom the criminal offence is attributed is registered until the commencement of the judicial examination, the prosecutor, the accused, or his or her special representative may propose the conclusion of an agreement on the conditions for the admission of guilt and the determination of the sentence. 2. During the negotiations for the conclusion of the agreement, the presence of defence counsel for the accused is mandatory. The conclusion of such an agreement is permitted for criminal offences for which the law provides for a maximum sentence of no more than seven years' imprisonment. This limitation shall not apply in the case of a cooperating witness/justice collaborator…".*

[49] Article 437 "Judicial Review" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. The court, sitting in chambers, shall decide to examine the case in a public hearing with the participation of the parties where: (a) the case is of significance from the perspective of the law, for the purpose of unifying or developing judicial practice; (b) the Criminal Chamber deems it necessary to summon and hear the parties due to the issues raised or the complexity of the case, in the situations referred to in points (b) and (c) of paragraph 1 of Article 432 of this Code. 3. The accused and the private parties shall be represented by defence counsel…".*

[50] Article 471 "Manner of Procedure before the Court" of the Criminal Procedure Code of the Republic of Albania provides that: *"…4. The hearing shall be conducted with the mandatory participation of the prosecutor and the defence counsel. The interested person shall be heard personally or by way of letters rogatory, if he or she so requests …".* Notwithstanding this clear statutory provision, the jurisprudence of the Albanian courts has revealed uncertainties in the application of the criminal procedural law governing the manner in which the court proceeds in matters relating to the execution phase of criminal judgments, in particular with regard to the parties required to participate in the proceedings conducted at the stage of execution of a criminal sentence. For this reason, by Unifying Decision no. 00-2025-1733 (87), dated 3 April 2025, the Criminal Chamber of the Supreme Court of the Republic of Albania clarified that: *"…The conduct of the hearing in the absence of the prosecutor and/or the defence counsel of the interested person, as required by Article 471, paragraph 4 of the Criminal Procedure Code, results in the absolute nullity of the procedural act (decision)…".*

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

*Criminal Procedure Code)*[51]; **xiii) searches and seizures (Article 310 of the Criminal Procedure Code)**[52].

## 3. Effectiveness of Defence in Cases of Court-Appointed Counsel

The European Court of Human Rights has consistently emphasised that the Convention is intended to ensure rights that are genuine and practical, rather than theoretical or illusory.

In this light, it has been made clear that the mere appointment of defence counsel does not, in itself, guarantee that the assistance provided to the accused will be effective.[53]

According to the standards developed in the case law of the European Court of Human Rights, the State cannot be held responsible for every shortcoming on the part of defence counsel, whether appointed under legal aid schemes or privately chosen by the accused. In this context, the intervention of State authorities arises only when the lack of an effective defence is manifestly apparent, or when such a failure has been sufficiently brought to the attention of the competent authorities, thereby imposing an obligation to act in order to ensure respect for the right to a fair trial[54].

According to the established case law of the European Court of Human Rights, State responsibility may arise—albeit in exceptional circumstances—where defence counsel does not genuinely act in the interests of the accused or fails to comply with essential procedural requirements. Such shortcomings

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[51] Article 264 "Extension of Pre-trial Detention" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. At any stage and level of the proceedings, where an expert examination of the mental condition of the defendant has been ordered, the time-limits of pre-trial detention shall be extended for the period set for the completion of the expert examination. The extension shall be ordered by the court, upon a request by the prosecutor, after hearing the defence counsel. The decision may be appealed before the court of appeal. 2. During the preliminary investigations, the prosecutor may request the extension of pre-trial detention time-limits that are about to expire, where significant security needs exist and particularly complex verifications render such extension necessary. The court, after hearing the prosecutor and the defence counsel, shall issue a decision. The extension may be granted only once and shall not exceed three months…".*

[52] Article 310 "Notification of the Defendant to Attend Searches and Seizures" of the Criminal Procedure Code of the Republic of Albania provides that: *"1. When the prosecutor is to carry out a search or seizure, he/she shall notify the defendant in order for him/her to be present together with the defence counsel of his/her choice and, where the defendant has not appointed one, shall appoint defence counsel ex officio. 2. Where the defendant and his/her defence counsel have been duly notified but fail to appear without a justified reason, defence counsel shall be appointed ex officio. This circumstance shall be recorded in the relevant official report (minutes)."*

[53] See the judgment in Imbrioscia v. Switzerland, 24 November 1993, Series A no. 275, p. 13, § 38.

