

**ANALYSIS OF
CRIMINAL APPELLATE PROCEEDINGS IN ALBANIA**

osce

2007

Published by the OSCE Presence in Albania
Sheraton Tirana Hotel & Towers, 1st Floor
Sheshi "Italia"
Tirana, Albania
Tel: (355 4) 235993/6
Fax: (355 4) 248684
www.osce.org/albania

© OSCE Presence in Albania, 2007.
All rights reserved.

ISBN: 978-99943-993-7-6

343.196 .047(496.5) "2004/2006"
347.921.2 .047(496.5) "2004/2006"
341.4 .05 :347.921.2(496.5)

CIP Katalogimi në botim BK Tiranë
Analysis of criminal appellate proceedings
in the Republic of Albania / OSBE. - Tiranë :
OSBE, 2007.
144 f. ; 165x235

Printed by "albPAPER"

Table of Contents

Acknowledgments	vii
Table of abbreviations and acronyms	ix
SUMMARY	1
Background	1
Scope of the Report	2
Summary of Findings and Recommendations	3
Methodology	8
CHAPTER 1: LEGAL REASONING IN THE CONTEXT OF CRIMINAL APPELLATE PROCEEDINGS	11
I. INTRODUCTION	11
II. THE RIGHT OF APPEAL IN CRIMINAL CASES UNDER INTERNATIONAL AND ALBANIAN LAW	13
III. REVIEW POWER OF APPELLATE COURTS IN CRIMINAL CASES	15
IV. LEGAL REASONING IN CRIMINAL APPELLATE PROCEEDINGS	19
A. Legal Reasoning in Criminal Appellate Decisions	20
1. Applicable International and Albanian Law	20
2. Findings	22
B. Reasoning in Sentencing	27
1. Applicable International and Albanian Law	27
2. Findings	28
C. Examination of the Grounds of Appeal	31
1. International and Albanian Law	31
2. Findings	32
D. Interpretation and Application of Substantive and Procedural Law by the Appeals Courts	34
1. Interpretation and Application of Substantive Law	34
2. Interpretation and Application of Procedural Law	37
E. Problems with the Evaluation of Evidence by the Courts of Appeal ..	40
1. International and Albanian Legal Framework	40
2. Findings	41
F. Case Study	45
V. CONCLUSION AND OUTLOOK	47
VI. RECOMMENDATIONS	49

CHAPTER 2: APPEALS AGAINST DECISIONS ON DETENTION ON REMAND	52
I. INTRODUCTION	52
II. INTERNATIONAL AND ALBANIAN LAW ON PRE-TRIAL DETENTION ...	53
A. Permissible Grounds for Decisions on Pre-Trial Detention	53
B. Reasoning and Justification of Decisions on Detention on Remand	57
C. Appeals against Decisions on Detention on Remand	59
III. JUSTIFICATION OF DETENTION ORDERS: FINDINGS	60
A. Use of Stereotyped Wording in Detention on Remand Orders	62
B. Proportionality of Detention on Remand	67
C. Failure to Consider Defence's Arguments	69
IV. CONCLUSION	74
V. RECOMMENDATIONS	76
CHAPTER 3: PROCEDURAL DELAYS IN CRIMINAL APPELLATE PROCEEDINGS	79
I. INTRODUCTION	79
II. APPLICABLE INTERNATIONAL AND ALBANIAN LAW	80
III. DELIVERY AND COMMUNICATION OF COURT DOCUMENTS	82
A. Delivery of Written Judgments by the First Instance Courts	82
1. Applicable Albanian and International Law	83
2. Findings	84
3. Statistical Information on the Time Needed for Delivering Written Judgments	87
4. Potential Remedies Regarding the Inadequacy of Procedural Time Lines for Issuing Written Decisions and Filing Appeals	90
5. Conclusion	93
B. Transfer of Court Files from the First Instance Courts to the Courts of Appeals	93
1. International and Albanian Law	93
2. Findings	94
C. Postponements in the Scheduling of Hearings on Appeal	101
1. Summoning of the Parties and Scheduling of Appellate Hearings	102
2. Remedies	105
IV. CONCLUSION	107
V. RECOMMENDATIONS	109
CHAPTER 4: TRANSPARENCY AND ACCESS TO COURT PROCEEDINGS	114
I. INTRODUCTION	114

II. TRANSPARENCY OF COURT ACTIVITIES AND PROCEEDINGS:	
THE RIGHT TO A PUBLIC HEARING	116
A. Access to the Trial Schedule	117
B. Public Access to Court Buildings	119
III. ACCESS TO AND PUBLICATION OF COURT DECISIONS	119
A. The Albanian Practice	122
IV. TRIAL RECORDS	123
V. ACCESS TO COURT REGISTERS	124
VI. CONCLUSION.....	125
VII. RECOMMENDATIONS.....	127
ANNEXES	131
Annex A:	
Table of Court Files Consulted in the Context of Criminal Appellate Proceedings	132
Annex B:	
Table of Decisions on Detention on Remand Consulted in the Context of Criminal Appellate Proceedings	134

Acknowledgments

This report was written by Maya Goldstein-Bolocan. The author and the OSCE Presence in Albania would like to express their gratitude to all the judges, prosecutors, lawyers and court administrators who have facilitated access to the information at the basis of this report. This report would have not been possible without the assistance of the field personnel of the OSCE Presence in Albania who gathered information. Frank Dalton provided insightful guidance and comments throughout the process. Ama Kraja provided valuable assistance in collecting information at the district and appellate courts in Tirana, elaborated the statistics and assisted with the editing of the Albanian version. Responsibility for any errors or omissions remains with the author.

Table of Abbreviations and Acronyms

ABA-CEELI	American Bar Association-Central European and Eurasian Law Initiative (now known as ABA-ROLI, i.e., American Bar Association Rule of Law Initiative)
CC	Criminal Code
CoE	Council of Europe
CPC	Criminal Procedure Code
CC Commentary	Commentary to the Criminal Code
CLE	Continuing legal education programs
CPC Commentary	Commentary to the Criminal Procedure Code
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
FTDP	Fair Trial Development Project
ICCPR	International Covenant on Civil and Political Rights
OSCE	Organization for Security and Co-operation in Europe
UDHR	Universal Declaration of Human Rights

SUMMARY

Background

In the past fifteen years, the Albanian criminal justice system has undergone radical changes and made significant progress in the transition from an instrument of the state to a public institution that protects citizens and advances the rule of law. A new legal framework is being refined in a manner that is mostly in line with international standards. The School of Magistrates is regarded as an effective institution capable of furthering the competence and preparation of judges. The Court for Serious Crimes, which was established in January 2004, has proved to be willing and able to deliver justice effectively and impartially, despite its politically charged task. Courts throughout Albania have been fully operational and working regularly.

Nevertheless, much progress remains to be made before the Albanian judiciary can be genuinely considered as being efficient, fair and fully independent and accountable. Backlogs and delays still hamper the work of the courts. The uneven competence and professionalism of judges, prosecutors, lawyers and other actors involved in the administration of justice is an obstacle to fair trials. Access to reliable information about judicial activities (e.g., the trial schedule) has yet to improve, and only decisions of the High Court and Constitutional Court are published on a regular basis. Against this background, lack of public confidence in the system is widespread.

In line with its mandate to assist the Albanian government in the process of legal and judicial reform and in the consolidation of the rule of law, the OSCE Presence in Albania initiated the Fair Trial Development Project (FTDP) in 2003. The Project goal is to assess the Albanian judicial system for its compliance with domestic law and international fair trial standards and to produce analytical reports¹ that contain concrete recommendations directed at increasing its efficiency, fairness, transparency and users' accessibility.

¹ Under the FTDP, two reports have so far been published. The Fair Trial Development Project *Interim Report*, published in January 2005, covered issues related to the administration of justice by the Tirana District Court and the first instance Court for Serious Crimes. The second report *Analysis of the Criminal Justice System of Albania*, published in November 2006, highlighted a cross section of issues including rights during pre-trial detention, the right to an effective defence, access to justice for victims of domestic violence, as well as transparency and witness protection issues. The analytical reports are published in Albanian and English.

The present report, *Analysis of Criminal Appellate Proceedings in Albania*, is published under the FTDP and presents an assessment of the procedure and practice of Albanian criminal appellate courts. As judicial error and misapplication of substantive and procedural law are inevitable features of all judicial systems, multiple layers of judicial scrutiny are essential to filter out and minimize shortcomings in decisions taken by the lower courts. Given their importance in remedying potential miscarriages of justice and their “guiding” function vis-à-vis lower courts, it is essential that appellate courts conduct their activities transparently and efficiently, and that the review they undertake be of a high quality. While the activity of district courts has been the subject of much interest and has been analysed in several reports, this is the first time that the law and operation of criminal appellate courts has been the object of detailed scrutiny.

This analysis hopes to serve as a tool for the country’s authorities and for international actors in their continued efforts to improve the judicial system in Albania, as well as for individuals and organizations working in the justice field. Last but not least, it is hoped that the Albanian School of Magistrates and the various law faculties in Albania will find this report useful in their endeavours to educate future judges, prosecutors and lawyers in the country.

Scope of the Report

This report analyses the procedures and practices of Albanian appellate courts in criminal cases and assesses them against international fair trial standards and Albanian procedural law.

The objective is to identify procedural, practical and structural issues affecting the performance of criminal appellate courts, and to make recommendations for their improvement. The report focuses on a cross-section of issues and is divided into four chapters.

Chapter 1 outlines the scope of **judicial review of criminal appellate courts** under international and Albanian law and, by focusing on the **quality of legal reasoning** as reflected in court decisions, assesses **how this review is carried out**. The quality of the appellate decision-making process is scrutinized in the areas of: sentencing; consideration of defence arguments; application of substantive and procedural law; and evaluation of evidence.

Chapter 2 discusses issues related to the need for proper and **adequate justification** for the application of **detention on remand** and the **type of review power** exercised by appellate courts in this context.

Chapter 3 focuses on the issue of **procedural delays** in the context of criminal appellate proceedings, specifically those related to the delivery of first instance written decisions and the transfer of files between courts. This chapter also deals with the issue of the frequent and unjustified postponement of appellate hearings.

Chapter 4 covers the issue of **transparency and access to judicial information**. It analyses the right of public access to court proceedings and judicial decisions, and briefly examines the issues of transparency of trial records and court registers.

Each chapter contains a number of specific recommendations on how problems identified in the context of criminal appellate proceedings could be addressed.

Summary of Findings and Recommendations

General observations

The procedural rules governing appellate proceedings are frequently not respected. Criminal appellate courts often fail properly and fully to reason their decisions. They also fail to exercise their guiding role vis-à-vis the lower courts. In some of the cases examined, appellate courts provided flawed interpretations of the law and have neglected properly to address defence arguments. Delays in the processing of criminal appellate cases are common. As a consequence, the right of individuals to a fair trial is often violated. There is a need for further improvement if criminal appellate courts are to carry out their activities effectively, fairly and transparently.