[54] See the judgment in Kamasinski v. Austria, 19 December 1989, Series A no. 168, p. 33, § 65.

ISSN: 1857-7881 (Print)
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cannot be reduced simply to an unsuccessful defence strategy or to weaknesses in legal argumentation[55].

In the same vein, in the case of *Güveç v. Turkey,* [56] the Court reiterated that, as a rule, the State is not responsible for the acts or omissions of the accused's lawyer, since the defence relationship is essentially a matter between the party and their counsel, irrespective of whether the latter is privately retained or appointed under a legal aid scheme. However, the Court clarified that where a defence counsel's failure to secure effective representation is clear and manifest, the national authorities are under a positive obligation to intervene to ensure the provision of effective defence.

In the particular circumstances of the Güveç case, the Court took into account the applicant's young age, the seriousness of the charges, the apparent inconsistencies in the evidence, as well as the repeated absences and failures of defence counsel to attend court hearings. Against this background, it found that the domestic judicial authorities ought to have intervened without delay to ensure effective legal representation, as required by the "interests of justice."

Their failure to do so led the European Court of Human Rights to conclude that, for a significant part of the proceedings, the applicant was, in practice, left without proper legal assistance. This, in turn, undermined his ability to participate effectively in the trial and ultimately violated his right to a fair trial.

Focusing on the Albanian context, the issue of effective defence cannot be limited to the mere formal presence of defence counsel. Instead, it must be evaluated on the basis of the actual quality of representation provided in practice. In many cases, especially where defence counsel are court-appointed, it becomes evident that the standard of effective defence is not always achieved. Lawyers often limit their role to merely attending hearings, without actively or meaningfully exercising the procedural rights of the accused. In this light, the mere appointment of a lawyer cannot be regarded as sufficient to discharge the State's positive obligation to ensure effective legal assistance.

In this respect, it should be noted that, pursuant to Article 49(3) of the Criminal Procedure Code,[57]court-appointed defence counsel are selected from a list made available by the Bar Association. However, an analysis of the legal and sub-legal framework governing the drafting and administration of this list reveals a lack of genuine guarantees for ensuring effective defence.

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[55] See the judgment in Czekalla v. Portugal, application no. 38830/97, 10 January 2003.
[56] See the judgment in Güveç v. Turkey, application no. 70337/01, 20 January 2009.
[57] Article 49 "Mandatory Defence" of the Criminal Procedure Code of the Republic of Albania provides that: *"(...) 3. The defence counsel appointed pursuant to this Article shall be selected by the proceeding authority from the list made available by the Chamber of Advocates ...".*

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Specifically, as regards the manner of selecting court-appointed defence counsel, Article 28 of Law No. 55/2018 "On the Legal Profession in the Republic of Albania" regulates only the competent body responsible for compiling the list[58], without providing for substantive, professional, or qualitative criteria that lawyers must fulfil to be included therein. On the other hand, the Statute of the Albanian Bar Association provides for the formal procedure for the preparation and administration of the list. Yet it does not define substantive standards for professional experience, specialisation in criminal law, actual workload, or the capacity to ensure effective and continuous representation. In this context, it appears that neither the law nor the internal acts of the Albanian Bar Association set minimum conditions or qualitative criteria that a lawyer must satisfy to be included in the list of court-appointed defence counsel.

It is worth emphasising that the Albanian Bar Association itself has acknowledged that it does not exercise any proactive monitoring mechanism over the quality of the work of court-appointed lawyers, limiting its role solely to receiving general feedback from the prosecuting authorities and examining potential disciplinary complaints[59]. It is worth emphasising that the Albanian Bar Association itself has acknowledged that it does not exercise any proactive monitoring mechanism over the quality of the work of court-appointed lawyers, limiting its role solely to receiving general feedback from the prosecuting authorities and examining potential disciplinary complaints. Such an approach, justified on the grounds of the independence of the legal profession, creates a visible gap between international standards, which require a genuine assessment of the effectiveness of defence, and the Albanian legal framework, which does not provide for any institutional obligation to ensure quality control over legal aid provided *ex officio*.

On the other hand, the Prosecution Office and the courts are also responsible for appointing defence counsel, depending on the stage of the proceedings, based on lists transmitted by the Albanian Bar Association. According to the findings of Res Publica (2016)[60], a particularly problematic issue is that these institutions enjoy almost unfettered discretion in appointing lawyers, without clear guidelines or rules, including limitations on the frequency of reappointing the same lawyer. This discretion, according to the

[58] Article 28 "Steering Committee of the Albanian Chamber of Advocates" of Law no. 55/2018 "On the Legal Profession in the Republic of Albania" provides that: *"(...) 2. The Steering Committee shall exercise the following competences:...(ë) prepares the list of lawyers who provide secondary legal aid services, in accordance with the legislation in force on state-guaranteed legal aid ..."*.

[59] RES PUBLICA, Effectiveness of Legal Aid in Criminal Proceedings in Albania: How far are we from the international standarts?, 2016, p.68.

[60] Ibid.

ISSN: 1857-7881 (Print)
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study, has been abused in practice, leading to the *de facto* monopolisation of legal aid by a small group of lawyers, particularly in Tirana. Moreover, although the Prosecution Office and the courts also have the authority to assess the professional conduct of defence counsel and to replace them in cases of lack of professionalism or ethical breaches, this authority appears not to be exercised in practice, thereby further weakening the guaranteeing mechanisms for ensuring effective defence.

In light of the above, in the absence of clearly defined standards for selecting court-appointed defence counsel and for effective monitoring of their work, the risk that defence remains merely formal is significantly increased.

## 4. Abusive Conduct of Defence Counsel in Proceedings and Its Consequences in Cases of Mandatory Defence

Judicial practice has revealed cases in which privately chosen defence counsel for the accused have failed to appear at the stage of presenting final submissions or have contributed to repeated adjournments of hearings, notwithstanding that the court had afforded them reasonable opportunities to submit such conclusions. In some of these cases, it has been established that the absence of defence counsel was continuous and unsupported by lawful reasons, and that the accused had been given a genuine opportunity to regularise their legal representation, including the replacement of privately chosen counsel. In this context, taking into account that the judicial examination had been completed and had taken place in the presence of defence counsel, and that the conduct of counsel at the stage of final submissions reflected a lack of willingness to exercise this right, the courts have held that proceeding to the delivery of a judgment did not constitute a violation of the right of defence. Moreover, since the trial was conducted in the presence of chosen defence counsel, the failure to appear and to submit final arguments, after reasonable opportunities and time limits had been granted, has not been assessed as a breach of the standard of mandatory defence.

Judicial practice has also identified cases in which, despite the court's ongoing efforts to ensure the effective exercise of the right of defence, the conduct of criminal proceedings has been accompanied by significant difficulties arising from the procedural behaviour of the accused and their defence counsel. These situations have been characterised by repeated acts or omissions (such as leaving hearings without justification, continuous and repetitive requests for adjournments on health-related or other grounds, refusal by court-appointed defence counsel to assume the defence, and their removal from the list of court-appointed lawyers, etc.), which have resulted in unjustified delays and obstruction of the normal progress of the trial.

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

Thus, in the case concerning the trial of defendants E.Sh., G.D., E.Q., E.Z., and B.Sh.[61], the court undertook all necessary measures to ensure proper notification, participation, and, where required, the replacement of both privately chosen and court-appointed defence counsel for each defendant, including notifying the National Chamber of Advocates to initiate the relevant disciplinary measures. Where such measures proved ineffective, and the conduct of the defendants and their defence counsel continued to disrupt the proper course of the proceedings, the court proceeded with the trial in their absence. This decision followed a thorough assessment of the parties' conduct across multiple unsuccessful hearings, as well as repeated warnings regarding the procedural consequences of such behaviour. In its reasoning, the court referred to both domestic and international standards on the right of defence and mandatory defence, examining them in light of the parties' procedural conduct. On this basis, it concluded that the actions in question were deliberate and intended to obstruct the progress of the trial.