Legal Reasoning in the Context of Criminal Appellate Proceedings

Appeals courts are expected scrupulously to examine cases put before them, and to interpret and apply the law correctly and consistently within the boundaries of clear legal procedures. More importantly, appellate courts must provide clear and complete reasoning for the decisions they render on the merits of a case, after properly assessing the evidence for and against a defendant. As described in the report, one of the most significant shortcomings is the failure of the Albanian courts of appeals to reason – properly and fully – their decisions.² The generally poor judicial reasoning by courts of appeals does not satisfy the requirement of a genuine and thorough review as prescribed by Albanian and international law and appears to violate the principle of presumption of innocence.

² See explanation on “Methodology”, pp. 8,9.

Recommendations

To satisfy the requirement of a genuine and thorough review, appeals judges must fully reason their decisions in compliance with domestic and international law. Courts of appeals must systematically *address each ground of appeal raised by the parties* in their submissions, and *address all the essential issues* that were submitted to their jurisdiction without *merely* endorsing the findings reached by a lower court. Similarly to first instance decisions, appellate courts must include *a description of the factual circumstances and the evidence upon which their decisions are based, as well as the reasons for the court not accepting contrary evidence*. They must also evaluate the claims of the parties and the reasons for accepting or rejecting them. If appellate court decisions reverse, or modify, decisions issued by the lower court, they need to provide sound and clear reasons for this. If the facts do not appear to have been ascertained correctly or fully by the court of first instance, appellate courts must exercise their authority to order the re-performance of the judicial examination, or obtain new evidence, even on their own initiative. To assist judges in improving their legal reasoning skills, additional training on legal/judicial writing and reasoning should be provided by the School of Magistrates, in the context of both its continuing legal education programme and its regular school curricula.

Appeals Against Decisions on Detention on Remand

Under international and Albanian law, all decisions regarding pre-trial detention, including those reached on appeal, must be properly grounded and reasoned. Judges at the Tirana District Court fail to reason their decision on detention on remand and to show that this was a measure of “last resort”. Appeals courts, in turn, frequently “rubber-stamp” first instance decisions and fail to intervene to correct them where they are insufficiently grounded. This practice violates due process standards and puts the accused person in an unjustifiable position, where the burden of proof is shifted and basic principles of justice, such as that of the presumption of innocence and of liberty pending trial, are neglected.

Recommendations

Appellate courts must more vigorously and effectively carry out their review functions. They must examine decisions on pre-trial detention in their entirety, regardless of the grounds of appeal or those stated in the decision reviewed. They must repeal relevant decisions where they are not fully reasoned, and need consistently to instruct lower courts to include in their decisions on pre-trial detention detailed and *individualized reasoning* that takes into account the existence of the substantive grounds for ordering such a measure, as well as the proportionality of detention in the specific case. The Magistrate School’s courses covering judicial/legal reasoning and writing

should specifically deal with this requirement in the context of decisions on detention on remand. Training oriented towards practice on the underlying principles and legal framework on pre-trial detention must be delivered to first instance and appellate judges alike. The People's Advocate should carry out full investigations into alleged mishandling of pre-trial detention cases by the competent judicial authorities, and recommend remedies where violations have been ascertained. The Inspectorates under the High Council of Justice and under the Ministry of Justice should carry out regular inspections on how issues related to pre-trial detention are handled by the courts.

Procedural Delays in Criminal Appellate Proceedings

The right to be tried within a reasonable time is recognized under international law. Delays in the processing of criminal cases and increases in court backlog foster impunity and reduce public confidence in the justice system. When unjustified delays in the processing of court cases are significant, attributable to the state and avoidable, they may violate an accused person's right to a fair trial. Frequently, however, postponements and delays simply result in wasted time and resources. In Albania, inconsistency and delays have been observed in the practice with which fully reasoned, first instance decisions are delivered in writing. In the majority of cases, written decisions of the Albanian district courts sampled were issued after a delay, and after the 10-day deadline for filing an appeal had passed. Current provisions disciplining the timeframe for the delivery of written decisions and for the submission of appeals seem to provide for unrealistically short deadlines. In practice, these have proved difficult to respect. Delays and inconsistencies across courts in the delivery of written decisions, coupled with the short deadline to file an appeal, may hamper the ability of defendants (or prosecutors) effectively to exercise their right of appeal. Delays are also due to the failure to observe procedural timeframes for the transfer of files between courts. Finally, they are often due to frequent unjustified postponements of appellate hearings attributable to the failure of the parties to appear.

Recommendations

Delivery of Written, and Fully Reasoned, First Instance Decisions

Improvements in this area could be achieved by identifying the practices used in courts with a higher level of efficiency and by transposing them to other courts.

The Albanian Criminal Procedure Code (CPC) provisions on the timeframes for delivering a written decision and filing an appeal could be reviewed so as to make them more easily enforceable. Amendments could include a

provision that provides for longer timeframes in producing written judgments in complex cases, and a provision that modulates the timeframe for lodging an appeal by taking as a reference the date of *delivery* of the written decision. Court authorities should be more vigilant in ensuring that decisions are deposited and delivered within the prescribed legal time period. The High Council of Justice should initiate disciplinary proceedings in cases where judges are responsible for unreasonable delays in delivering written decisions.

Transfer of Case Files Between First Instance and Appellate Courts

The Minister of Justice should issue an instruction spelling out the legal duties of court officials to deliver case files in a timely manner to the respective appellate court, if a case is appealed. Systematic monitoring of these practices should be undertaken by the Chief Judges and the Chancellors of the district courts, as well as inspectors at the Ministry of Justice and at the High Council of Justice.

Planning and Scheduling of Appellate Hearings

Effective case flow management practices and procedures should be adopted. Guidelines on what is a justifiable cause of prolongation/postponement of the hearing should be introduced. Administrative “best practices” should be shared among chief judges, and mandatory training on case-flow management should be organized for courts judges and administrators.

Failure of the Parties to Appear and Notification of Summons

Where delays are caused by the unjustified absence of defence counsel, the National Chamber of Advocates should take disciplinary measures in accordance with the law. The CPC could be reviewed to: include the possibility for the courts to impose fines for the duly summoned parties who, without justification, fail to appear; empower the court to issue an order of apprehension of a defendant who, without justification, has failed to appear; include the possibility for the court to adopt disciplinary measures against defence lawyers and prosecutors, and of requesting the exchange of the latter, when they fail to appear. The CPC may be amended to require that the appellant expressly state, on the notice of appeal, his address for future service of court notices, so that any document delivered to that address will be deemed served.

Transparency and Access to Court Proceedings

The openness and transparency of judicial activities and proceedings foster fundamental values such as public confidence in the judicial system, understanding of the administration of justice, and judicial accountability. Albanian law establishes a general duty on the judiciary, similarly to that of other government agencies, to provide access to information contained in official

documents upon request. In Albania, transparency of judicial proceedings, including those at the appellate level, is hampered by a wide range of practical and logistical difficulties, such as inconsistent practices in providing updated information about court proceedings, inadequate court facilities and limited access to judicial decisions. Inconsistencies in the practice of keeping court registers and inaccurate trial records may also impair transparency of court activities.

Recommendations

General

All public officials, including court and justice officials, should be trained on the right to information about official documents. Through public awareness campaigns, the general public should be made aware of its right to attend trials and to obtain information about public documents, including court decisions. Each appellate court should have appropriate structures in place to respond to requests for information by the public. Inspectors at the Ministry of Justice and at the High Council of Justice should take transparency issues into account when conducting their inspections.

Access to Judicial Information and Hearings of the Courts of Appeals

All courts must make available *up-to-date* information on the date, time and venue of public hearings (including those that have been postponed from an earlier date) to the public on a regular and consistent basis. All appellate courthouses should be provided with adequate facilities for the attendance at appellate hearings by the public.

Court Decisions

In the short-term, all appellate court decisions in criminal cases should be made available to any interested party on request and payment of a fee covering only costs, in accordance with the Law on the Right of Information about Official Documents.³ In the longer-term, a website should become operational at all courts of appeals, reporting summaries of the courts' decisions, chronologies of the hearings and reasons of continuances. In the medium term, significant numbers of courts decisions should be published in their entirety. Given that this is an ambitious undertaking, in the short term it would suffice if, at least, the most significant appellate court decisions were published in their entirety. In addition, it would be useful to publish at least a certain number of randomly selected decisions in order to ensure that judges know that *any* decision they write could be subject to easy public scrutiny. The Ministry of Justice should issue guidelines on public access to justice. The guidelines

³Law no. 8503, dated 30 June 1999, "On the Right to Information about Official Documents", article 3.

should also set modalities for providing information on judicial decisions and other documents to the media and the public at large.

Court Registers and Records

More consistency and accuracy is needed in the keeping of court registers relevant to criminal appellate proceedings, and uniform standards should be used to identify and record cases.

New electronic and technological processes for the preparation of minutes should be adopted in all courts so as to allow rapid and accurate record-keeping.

Methodology

Chapter 1 is based on the analysis of fifteen randomly selected case files. In thirteen cases, criminal appellate proceedings were concluded between January 2005 and December 2006. In two other cases, criminal appellate decisions were pronounced in October 2003 and December 2004. More specifically, the analysis covers: four cases in Tirana, three cases in Vlora, six cases in Shkodra (of which four appeals against decisions of the Shkodra District Court, and two against decisions of the Kukës District Court), and two cases in Gjirokastra.⁴ A template has been distributed to assist part-time court observers in the review of the case files. In all cases, district and appellate court decisions have been reproduced and carefully scrutinized, especially concerning their reasoning. Both the records of first instance and appellate proceedings were thoroughly examined to assess compliance with due process standards. Applications for appeals submitted by defence lawyers have also been examined in order to identify the grounds for appeal and assess how these were dealt with by second instance courts. Whereas most of the findings reported are based on the analysis of court documents, some are also based on the direct observation of appellate court proceedings.

In Chapter 2 the analysis is based on an in-depth review of ten randomly selected decisions on detention on remand issued by the Tirana District Court, the appeals made against them, and the relevant rulings by the Tirana Court

⁴ The OSCE Presence in Albania submitted a request to the Chairs of the respective district courts to select the cases randomly among those involving serious criminal offences. The cases analysed involved sexual assault (CC articles 101, 102, 102/a and 104), domestic violence (CC articles 84, 85, 86, 87, 88, 88/a, 88/b, 89, 90, 91, 92 and 110), prostitution (CC articles 113, 114 and 114/a), murder (CC articles 78, 79, 82, 83), narcotics offences (CC articles 283, 284, 284/c), as well as offences related to corruption (CC articles 244, 245, 248, 259 and 260). For a table of the cases analysed see annex A.

of Appeals.⁵ All decisions on detention on remand were taken by the Tirana District Court in the course of 2006.⁶ The decisions have been analysed to identify shortcomings in the review function and reasoning of the appellate courts in this area.