The Supreme Court examined a similar case in proceedings against the defendant D.T.[62], where the participation of defence counsel and the effectiveness of the defence were brought into question. In that case, although the Court of Appeal for Serious Crimes[63] had concluded that the failure to comply with procedural provisions regarding the participation of defence counsel constituted grounds for the absolute nullity of the first-instance judgment, the Supreme Court adopted a different position. The Criminal Chamber considered that, in the specific circumstances of the case, the situation did not give rise to absolute nullity of the proceedings. It observed that the court of first instance had made consistent and concrete efforts to safeguard the defendant's right of defence, including the appointment of court-appointed counsel and ensuring a genuine opportunity for the defendant to select legal representation. The Supreme Court emphasised the defendant's conduct during the proceedings, pointing out that it was inconsistent with due process principles and that he had misused the procedural rights granted to him, which amounted to abuse. Against this background, the Criminal Chamber noted that, as a consequence of such conduct, more than thirty (30) hearings had been held without any meaningful progress in the examination of the case. It further concluded that the accused's conduct was aimed at obstructing the proper organisation and conduct of the trial by the judicial

[61] See Decision no. 31, dated 3 December 2021, of the Special Court of Appeal for Corruption and Organized Crime of the Republic of Albania.
[62] See Decision no. 00-2024-1069 (140), dated 11 June 2024, of the Criminal Chamber of the Supreme Court of the Republic of Albania.
[63] See Decision no. 122, dated 1 December 2014, of the Tirana Court of Appeal for Serious Crimes.

ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

authorities, in breach of the principles of due process and, in particular, the requirement that proceedings be concluded within a reasonable time.

From the cases analysed above, it emerges that the approach of the Albanian courts has been oriented towards the position that a violation of the principles of due process cannot be claimed where the accused abuses the procedural rights granted by law, thereby, in a certain sense, leading to their "forfeiture". According to this approach, where the court has genuinely ensured the opportunity for legal representation and has taken all necessary measures to guarantee the effective exercise of this right, but the conduct of the accused or of defence counsel aims at obstructing the proceedings, the continuation of the trial does not constitute a violation of the right of defence nor of the standards of due process.

## Conclusions

The analysis shows that mandatory defence functions as a crucial safeguard of due process and a key mechanism for ensuring the effective exercise of the right of defence. Defence counsel should not be regarded as merely a formal requirement; their role is substantive, as it helps ensure equality of arms, genuine adversarial proceedings, and the informed and effective participation of the accused in the criminal process, especially in cases involving heightened vulnerability or serious charges.

The 2017 amendments to the Criminal Procedure Code have reinforced the protective function of mandatory defence by both broadening and clarifying the situations in which State intervention is required. However, despite these normative improvements, judicial practice suggests that the mere formal presence of defence counsel does not, in itself, guarantee a real and effective defence, particularly where adequate institutional mechanisms to ensure the quality of legal representation are lacking.

In this context, the manner in which *ex officio* defence counsel are selected, appointed, and supervised highlights the need for clearer standards and more meaningful professional criteria, in line with the well-established case law of the European Court of Human Rights. In the absence of such guarantees, there is a risk that mandatory defence may be reduced to a purely formal presence, thereby indirectly undermining the very essence of the right to a fair trial.

Finally, the analysis of judicial practice shows that abuse of the right of defence by the accused or by defence counsel cannot serve as a basis for alleging a breach of procedural standards, provided that the court has genuinely ensured the possibility of legal representation and has taken all reasonable measures to secure the effective exercise of this right. In this sense, maintaining a balance between safeguarding the right of defence and

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preventing abusive conduct is a key element for the fair and efficient functioning of the criminal justice process.

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ISSN: 1857-7881 (Print)
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ISSN: 1857-7881 (Print)
e-ISSN 1857-7431 (Online)

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