Chapter 3 provides statistical information on the progression of criminal appeals with reference to the time frames set forth in the Albanian Criminal Procedure Code. First, statistics on the time needed for delivering first instance written judgements are provided on the basis of information obtained from three Albanian district courts -- Tirana, Durrës, Kukës.⁷ Second, statistics are provided on the number of days necessary to transfer case files from the courts of first instance to the appeals courts in Tirana, Kukës, Durrës, Shkodra, Vlora and Gjirokastra. Each court of appeals provided the OSCE Presence in Albania with information on 20 cases for which the appeal was decided in the course of 2006, as reflected in the "Fundamental Criminal Register" ("*Regjistri themeltar penal*").⁸

The report's findings are also based on interviews conducted with actors operating within the criminal justice system (lawyers, judges, prosecutors).

⁵On 31 January 2007, the OSCE Presence in Albania addressed an official request to the Chair of Tirana District Court asking to consult ten copies of randomly selected Tirana Court of Appeals decisions on detention on remand pronounced between January 2006 and the date of the request (January 2007), together with the respective Tirana District Court's decisions and notices of appeals. For a table of the cases consulted, see Annex B.

⁶Following appeals against those decisions, nine decisions were taken by the Tirana Court of Appeals in 2006, and one was taken in January 2007.

⁷Sixty cases were taken as a reference from the Tirana District Court's register called "Directory of criminal decisions for the first instance courts" ("*Numerator i vendimeve penale për gjykatat e shkallës së parë*"); thirty cases were taken from the Durrës District Court's register called "Register of criminal cases" ("*Regjistri i çeshtjeve penale*"); thirty cases were taken from the "Register of files submission" ("*Libri i dorëzimit të dosjeve*") of the Kukës District Court.

⁸For the purpose of collecting data, the chief secretaries and the chancellors of the six courts of appeals were asked to provide the relevant information as contained in their respective Fundamental Criminal Registers. In Gjirokastra, the cases considered were decided between 2006 and 2007. The register contains detailed information on criminal appeals forwarded to the higher courts, such as the date of registration of the appealed case with the secretariat of the court of appeals, the name of the defendant, the party submitting the appeal, the charge, an indication of the number, date, judge and court of first instance that have issued the decision, the verdict and sentence, data on the file (e.g., case file number), the number and type of decision taken in the case by the court of appeals together with the name of the rapporteur judge or the chair of the appellate court panel.

CHAPTER 1

LEGAL REASONING IN THE CONTEXT OF CRIMINAL APPELLATE PROCEEDINGS

I. INTRODUCTION

Courts of appeals play an important role in modern criminal justice systems by redressing potential miscarriages of justice and contributing to the development of a country's jurisprudence. Appellate rulings are the primary means by which, through the assessment of trial error, substantive criminal and procedural law evolve and develop. In the exercise of their review power, appellate courts play a "guiding role" vis-à-vis lower courts because the decisions they take are in general, even in the context of civil law systems, followed by the lower courts.⁹

Given their importance, it is essential that the type of review undertaken by appellate courts in criminal cases be genuine and of a high quality. This means that, in the exercise of their functions, appeals courts are expected to examine scrupulously cases put before them, and to interpret and apply the law correctly and consistently within the boundaries of clear legal procedures. They must undertake a thorough analysis of the case brought before them, the grounds for the judge's verdict, as well as the arguments and grievances raised by the appellant. Most importantly, appellate courts must provide clear and complete reasoning and sound rationale for the decisions they render on the merits of a case, after properly having assessed the evidence for and against the defendant. This is especially true when appellate courts modify or reverse first instance decisions, in which case the courts have a responsibility fully to explain why these decisions are deemed to be deficient.

⁹ *Stare decisis* is the doctrine of the binding nature of judicial precedents, typical of common law jurisdictions, according to which decisions of courts are binding for the court that issues them and for lower courts in the same jurisdiction. While the doctrine does not formally apply in the context of civil law jurisdictions, in practice even in those legal systems, a form of precedent informs judicial decision making, so that courts decide similar cases similarly, as courts do in common law countries. See J.H. Merryman, *The Civil Law Tradition*, 2nd ed. (Palo Alto, California, Stanford University Press, 1996), p. 47. Moreover, court decisions frequently form the basis of legal commentaries, which in turn are an important source of law in civil law systems.

Through trial observation and a review of case files,¹⁰ the OSCE Presence in Albania has observed that there have been shortcomings in the exercise of review power by Albanian Courts of Appeals. More specifically, in the cases studied, appellate courts often undertook only a cursory and superficial analysis of the issues put before them, as opposed to exercising the broad review power they are assigned by law. In most cases, decisions were taken following a hearing lasting only a few minutes.¹¹ During such hearings, courts often failed to address *all* grounds of appeal and, where needed, to evaluate relevant evidence properly. Questioning of the parties present at the hearing was often cursory and superficial, resulting in decisions (often no more than two or three pages long) that were poorly reasoned. As has been observed in some cases, when the first instance court seems to have relied on weak, equivocal evidence, and adopted flawed reasoning, the appellate court has failed to acknowledge those issues, *de facto* perpetuating mistakes and deficiencies in the decisions issued by the lower court. The generally poor decision-making process and judicial reasoning by courts of appeals in turn does not satisfy the requirement of a genuine and thorough review as prescribed by Albanian and international law and may violate the principle of the presumption of innocence.¹²

This chapter briefly introduces the international and Albanian legal framework on criminal appeals. It then outlines the scope of judicial review of criminal appellate courts under Albanian law and discusses how this is exercised in practice. After presenting the applicable legal

¹⁰ This chapter is based on the analysis of fifteen case files. In thirteen cases, appellate proceedings were concluded between January 2005 and December 2006, whereas in two other cases appellate decisions were pronounced in October 2003 and December 2004. More specifically, the analysis covered: four court files concerning criminal appellate proceedings in Tirana, three court files concerning criminal appellate proceedings in Vlora, six court files concerning criminal appellate proceedings in Shkodra (of which four appeals against decisions of the Shkodra District Court, and two against decisions of the Kukës District Court), and two court files concerning criminal appellate proceedings in Gjirokastra. In all cases, both the records of first instance and appellate proceedings were examined in depth to identify due process violations and to assess the way in which proceedings were conducted. It should be noted that there is sufficient repetition of observed phenomena in these files that it is statistically unlikely that a larger sample would significantly change the findings and conclusions contained in this chapter. For a more complete discussion on "Methodology", please see pp. 8,9.

The OSCE Presence in Albania submitted a request to the Chairs of the respective district courts to select the above cases randomly among those involving criminal offences such as sexual assault (CC articles 101, 102, 102/a and 104), domestic violence (CC articles 84, 85, 86, 87, 88, 88/a, 88/b, 89, 90, 91, 92 and 110), prostitution (CC articles 113, 114 and 114/a), murder (CC articles 78, 79, 82, 83), narcotics offences (CC articles 283, 284, 284/c), as well as offences related to corruption (CC articles 244, 245, 248, 259 and 260).

¹¹ Frequently, appellate hearings are completed in one or two sessions.

¹² For a discussion on the power of review of Albanian criminal appellate courts see *infra*, pp. 15-17.

framework, this chapter provides an analysis of legal reasoning as exercised by criminal appellate courts in the context of their decisions, specifically in the following areas: sentencing, consideration of defence arguments, application of substantive and procedural law, and the evaluation of evidence. Finally, some recommendations are formulated to address the problems observed in this context.

II. THE RIGHT OF APPEAL IN CRIMINAL CASES UNDER INTERNATIONAL AND ALBANIAN LAW

The right to appeal against decisions in criminal cases is enshrined in international law.¹³ Article 14 (5) of the International Covenant on Civil and Political Rights (ICCPR) states “Everyone convicted of a crime shall have the right to his/her conviction and sentence reviewed by a higher tribunal according to law”.¹⁴ Although the European Convention on Human Rights (ECHR) does not expressly set out the right to appeal, decisions of the European Court of Human Rights (ECtHR) indicate that this right is inherent in the right to a fair trial under article 6. Also, this right is expressly guaranteed by article 2 of Protocol 7 to the ECHR.¹⁵

The right to appeal is generally applicable to everyone convicted of a criminal offence, regardless of its seriousness.¹⁶ Nevertheless, article 2 (2) of Protocol 7 to the ECHR provides that the right of appeal may be limited by law if the offence is of a minor character, if the person was tried in the first instance in the highest tribunal of the state, or if the person was convicted after an appeal against his or her acquittal.¹⁷ While, generally, the right to review ensures that there will be at least two levels of judicial scrutiny in a criminal case, if domestic law provides for more than one

¹³The Albanian Constitution provides that all international conventions ratified by Albania are directly applicable in the country, except where these are not self-executing, and take precedence over national laws. Constitution article 122.

¹⁴ICCPR article 14, section 5.

¹⁵Protocol 7 to the ECHR article 2, section 1, reads “Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law”. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, article 2, section 1. Albania ratified Protocol 7 on 10 February 1996.

¹⁶Human Rights Committee General Comment 13, para. 17. The Human Right Committee held that a charge involving a one-year sentence was serious enough to warrant a review by a higher tribunal regardless of whether the domestic law classified the offence as criminal. *Salgar de Montejo v. Colombia* (64/1979), 24 March 1982, 1 Sel./ Dec. 127, at 129-30.

¹⁷Protocol 7 to the ECHR, article 2, section 2.

instance of appeal, the convicted person must be given *effective access* to each of these.¹⁸

As in the case of first instance proceedings, the *fair trial guarantees of article 6 of the ECHR apply to any appeals stage*,¹⁹ whether the appeal is on points of fact or of law.²⁰ Fair trial rights applicable to the appeal include, *inter alia*, the right to adequate time and facilities to prepare the appeal, the right to counsel, the right to equality of arms (including the right to be notified of the opposing party's submissions), the right to a hearing before a competent, independent and impartial tribunal, as well as the right to a public and reasoned judgement within a reasonable time.²¹ The way in which the guarantees apply in concrete cases depends, however, on the special features of such proceedings. According to the ECtHR case law, account must be taken of the entirety of the proceedings conducted in the domestic legal order, the functions in law and practice of the appellate body, and the manner in which the interests of the parties are presented and protected.²²

In line with international standards, the Albanian Constitution provides for the general right to appeal a judicial decision to a higher court, except when the Constitution specifically denies this right.²³ Further, the Albanian Criminal Procedure Code (CPC) provides a general right to appeal against decisions of the first instance court in criminal cases.²⁴ This right may be exercised by the parties that have taken part in the trial before the court of first instance.²⁵ Appeals courts review cases from first instance courts in three-judge panels²⁶ and may examine issues of both fact and law.²⁷

¹⁸ Henry v. Jamaica (230/1987), 1 November 1991, Report of the Human Rights Committee, (A/47/40), 1992, p. 218, para 8.4.

¹⁹ Delcourt v. Belgium, ECtHR, 17 January 1970, para. 25.

²⁰ Id. Applications for leave to appeal are also subject to Article 6. See Monnell and Morris v. UK, ECtHR, 2 March 1987.

²¹ See Melin v. France, ECtHR, 22 June 1993, where the Court found no violations but noted that certain fair trial rights attach to appeal proceedings.

²² Monnell and Morris v. The United Kingdom, ECtHR, 2 March 1987, para. 56.

²³ Constitution article 43 states "Everyone has the right to appeal a judicial decision to a higher court, except when the Constitution provides otherwise".

²⁴ CPC article 422 provides that the prosecutor, the defendant and the private parties may appeal the decisions of the first instance court.

²⁵ CPC articles 408-411. Halim Islami, Artan Hoxha, Ilir Panda, Criminal Procedure Commentary (Tiranë, Botimet Morava, 2003), p. 535 [hereinafter CPC Commentary].

²⁶ Law no. 8436, dated 28 December 1998, "On the Organization of the Judicial Power in the Republic of Albania", article 7.

²⁷ The High Court, which is the highest appellate body in Albania, has the power to review decisions of the courts of appeal only on points of law. Id., article 13.

Six regular courts of appeals currently function in Albania: Durrës, Gjirokastrë, Korça, Shkodër, Tirana and Vlora, with a total of 47 judges.²⁸ Judges of courts of appeal are appointed by the President of the Republic on the proposal of the High Council of Justice.²⁹ Like any other judges, judges of the courts of appeal are independent and subject only to the Constitution and the law.³⁰

III. REVIEW POWER OF APPELLATE COURTS IN CRIMINAL CASES

Reviews on appeal must be more than formal verifications of procedural requirements and must entail a genuine examination of the case by the competent appellate court, with regards both to the facts and to the legal aspects.³¹ The Albanian CPC is consistent with this view. In Albania, appeals against decisions in criminal cases may involve either points of fact or law.³² Article 425 of the CPC provides that the court of appeals “examines the case thoroughly and it does not restrict itself to only the grounds presented in the appeal”,³³ seemingly providing the court with a broad power to review the whole case on its merit. This seems to indicate that the appellate court may correct errors – on points of fact or law – made by the lower court, beyond those raised by the appellant, and may effectively change

²⁸In addition to the regular appellate courts, there are the Military Court of Appeals (located within the Tirana Court of Appeals) and the Serious Crimes Appellate Court. An Electoral College also operates at the Tirana Court of Appeals, but consists of judges drawn by lot from various other appellate courts throughout the country. As of November 2007, the total number of appellate judges, including those of the Military Court of Appeals (which is located within the Tirana Court of Appeals), and those of the Serious Crimes Court, was 67. Violanda Theodhori, Career and Evaluation Directorate, High Council of Justice.

²⁹Judges of the Courts of Appeal are required to have at least five years of experience in first instance courts and be distinguished for professional capability and high ethical and moral qualities. See Law no. 8436, dated 28 December 1998, “On the Organization of the Judicial Power in the Republic of Albania”, article 24, section 1. In addition, appeals judges, like any other judge, need to meet the conditions required by article 19 of the Law no. 8436, dated 28 December 1998, “On the Organization of the Judicial Power in the Republic of Albania”.

³⁰Constitution article 145.

³¹The courts that hear an appeal must examine not only whether the grounds of appeal are valid, but also whether or not due process (i.e., traditional fair trial guarantees, such as that of the presumption of innocence, the right to be tried by an independent and impartial tribunal, the right to equality of arms, etc.) has been observed, even in regard to *unreported* irregularities. See Annual Report of the Inter American Commission on Human Rights 1990-1991, Report 74/90 – Case 9850 (Argentina), Resolution No. 22/88 of 23 March 1988, section III, para. 18, available at <http://iachr.org/annualrep/90.91eng/Argentina9850.htm> [last accessed on 19 November 2007].

³²CPC Commentary, p. 549.

³³CPC article 425, section 1.

or reverse decisions whenever it deems it necessary. Under the CPC, the court of appeals may even review the part of the decision that concerns co-defendants who have not filed an appeal within the limits of the grounds of appeal.³⁴

An appeal can be filed, *inter alia*, by the prosecutor, the defendant, or his legal representative, and may be made against the whole decision or parts of it.³⁵ Because grounds for appeal can involve questions either of fact or of law, in appealing against a criminal conviction, the defendant may request that it be quashed, arguing that the trial judge erred in assessing and evaluating the facts, or that the decision is based on an incorrect interpretation and application of the substantive or procedural criminal law. In discussing the points and grounds of appeal, the Commentary to the Criminal Procedure Code (CPC Commentary) states only that an appeal may be filed by a defendant against decisions of acquittal³⁶ or conviction, against the type and measure of punishment, as well as against the “motives of the decision”, i.e., its reasoning.³⁷ In Albania, the broad scope of review assigned to appellate courts means that all pertinent legal and factual issues must be considered on their merits insofar as possible, toward the end of a final determination of the entire case concerning the applicant.³⁸ Such broad review power is in line with the very purpose of criminal appellate proceedings, namely to fill deficiencies and correct mistakes where these have occurred at the trial stage.

Following an appeal, the court of appeal may uphold, modify, or reverse the first instance decision on the merit of a case. In the latter case, it may either dismiss the case or annul the decision and remand it to the first instance court.³⁹

When the *appellant is the prosecutor*, the appeals court may:

- give to the fact a more serious legal qualification, alter the classification or extend the length of punishment, change the precautionary measures and impose any other measure provided by law;

³⁴ Id.

³⁵ Appeals can also be filed by: the district prosecutor and the prosecutor in the court of appeals, despite the request made during the hearing by representatives of the prosecutor; the injured party/private prosecutor, even through his attorney; the civil plaintiff and the civil defendant. See CPC articles 408-412.

³⁶ But note that a decision dismissing the case because the fact does not exist cannot be appealed by the defendant. CPC article 329.

³⁷ CPC Commentary, p. 535.

³⁸ See CPC Commentary, p. 550.

³⁹ CPC article 428.

-
- sentence the one who is acquitted, acquit him under a cause different from that stated in the decision subject to appeal, or impose a precautionary measure;
 - impose, change or exclude a supplementary punishment or a precautionary measures.⁴⁰

When a decision is *appealed only by the defendant*, the principle of *no reformatio in pejus* applies. This means that the court may not impose a heavier sentence, a heavier precautionary measure, or acquit under a cause less favourable than that stated in the decision that has been appealed.⁴¹

The Albanian CPC does not specifically indicate the cases in which a decision may be appealed. Thus, the table appearing in the next page, based on the Bosnia and Herzegovina Criminal Procedure Code, may help the reader to clarify on which grounds an appeal may be made and, in turn, on which grounds decisions of the first instance judge may be reformed or changed. These grounds are not exhaustive, and are selectively taken from articles 297 through 300 of the Bosnian CPC.

⁴⁰ CPC article 425, section 2.

⁴¹ CPC article 425, section 3.

A decision/ verdict may be appealed on the following grounds:	Examples
An essential violation of the provisions of criminal procedure [*]	a) if the court was improperly composed in its membership or if a judge who did not participate in the main trial or who was disqualified from trying the case by a final decision participated in pronouncing the decisions; b) if a judge who should have been disqualified participated in the main trial; c) if the main trial was held in the absence of a person whose presence at the main trial was required by law, or if in the main trial the defendant, defence attorney or the injured party, in spite of his petition, was denied the use of his own language at the main trial and the opportunity to follow the course of the main trial in his language; d) if the right to defence was violated; e) if the public was unlawfully excluded from the main trial; f) if the Court reached a verdict and was not competent, or if the Court rejected the charges improperly due to a lack of competent jurisdiction; g) if, in its decision, the Court did not entirely resolve the contents of the charge; h) if the decision is based on evidence that may not be used as the basis of a verdict under the provisions of the CPC; i) if the sentence exceeds the charges as specified in the indictment submitted or amended at the trial; j) if the wording of the decision was incomprehensible, internally contradictory or contradicted the grounds of the decision or if the decision had no grounds at all or if it did not cite reasons concerning the decisive facts; k) if the Court has not applied or has improperly applied some provisions of the CPC to the preparation of the main trial or during the main trial or in rendering the decision, and this affected or could have affected the rendering of a lawful and proper verdict.
A violation of the criminal code ^{**}	a) as to whether the act for which the accused is being prosecuted constitutes a criminal offence; b) as to whether circumstances exist that preclude criminal responsibility; c) as to whether the circumstances exist that preclude criminal prosecution, and especially as to whether the statute of limitation on criminal prosecution applies, or as to whether prosecution is precluded because of amnesty or pardon, or as to whether the cause has already been decided by a legally binding verdict; d) if a law that could not be applied has been applied to the criminal offence that is the subject matter of the charge; e) if the decision pronouncing the sentence, the decision pronouncing a suspended sentence, or the decision pronouncing a security measure has exceeded the authority that the court has under the law; f) if provisions have been violated concerning the crediting of pre-trial custody and time served.
The state of the facts being erroneously or incompletely established ^{***}	a) when the Court has erroneously established some decisive fact or has failed to establish it; b) when new facts or new evidence so indicate.
The decision as to the sanctions ^{****}	a decision may be contested due to the sentence or suspended sentence, if the court did not correctly fashion the punishment in view of the aggravating or mitigating circumstances that had a bearing on a greater or lesser punishment; a decision also may be contested because the Court applied or failed to apply provisions concerning mitigation of punishment, release from punishment or suspension of a sentence, though the legal conditions for that existed.

^{*} Bosnia and Herzegovina CPC, article 297.

^{**} Id. article 298.

^{***} Id. article 299.

^{****} Id. article 300, section 1.

IV. LEGAL REASONING IN CRIMINAL APPELLATE PROCEEDINGS

Both international and Albanian law establish a duty on judges to reason their decisions. It is crucially important that courts provide clear and complete rationale for the decisions they render. A reasoned decision demonstrates to the parties that their case has been heard and evaluated, allows public scrutiny of the justice system and is a necessary pre-requisite for effectively mounting an appeal. In reasoning their decisions in criminal cases, appellate judges must examine the requests and arguments submitted by the appellant, scrutinize thoroughly the grounds and rationale of the decision appealed (including the part of the decision on sentencing), provide a correct interpretation of the law and properly assess and evaluate the evidence.

The OSCE Presence in Albania has noted that one of the most significant shortcomings in the context of criminal appellate proceedings in Albania is the failure of the courts of appeals properly and fully to reason their decisions.⁴² This violates the right to a fair trial protected under international and Albanian law. The lack of adequate legal reasoning has repercussions on the overall quality of decision-making of the courts of appeals in criminal cases, and has been observed in four main areas:

- lack of adequate reasoning in criminal appellate decisions, including decisions on sentencing;
- failure to address all the grounds of appeal;
- mistakes in the interpretation of procedural and substantive law;
- inadequate assessment and evaluation of evidence.

Several factors, including the lack of professionalism, inadequate legal argumentation skills, and a low level of understanding of the basic tenet of the presumption of innocence and its implications, are likely explanations for lack of adequate reasoning as reflected in judicial decisions. While this is sometimes evident in first instance decisions, it is even more striking when it affects decisions passed by the appellate courts.

⁴²See discussion *infra*, section IV, sub-sections A through F, pp. 20-47.

A. Legal Reasoning in Criminal Appellate Decisions

1. Applicable International and Albanian Law

International fair trial standards as expressed through case law require judges to reason their decisions.⁴³ Although not expressly required under article 6 of the ECHR, the right to a reasoned judgement is implicit in the right to a fair hearing as guaranteed by article 6, section 1, of the ECHR and applies to both civil and criminal cases.⁴⁴ In addition to an accused person's right to understand the motives of decisions affecting his rights, a fully reasoned judgement allows public scrutiny of the justice system and gives an opportunity to ordinary citizens to see how justice is being administered in their name.

The requirement of a reasoned judgement demonstrates to the parties that "they have been heard" and is particularly important for the effective exercise of the right to appeal, as without reasons justifying a court decision, the appellant cannot properly and effectively challenge the decision of the lower court.⁴⁵ A reasoned judgement that, in the case of a conviction, clearly explains the facts and evidence on which a guilty verdict is grounded, explains why the defence arguments have been rejected, and justifies the sentence passed, is also an indication that the underlying principle of the presumption of innocence has been respected in the specific case.⁴⁶

As is the case with other fair trial guarantees, the right to a reasoned judgement applies also in the context of final appeals proceedings.⁴⁷

⁴³ Hood v. the United Kingdom, ECtHR, 18 February 1999, para. 60.

⁴⁴ D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights* (London, Butterworths, 1995), p. 215.

⁴⁵ Suominen v. Finland, ECtHR, 24 July 2003, paras. 34 -38. In that case the Court argued that, even though a domestic court has a certain "margin of appreciation" (i.e., discretion) when choosing arguments in a particular case and admitting evidence in support of the parties' submissions, an authority is obliged to justify its activities by giving reasons for its decisions. A reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice. In Suominen v. Finland, the Court also considered that the applicant was denied a fair proceeding because of the court's refusal to admit the evidence proposed by her.

⁴⁶ ECHR article 6, section 2, states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The ECtHR has stated that this principle "requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him". See Barberá, Messegué and Jabardo v. Spain, ECtHR, 6 December 1988, para. 77.

⁴⁷ See X v. FRG, ECtHR, 31 March 1992.

At the appellate as well as at the trial stage, such reasoning is basic to the coherent development and presentation of any criminal case and is reflected, *inter alia*, in the consideration of issues relating to detention, the examination of witnesses, the deliberation of evidence and sentencing. As emphasised by the European Court of Human Rights, whereas national courts are allowed a substantial discretion as to the structure and content of their judgements, they must always “*indicate with sufficient clarity the grounds on which they basis [sic] their decision*” so that the “*accused may usefully exercise the right of appeal available to him*”.⁴⁸ Although, as observed by the European Court of Human Rights, the reasons given at the appellate stage need not always be so full,⁴⁹ the notion of a fair hearing requires that a national court that has given sparse reasons for its decisions, whether by incorporating the reasons of a lower court or otherwise, did in fact address the essential issues that were submitted to its jurisdiction, and did not merely endorse without further ado the findings reached by a lower court.⁵⁰ While, in practice, it is not necessary for the court to give detailed answers to every question,⁵¹ in cases where a submission would, if accepted, be decisive for the disposition of the case, a “*specific and express outcome*” by the court in its judgement is always required.⁵²

In line with international law, the Albanian Constitution requires that all judicial decisions be reasoned.⁵³ In analyzing the nature of this requirement,⁵⁴ the Criminal Chamber of the High Court of Albania has emphasised that court decisions – both by the district and by the appellate courts – must include, in at least a concise form, “*the factual circumstance and the evidence upon which the decision is based, as well as the reasons why the court has not accepted contrary evidence*”.⁵⁵ This is especially important in the context of appeals proceedings, where the parties need to be given an opportunity effectively to object to factual and procedural issues underlying decisions issued by courts of first instance. The CPC Commentary has stated that judicial decisions must clearly indicate the

⁴⁸ Hadjanastassiou v. Greece, 16 December 1992, para 33.

⁴⁹ See X v. FRG, ECtHR, 31 March 1992.

⁵⁰ Albina c. Roumanie, ECtHR, 28 April 2005, para. 34; Helle v Finland, ECtHR, 19 December 1997, para. 60.

⁵¹ Van der Hurk v. the Netherlands, ECtHR, 19 April 1994, para. 61.

⁵² Hiro Balani v. Spain, ECtHR, 9 December 1994, para. 28; Ruiz Torija v. Spain, ECtHR, 9 December 1994, para. 30, where the Court found breaches.

⁵³ Constitution article 142.

⁵⁴ In Albania decisions are composed of three parts: the introduction, the descriptive or reasoning part and the legal conclusion. CPC Commentary, p. 506.

⁵⁵ Criminal Chamber of the High Court, Decision no. 100, 1 February 2001, cited in CPC Commentary, p. 506. The reasoning should also contain mitigating and aggravating circumstances as well as the assessment of the dangerousness of the defendant, and the reasons for determining the type and measure of punishment. See *id.* See also CPC article 383, section 1 (ç).

*factual circumstances as well as the evidence that proves them, the claims of the parties and the reasons for accepting or rejecting them, any mitigating or aggravating factors, the assessment of the dangerousness of the defendant, as well as reasons for determining the kind and amount of punishment.*⁵⁶

2. Findings

It has been noted that, contrary to domestic and international law, Albanian courts frequently fail properly and fully to reason their decisions. While, often, decisions by the courts of first instance appear to be poorly reasoned – where judges seem to rely on weak, insufficient evidence, and to adopt a flawed rationale – appeals courts, in turn, fail in their fundamental duty to review the quality and consistency of the decision making process of the courts of first instance. Where appeals courts fail to point out such a fundamental procedural violation (i.e., the inadequate, or complete lack of, reasoning in decisions), they fail genuinely and comprehensively to exercise their review power, in violation of both Albanian and international norms on due process. The following cases exemplify what is described above.

Case of Altin Diko (the rape case)

Altin Diko was convicted of the repeated rape of his sister-in-law according to article 102, section 2, of the CPC, and sentenced by the Tirana District Court to nine years of imprisonment on 14 July 2004. According to the indictment, the victim allegedly was kidnapped by the defendant and kept in a private house in Durrës for ten days, during which she was subject to repeated acts of physical and psychological violence. The prosecution case revolved around the statement of the victim and witnesses, family members who merely confirmed the victim's disappearance for a "few days" without giving other clues as to the reasons for her absence. Despite inconsistencies in both the victim's and the witnesses' statements, no attempt were made by the first instance court to clarify them. Instead of articulating in a comprehensive and intelligible way the elements of the offence, the first instance decision briefly stated that the defendant had "used physical

⁵⁶ CPC Commentary, p. 506.

Since, as noted above, the commentary refers to a court's duty to address the claims of the parties and indicate the reasons for accepting or rejecting them, it appears that Albanian law goes beyond current international standards in this context. The CPC in fact requires the courts not only expressly to address issues directly related to the culpability of the defendant, but also to deal with any other issues (however minor) the latter might have raised on appeal.

and psychological violence and had sexual intercourse with her". No further exploration and analysis of the elements of the offence were provided. In one paragraph, the decision found that for ten consecutive days⁵⁷ the defendant had kept the victim in the room of a house, and that on 29 January 2004, she had managed to escape and go to the home of her parents – who later accompanied her to the police station. The decision did not provide any explanation of how the accused person had managed to keep the victim in the location where the alleged rape took place against her will or of the circumstances of her escape.

As opposed to presenting an accurate and detailed analysis and discussion of the evidence for and against the defendant in the case, the *one-page* District Court decision stated only that his guilt appeared to be "*completely proved by the testimony of the victim, the testimony of other witnesses, and by the written evidence*". Strikingly enough, the written evidence – presumably the forensic medical report – had indicated that during the physical and gynaecological examination, no signs of physical violence had been found on the victim's body. After presenting a summary of the facts, no indication whatsoever was given in the decision of which witnesses had been relevant to confirm the prosecution theory and in which way their testimony had contributed to it.

On 23 July 2004, counsel for the defendant submitted an appeal in which he argued that the decisions was based on insufficient and contradictory evidence, and requested the appeals court to dismiss the case and acquit the defendant.

On 14 January 2005, the Tirana Court of Appeals upheld the first instance decision. A review of the records indicates that, at the criminal appellate hearing, the panel asked only two questions to the defendant, namely: (1) whether the victim had consented to the sexual intercourse or whether he had used violence against her; and (2) why he was in Durrës – a fact that the defendant denied and to which there was no further questioning. The decision on appeal, less than one page, reads as follow: "*The facts are completely proved by the explanations given by the witnesses questioned as H.I. and S.S., and by the statement of the injured [party]*". While, differently from the first instance decision, the appellate court at least indicated on which witnesses' statements it relied to confirm a guilty verdict, it again failed to indicate what portions and elements were considered to be conclusive in supporting this verdict.

⁵⁷From 19-29 January 2004.

It appears that the Tirana Court of Appeals did not sufficiently reason its decision where it failed to indicate specific facts and evidence on which this was based as well as explicitly to state the reasons for not accepting contrary evidence submitted by the defendant. More specifically, and similarly to the first instance decision, the Court of Appeals failed to indicate in which way the evidence indicated in the decision (mainly witness evidence and the victim's statement) had been determinant in bringing about a guilty verdict. The decision, in other words, failed to cite reasons concerning the decisive facts.

While the first instance court erroneously relied on irrelevant evidence (i.e., the forensics report stating that no signs of violence could be noted on the body of the victim, as confirmed by an inspection of the file by the OSCE Presence in Albania), and thus adopted obviously flawed reasoning in choosing to rely on that evidence, the appellate court failed to acknowledge that mistake.

Case of Liçaj (or the drug trafficking case)

On 6 December 2004, following an expedited trial, **Selvie Liçaj** – a 70-year-old woman – was convicted by the Vlora District Court of the illegal production and selling of narcotics⁵⁸ and of illegal possession of military weapons.⁵⁹ As reflected in the first instance decision, charges against the woman relied on the results of a police search that had yielded 6 kg of cannabis sativa and 2 automatic guns found in the house that the accused person shared with her husband and in a nearby hut.

The prosecution file contained the followings:

- a report of the house search
- a report of the seizure of 6 kg of narcotics and 60 bullets
- the results of the toxicological and of the ballistic expertise
- a statement given by the defendant during the preliminary investigations
- the testimony of the husband of the accused, Salo Liçaj, who accused his wife of having stored the drug that had not been found by the police in the course of an operation conducted two years earlier with the aim of destroying the cannabis sativa.

After a summary exposition of the facts, the Vlora District Court found that the defendant had consumed the elements of the criminal offences

⁵⁸ CC article 283.

⁵⁹ CC article 278, section 2.

with which she was charged.⁶⁰ It further stated that the defendant “*is an adult, responsible before the law, and has intentionally committed the criminal offences of which she is accused ...and thus she will be responsible for the sanctions provided by these provisions*”. Strikingly, the first instance court failed to discuss and analyze the very elements of the criminal offences,⁶¹ or to discuss and indicate how evidence presented by the prosecutor supported a verdict of guilt vis-à-vis the defendant. More specifically, by listing documents present in the prosecution file, the court only noted that the report⁶² on the seizure of the 6 kg of narcotics and 60 bullets indicated that the criminal offence had been committed by the defendant. From the above, it appears that, by *merely* listing documents, the first instance court did not sufficiently substantiate its decision.

It is worth noting that, while the guilty verdict was delivered following an expedited trial,⁶³ Albanian law does not dispense the courts from their duty fully to reason decisions where such special proceedings are adopted. As indicated by the Commentary to the CPC, the expedited trial is not linked to any conditions – not least an admission of guilt by the defendant. It only requires that the defendant ask that the case be decided on the basis of the documents present in the files at the time the case goes to trial. Therefore the court may or may not find the defendant guilty on the basis of its evaluation of the acts in the prosecution file. Considerations of expediency justifying the accelerated trial may not take priority over the need to seek justice in the concrete case, so that the court may accept a defendant’s request for accelerate trial only when, and if, it is convinced that it can resolve the case on the basis of the existing documentation, without need to undertake further judicial examination.⁶⁴ As in any other case,

⁶⁰ CC article 283, section 1; CC article 278, section 2.

⁶¹ Under CC article 278, section 2, holding weapons, bombs, mines or explosive materials without the authorization of state bodies is punishable by a fine or up to seven years of imprisonment. CC article 283 states that, *inter alia*, the keeping of narcotic and psychotropic substances (except where this is for personal use and in small portions), as well as the seeds of narcotics plants, in violation of the law, or “in excess of their contents” [sic] is punished by five to ten years of imprisonment.

⁶² Report related to the seizure of evidence, 19 January 2004.

⁶³ An expedited trial can be initiated on the request of the defendant or his counsel before the beginning of the judicial examination. When the court considers that the case may be decided on the basis of the documentation included in the file, it can hold an expedited trial. At the hearing, which is generally conducted in the presence of the defendant and his defence counsel (as well as the private parties), the prosecutor introduces the results of the preliminary investigation and gives his opinion on the defendant’s request for an expedited trial. Following that opinion, the defendant is heard. If the court pronounces a guilty verdict, the sentence is automatically reduced by one-third. See CPC articles 403-406; see also CPC Commentary, pp. 522-23.

⁶⁴ CPC Commentary, pp. 526-530.

following an expedited trial, a court must justify and fully motivate the decision it takes on the merits of the case. Such decisions can then be appealed by the parties, either as to the guilt or as to the measure of punishment.⁶⁵

On 13 December 2004, counsel for the defendant appealed the decision requesting a suspension of the five-year prison sentence due to the low level of danger posed by the defendant (as indicated, among others, by her age, her state of health, and the fact that she had not been previously convicted).

On 3 June 2005, the Vlora Court of Appeals upheld the first instance decision. After recapitulating the findings of the house search and summarizing what already had been stated by the District Court, the Vlora Court of Appeals reasoned that:

(a) the defendant had asked for an expedited trial, entered a guilty plea, and that this request was accepted;

(b) the defendant's guilt was proved "even by" the documents present in the file, such as the report of the house search, the protocol of the sequestration of material evidence, and the reports of biochemical and ballistic expertise.

The Appeals Court very concisely concluded that, "*as the defendant's guilt was based on evidence, [the court] fairly found her guilty*". It appears that, instead of pointing out the lack of reasoning in the district court decision, the appeals court issued a similarly deficient judgement, replicating and reiterating the error committed by the trial court. Even if the appeal was made against the type of punishment (and not against the verdict), the court should have exercised the broad power conferred upon it by the law "*thoroughly*" to review the case, even beyond the grounds of appeal.⁶⁶ The court could have reversed the first instance verdict and dismissed the case for insufficient evidence. Alternatively, it could have reversed the decision and sent the case back to the lower court for retrial. In either case, the court should have stressed the obligation of the lower court to reason its decisions fully by indicating "*facts and evidence*" on which the judgement was based.⁶⁷

⁶⁵ CPC article 406, section 3. See also CPC Commentary, p. 525.

⁶⁶ See CPC article 425, section 1, and discussion *supra*, pp. 15-17.

⁶⁷ CPC article 383 (ç).

B. Reasoning in Sentencing

1. Applicable International and Albanian Law

International standards state that, when deciding on sentencing (i.e., with regards to the type and measure of punishment), a court should provide concrete reasons. This is especially true when a custodial measure is imposed, in which case specific and detailed reasoning must be provided in the court decision.⁶⁸ This provides protection against arbitrariness and ensures that the accused person and the society as a whole understand the reasons for the punishment.

In sentencing, the court must ensure that the punishment constitutes an individualized measure, tailored to the specific circumstances of the accused person and of the crime. Article 47 of the Albanian CC provides that, in determining the range of punishment against a person, the court must consider the dangerousness of the criminal act, the dangerousness of the person who committed it, the level of guilt, as well as mitigating and aggravating circumstances.⁶⁹ In stressing the importance of adequate reasoning of court decisions, the Commentary to the Albanian CPC states that decisions must clearly indicate, in addition to the above, an assessment of the dangerousness of the defendant and the *reasons for determining the kind and amount of punishment*.⁷⁰ Thus, the court must indicate the circumstances considered in fashioning the punishment or in deciding that the accused person should be released from it.

Under Albanian law, a defendant can appeal decisions with regard to the punishment as determined by first instance courts. As Albania has no legislatively imposed sentencing guidelines⁷¹ to instruct the courts in determining punishments, the provision of detailed reasoning by the appellate courts is especially important in providing guidance in that context.

⁶⁸ Council of Europe, Recommendation No. R (92) 12 of the Committee of Ministers to Member States Concerning Consistency in Sentencing states "1. Courts should, in general, state concrete reasons for imposing sentences. In particular, specific reasons should be given when a custodial sentence is imposed. 2. What counts as reason is a motivation which relates the particular sentence to the normal range of sentence for the type of crime and to the declared rationales for sentencing".

⁶⁹ CC article 47.

⁷⁰ CPC Commentary, p. 506.

⁷¹ But note that what stated in the Commentary to the CPC could be considered guidance for sentencing.

2. Findings

The OSCE Presence in Albania has observed that appeals courts have, on a number of occasions, failed properly and fully to reason and substantiate decisions on the type and measure of punishment.

In many instances, no individualized reasoning is apparent, with the decision on sentencing merely using stereotyped wording, for instance by vaguely and generically referring to the dangerousness of the defendant or the offence committed.

In the case of **Altin Diko**, convicted of rape,⁷² in determining the measure of punishment, the Tirana District Court considered the “social dangerousness of the offence, that of the defendant, etc.” No further discussion was made of such factors. On its part, the Court of Appeals failed to elaborate further on such criteria, and similarly stated “the type and measure of punishment are in accordance with the social dangerousness of the offence and of its author”.

In some cases, courts may even fail to elaborate the mitigating and aggravating circumstances on which decisions on punishment are based, or may do so insufficiently. In other cases, appeals courts appear to give inappropriate weight to elements considered in determining the measure of punishment, i.e., where some aggravating factors are given priority over others without there being a justification for this. Finally, decisions frequently present a list of factors without expressly indicating which are to be considered aggravating or mitigating circumstances.⁷³

On 5 October 2004 **Gjergj Selimaj** was convicted by the Vlora District Court of the aggravated murder of his wife.⁷⁴ The Vlora Court of Appeals modified the first instance decision by convicting him of premeditated murder instead. In turn, it reduced his sentence from a life sentence to twenty-four years of imprisonment. In discussing the measure of punishment, the Court of Appeals took into consideration, *inter alia*, the “deep repentance” of the defendant following commission of the crime, as well as his personality. While the other mitigating and aggravating factors considered (i.e., the fact that he had eventually surrendered to police after committing the crime, and its “weak” motives) appear to

⁷² See discussion on this case at pp. 22-24.

⁷³ For instance, decisions often generically refer to the “young age of the defendant” without indicating whether this is considered as a mitigating or an aggravating circumstance.

⁷⁴ The defendant – who killed his wife with an axe – was convicted by the Vlora District Court of intentional murder by causing special pain to the victim. See CC article 79 (e).

have been sufficiently analysed in the decision, no facts were indicated to support the alleged repentance of the accused. Further, the court did not provide explanations of how the defendant's personality impacted the punishment.

In the case of **Selvie Liçaj**, mentioned above,⁷⁵ the defence lawyer of the 70-year-old woman appealed the Vlora District Court decision that had sentenced her client to a five year prison term, and requested that this be suspended by putting her client on probation.⁷⁶ In his notice of appeal, the lawyer asked the court to consider the low level of danger posed by the defendant as indicated, *inter alia*, by her age, by her state of health, as well as by her not having been convicted previously.⁷⁷ The Vlora Court of Appeals denied the request and confirmed the first instance decision, stating that the lower court had properly weighted the social dangerousness posed by the defendant and the offence of which she had been convicted. The court reasoned that, while it was true that the defendant did not pose a serious threat, “ *the dangerousness of the offences with which she is charged [i.e., illegal production and sale of narcotics and illegal possession of military weapons], because they are widespread, is of real concern and, taken in relation to one another in determining the right sentence, the dangerousness of the offence takes priority, so the request made for the application of article 59 of the CC cannot be accepted*”. The court did not further elaborate on the reason why the commonness of the crime should prevail over other factors, such as the low social danger posed by the accused. Further, it is worth noting that article 50 of the CC provides an exhaustive list of aggravating circumstances and these do not include the commonness of the crime. Finally, commonness should not be seen as an indicator of seriousness. Many of the most petty crimes are also among the most common.

It appears that, in the present case – involving a seventy-year-old woman with no prior convictions – the court might well have considered the application of non-custodial measures. International standards indicate that the use of imprisonment as a form of punishment should be strictly limited and represent the *extrema ratio* where no other measures are

⁷⁵ See discussion at pp. 24-26.

⁷⁶ If the person and the circumstances under which the criminal act was committed are of little dangerousness, the court, while sentencing the defendant to up to five years of imprisonment, may decide that the convicted person's sentence be suspended, provided that during the probation he or she does not commit any other criminal act as serious as, or more serious than, that for which the sentence was suspended. The suspension applies from eighteen months to five years. CC article 59.

⁷⁷ The lawyer also argued that the small amount of drugs involved, as well as the fact that the defendant had repented (as shown by the fact that she had pleaded guilty and explained in details the criminal offences committed), should have been considered by the court.

appropriate in a specific case. As stated by the Council of Europe, imprisonment should be used only “where the seriousness of the offence would make any other sanction or measure clearly inadequate”,⁷⁸ and efforts should be made to minimise custodial sentences in favour of non-custodial measures.⁷⁹ While Albanian criminal law provides an array of measures as alternatives to imprisonment, the court did not consider any of these.⁸⁰

In the case of **Leonard Hanku**, who was sentenced to 6 years for the rape of a minor, it is not clear how the Tirana District Court weighted the mitigating and aggravating factors considered in fashioning the sentence. The court only made a standard reference to the dangerousness of the criminal offence (i.e., rape of a minor) and of the defendant, as well as to the fact that the defendant had prior convictions. The victim having forgiven the defendant, the defendant’s youth and the defendant having a minor child were cited as mitigating circumstances. No indications were given as to why the young age of the defendant and his paternity had been considered as a mitigating circumstance, and why these had prevailed over the serious nature of the crime. Indeed, the court sentenced the defendant to 6 years, which appears to be a mild sentence considering the range of punishment provided by law for that crime – i.e., between five and fifteen years.⁸¹ The Court of Appeals, in turn, found that the lower court had decided fairly in relation to the punishment by only making a standard reference to the dangerousness of the criminal offence and of the defendant, as well as the fact that he had two prior convictions.

It appears that, in the specific case, the appellate court missed an opportunity to expand on the evaluation and the assessment of mitigating and aggravating circumstances in the concrete case, thus failing to provide much-needed guidance to the lower courts in this area. Further,

⁷⁸ Recommendation No. R (99) 22 Concerning Prison Overcrowding and Prison Population Inflation, Committee of Ministers of the Council of Europe, para. 1.

⁷⁹ Id. at para. 14. Recourse to non-custodial measures should be promoted whenever feasible, as these are increasingly regarded as effective means of treating offenders within the community to the best advantage of both the offender and the society.

See the United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), adopted by General Assembly Resolution 45/110 of 14 December 1990, preamble, available at http://www.unhchr.ch/html/menu3/b/h_comp46.htm (last accessed on 19 November 2007).

⁸⁰ Measures alternative to imprisonment *tout court* include probation, suspension of imprisonment and compulsion to perform public interest activities, early release on parole, the possibility to fragment execution of the imprisonment sentence, as well as fines. See CC articles 34, 58– 65. It is worth noting that most of the alternatives to imprisonment indicated above are not applicable in practice due to the inexistence of an appropriate institutional framework and infrastructure in Albania.

⁸¹ CC article 101, section 1.

the concrete punishment appeared to be mild in light of the reasons given by the court, giving the impression that gender-based crimes and violence against women are not taken seriously and are treated with unjustifiable leniency by the justice system.

C. Examination of the Grounds of Appeal

1. International and Albanian Law

The right to a fair trial requires that a national court that has given sparse reasons for its decisions, whether by incorporating the reasons of a lower court or otherwise, nevertheless address the essential issues that were submitted to its jurisdiction and that it not merely endorse the findings reached by a lower court.⁸² The right to a fair trial encapsulates, *inter alia*, the right of the parties to introduce observations that they deem relevant to their case.⁸³ The ECHR guarantees rights that are not illusory and theoretical but “concrete and effective”,⁸⁴ and this right can be deemed to be effective only where such observations actually have been considered and examined properly by a court. In other words, one effect of article 6, section 1, of the ECHR is to place the court under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, prior to assessing whether they are relevant to its decision.⁸⁵ The ECtHR has found that, while in practice it is not necessary for the court to give detailed answers to every question,⁸⁶ if a submission is fundamental to the outcome of the case, the court must specifically deal with it in its judgement.⁸⁷ In the case of *Hiro Balani v. Spain*, for instance, the applicant had made a submission that required a specific and express reply from the court. The court failed to give that reply, making it impossible to ascertain whether the court simply had neglected the issue or had intended to dismiss it and, if so, on what grounds. The ECtHR found this to be a violation of fair trial guarantees under Article 6, section 1, of the ECHR.⁸⁸ The principles described here apply both to trial hearings and to proceedings in the second instance.

⁸² *Albina c. Roumanie*, ECtHR, 28 April 2005, para. 34; *Helle v Finland*, ECtHR, 19 December 1997, para. 60.

⁸³ *Id.*, para. 30.

⁸⁴ *Artico v. Italy*, ECtHR, 13 May 1980, para. 33.

⁸⁵ *Albina c. Roumanie*, para. 30. In that case, the ECtHR found that the judgement of an appeals court in a civil case was not sufficiently motivated as it referred to arguments expressed by the lower courts in their decisions without having addressed and considered the arguments submitted by the applicants in his appeal. See *id.*, para. 34.

⁸⁶ *Van der Hurk v. the Netherlands*, ECtHR, 19 April 1994, para. 61.

⁸⁷ *Hiro Balani v. Spain*, ECtHR, 9 December 1994, para 28.

⁸⁸ See *id.*

As mentioned above, under article 425 of the Albanian CPC, courts of appeal must *thoroughly* examine cases brought before them.⁸⁹ In interpreting the term “thoroughly”, the Criminal Chamber of the High Court has found a duty of the court of appeals to “*examine and give a solution to all the grounds presented by the appellant*”.⁹⁰

2. Findings

The OSCE has observed that, frequently, courts of appeals fail to address each ground of appeal. They also fail to consider or even mention the arguments presented by the appellant in the notice of appeal.

For instance, in the case of **Diko**, who was sentenced on 14 July 2004 to 9 years of imprisonment for aggravated rape⁹¹ by the Tirana District Court, counsel for the defendant appealed the first instance verdict asking that his client be declared “not guilty” and acquitted.⁹²

The notice of appeal⁹³ argued that the District Court decision was based on insufficient evidence as it relied exclusively on what appeared to be the contradictory statements given by the victim in different stages of the proceedings. More specifically, defence counsel argued, among others, the following:

(1) that the decision of the Tirana District Court was not based on evidence, including the fact that the forensic analysis that had been indicated by the trial court decision as part of the evidence supporting a verdict of guilt, had actually found that no signs of violence had been observed on the victim;

(2) that the victim’s complaint was “contradictory and unclear”, including the fact that she had given contradictory statements to the prosecutor (i.e., by stating that she had been raped several times by the defendant) and to the court (i.e., by stating that the defendant had raped her only once);

(3) that the victim’s claim that she had managed to flee the house where the alleged violence took place by hitting the defendant on the head with a “hard object” was unfounded, as the latter showed on examination no visible signs or injuries;

(4) that the case should have been dismissed by the Tirana DC as the victim had, in the course of the trial hearing, withdrawn her complaint.

⁸⁹CPC article 425. In doing so, “[the court of appeals] also reviews the part that concerns co-defendants who have not filed an appeal within the limits to which the reasons raised in the appeal refer”.

⁹⁰CPC Commentary, p. 557.

⁹¹The defendant was convicted in the first instance of having raped the victim “more than once”. Under CC article 102, section 2, repeated rape is punishable by imprisonment of ten to twenty years.

⁹²See notice of appeal submitted on 23 July 2004 by defence lawyer Kosta Karanxha, p. 3. More information on this case is provided in the section on Legal Reasoning in Criminal Appellate Decisions, pp. 20-22.

⁹³Submitted to the Tirana Court of Appeals on 23 July 2004.

Despite a relatively clear and detailed articulation and exposition of the grounds of appeal in the appeal notice, the court of appeals did not address or acknowledge in its decision any of the relevant arguments (or sub-arguments), and failed to explain on what rationale the victim's statement had been considered credible and was relied on as the main evidence in securing a conviction by the court of first instance.

Even more strikingly, the appeals court's decision failed to point out that the Tirana District Court had indeed erroneously based its decision, in part, on irrelevant evidence – namely the forensic doctor's report indicating the absence of signs of violence on the victim's body. Having reviewed the entire case file in the case, it is possible to confirm that the findings of this report reflect what was claimed by the defence counsel.⁹⁴ It is thus obvious that such evidence should have not been weighed against the defendant.

It appears that, by failing to address, even concisely, the arguments raised on appeal, the Tirana Court of Appeals decision violated both Albanian and international law. Moreover, at a minimum, the same court should have modified the first instance decision by pointing out the illogical and contradictory nature of the lower court's reasoning where it referred, erroneously, to the forensic doctor's report in support of a guilty verdict in the specific case.

Similar observations and conclusions can be made in another case.

On 22 May 2003, **Leonard Hanku** was convicted of raping a minor⁹⁵ and sentenced to six years of imprisonment by the Tirana District Court. In formulating its guilty verdict, the court relied on:

- the victim's statement (that she had been raped by the defendant; that she had reported the fact to the sister-in-law of her cohabiting partner; and that the next day, she had also informed her partner before going to the police);
- the witnesses' statements (i.e., that of the partner of the victim and his sister-in-law, confirming that she had indeed told them about the rape; the statement by the former that the victim had told him that the defendant frequently harassed her);
- the result of the forensic report and the report of physical evidence (indicating that the knickers of the victim were torn on one side).
- the forensic report (stating that the injured had an ecchymosis in her left thigh).

⁹⁴ Altin Diko, Criminal file No. 757, registered with the Tirana District Court on 22 March 2004.

⁹⁵ CC article 101, section 1 provides that the commission of sexual or homosexual intercourse by force with children between fourteen and eighteen be punishable by five to fifteen years of imprisonment.

On 28 May 2003, counsel for the defendant appealed the decision on the basis of it not being based on sufficient evidence. The appeal argued that:

- (a) the conviction was based only on hearsay testimony of the witnesses;
- (b) the report concerning seizure of the physical evidence (indicating that the victim's underwear had been ripped on one side) were wrongly considered as evidence as they did not indicate that there had been rape (they might have already been torn);
- (c) the forensic report, indicating that the victim had one bruise on her left thigh, did not prove that she had been raped.

On 6 October 2003, the appeals court upheld the first instance decision. In its decision, the appeals court limited itself to summarizing the evidence, basically repeating the findings of the trial court, without addressing or even mentioning the defendant's grounds of appeal. The appellate court found that the evidence cited by the first instance court was indeed sufficient to support a guilty verdict. The decision then stated that, in addition to the detailed explanations given by the victim to the police and before the court, the guilt of the defendant was also proved "by the witnesses questioned, the physical evidence, forensic report no. 1033, according to which the injured had an ecchymosis of 3 x 2 cm on the left thigh, and the clothes of the injured (knickers and the shirt) that were torn". The appellate court failed altogether to address, not to mention to explain why it had not considered valid, the defendant's arguments.

D. Interpretation and Application of Substantive and Procedural Law by the Appeals Courts

The OSCE Presence in Albania has observed that, in some cases, appeals courts err in the interpretation and application of provisions of substantive and procedural law. This is worrying, as second instance courts should play an important role in guiding lower courts in the interpretation, clarification and application of substantive and procedural law, thus contributing to developing and shaping a country's jurisprudence.

1. Interpretation and Application of Substantive Law

On 5 October 2004, **Gjergj Selimaj** was convicted of the aggravated murder⁹⁶ of his former wife (by causing special pain to the victim) and sentenced to life imprisonment by the Vlora District Court. According to the first instance

⁹⁶Under article 79 (e) of the CC, intentional homicide committed by causing special pain to the victim is punishable by not less than twenty years or life imprisonment. CC article 70 (e).

decision, on the evening of 30 October 2002, following an argument between the victim and the defendant at the defendant's mother's house, the latter took an adze and hit the victim on the head, causing her death. The decision relied on the statements of witnesses at trial (all confirming a history of past abuses), on the statement of the defendant's mother (who caught the defendant "red-handed" in the immediate aftermath of the crime), the findings of the forensic expertise analysis stating that the death had been painful (and not instantaneous),⁹⁷ as well as the biological expertise analysis attributing the blood found on the defendant's clothes and on the adze to that of the victim.

The defence lawyer appealed the decision, arguing that the first instance court had erred in qualifying the crime as aggravated homicide (for causing special pain), and requesting that this be considered as murder committed in state of profound psychic distress⁹⁸ or, alternatively, unqualified intentional murder,⁹⁹ for which lower penalties are provided by law.¹⁰⁰

On 22 December 2004, the *Vlora Court of Appeals* changed the first instance decision finding the defendant guilty of premeditated murder, instead, and reduced the sentence from life imprisonment to 24 years. In doing so, the court argued that the criminal intent to commit the murder had not arisen in the defendant "instantaneously", but a "long time ago", and had been triggered by the repeated arguments with the victim, the last of which took place immediately prior to the murder. In rejecting the request of the defence lawyer (namely that the crime be qualified as "murder committed in a state of profound psychic distress"), the appellate court stated that the state of distress must be determined by the "provocation or unfair actions of the victim". The court went on to state that, according to the applicable case law, "unfair offences are considered *illegal actions addressed not only against the defendant, but also against his family members or relatives*" such as to trigger a defendant's state of psychic distress and cause him to lose control over his actions.

This decision can be criticised under several aspects.

⁹⁷ Forensic report no. 128, 12 December 2002.

⁹⁸ Murder committed in state of profound psychic distress is punishable by imprisonment of up to eight years. CC article 82.

⁹⁹ Intentional murder is punishable by a term of ten to twenty years of imprisonment. CC article 76.

¹⁰⁰ In the appeal, the lawyer pointed out that the court had failed to consider the results of a forensic analysis that had been requested by the defence, and whose findings were in direct contradiction with those of the expert heard by the court. The expert report submitted by the defence found that the adze's blows to the victim's body were imparted with speed, violence and high intensity, so that her death was "absolute". Forensic report no. 73, 7 June 2004.

Firstly, by stating that the psychiatric distress must be determined by “unfair actions”, which in turn are to be considered “illegal actions”, the appeals court clearly misread and misinterpreted the law. According to article 82 of the CC, the psychic distress must be caused by “violence or serious offence”.¹⁰¹ No mention is made in the law about “unfair actions”, or the latter having to be illegal. Further, the appeals court dismissed the hypothesis of “murder committed in a state of profound psychic distress” mainly on the ground that the fight preceding the murder was not at all “unusual” between former husband and wife, and as such capable of inducing a sudden state of profound distress in the defendant. By limiting its analysis to these elements, it appears that the court missed an opportunity to clarify the necessity of the “proportionality element” in the so-called murders committed “in the heat of passion”. More specifically, the court should have stressed that the provocation/triggering factor (in the words of Albanian law “the violence or serious offence”) should in any event be of such a nature and seriousness as to induce a person of average morality and reasonableness to fall into a state of “serious psychic distress” and lose control.

Secondly, it seems that the appeals court erred in qualifying the offence as “premeditated homicide” in the specific case, and provided a misleading interpretation of the relevant criminal provision with potentially negative repercussions for future decisions in similar cases. Unlike other criminal provisions, CC article 78, section 1, states only that premeditated homicide is punishable by fifteen to twenty five years of imprisonment,¹⁰² without defining the elements of the offence. According to the Commentary to the Criminal Code (CC Commentary), the element of premeditation exists whenever someone kills intentionally, in cold blood, and for weak motives.¹⁰³ For this element to exist, the criminal law of most countries requires that there be an adequately long lapse of time between the emergence of the criminal intent and its execution, and that such intent has persisted uninterrupted in the mind of the agent until the execution of the crime.¹⁰⁴ To determine whether premeditation has indeed occurred, the court needs to evaluate all the concrete circumstances of a case, such as the choice of the instrument to commit the crime, the cause

¹⁰¹ CC article 82.

¹⁰² CC article 78, section 1.

¹⁰³ Ismet Elezi, *E drejta penale (Pjesa e posaçme)* [Criminal Code Commentary (Special Part)] (Tiranë, Erik, 2007), pp. 42-44 [hereinafter CC Commentary (Special Part)]. According to the commentary, premeditation implies the existence of “direct premeditated intention”, calm persisting until the crime is committed, a relatively long lapse of time between the triggering element and the execution of the crime, a determination of the timing and means to commit it.

¹⁰⁴ See, e.g., Cass. Pen. Sez. 1, 13 May 1993. The Albanian Commentary to the CC uses similar, but confusing, language. It states that there needs to be a relatively long lapse of time between the triggering event and the execution of the actual crime, and that the “calm intent” needs to have persisted uninterrupted until execution of the crime. CC Commentary (Special Part), pp. 43-44.

of the crime, the choice of the most appropriate timing to commit the crime and the modalities for carrying it out – all facts that precede the execution of the crime itself. The court’s argument that the defendant premeditatedly killed his former wife does not seem to find support in the facts as ascertained by both the first and the second instance courts. More specifically, the timing and circumstances of the murder (i.e., the fact that the murder was preceded by a fight taking place in the house of the defendant’s mother at a time when she and other potential witnesses were present), and the dynamic (such as the mean used to kill – i.e., the adze, and the fact that the defendant did nothing to conceal the body of evidence or of the victim), seem to contradict the finding that the defendant acted in cold blood and in the execution of a premeditated, carefully planned crime. It appears that the second instance court could have better re-qualified the homicide as intentional murder, aggravated because it was committed: (a) for weak motives (the defendant murdered his former wife after she addressed insulting words to him during a fight); (b) savagely and ruthlessly.¹⁰⁵

2. Interpretation and Application of Procedural Law

On 6 December 2004, following an accelerated trial, **Selvie Liçaj** was convicted by the Vlora District Court of illegal possession of narcotics and military weapons. Under the law, if the accelerated trial terminates with a finding of guilt, the court must commute/reduce the punishment by imprisonment or fine by one-third.¹⁰⁶ The court decision must indicate both the sentence that would have been given if the trial had been conducted according to the ordinary procedure, as well as the actual sentence after application of the one-third reduction.¹⁰⁷ In the case discussed, the trial court had sentenced the defendant to five years of imprisonment. While the decision stated that the prison term should be reduced by one-third, it failed to indicate the actual prison term to be served upon application of the reduction, in violation of the applicable procedural law. Following an appeal by the defendant against the sentence, the appeals court upheld the first instance decision without rectifying the error, thus leaving uncertainty as to the exact amount of prison to which the defendant had been sentenced.

Ardian Guri was acquitted of trafficking of narcotics¹⁰⁸ by the Shkodra District Court on 24 October 2005. At the trial hearing, the prosecutor introduced a

¹⁰⁵ CC article 50 (a) and (c). These circumstances aggravate the punishment, which is ordinarily between ten and twenty years of imprisonment.

¹⁰⁶ See CPC article 406.

¹⁰⁷ CPC Commentary, p. 523.

¹⁰⁸ CC article 283, section 1.

report by the Forensics Institute in Tirana¹⁰⁹ finding that the over 4 kilograms of a cream-coloured powdered substance seized from the car of the defendant¹¹⁰ contained heroin and monoacetylmorphine – both classified as narcotic and psychotropic substances by the law.¹¹¹ From the trial record, it appears that the toxicologist who compiled the report was summoned by the court several times but always failed to appear. The trial court decision indicates that because the name on the report had been misspelled, on 26 May 2005 samples of the substance were sent to the Forensics Institute in Tirana for re-examination. Following inaction by the latter, samples of the substance were sent to the Tirana Police Forensics Institute. On 24 October 2005, the toxicological report by the Tirana Police Forensics Institute concluded that *whereas the two samples that had been submitted by the Shkodra District Court contained caffeine and paracetamol,*¹¹² *a third sample sent by a judicial police officer contained morphine and heroine.*¹¹³ Having reported the findings of the forensics reports in its decision dated 24 October 2005, the Shkodra District Court found the defendant *not guilty, reasoning that keeping paracetamol and caffeine did not constitute a criminal offence under the law.*¹¹⁴ The court seems to have based the decision on the chemical legal analyses conducted by the Tirana Police Forensics Institute – i.e., report no. 4173 of September 2005 and report no. 4910 of October 2005. It is worth noting that, in its reasoning, the court decision failed to point out the contradictory findings of the two reports, and to explain why it had considered one expert's evidence more valid than that of the other. With the same decision, the trial panel rejected a prosecution request to transfer the acts to him for further investigation following withdrawal of the accusation.¹¹⁵ Finally, it ordered destruction of the physical evidence (i.e., the cream-coloured powder seized by the Shkodra Police) on the basis of Article 190, section 1 (b), of the CPC.

On 4 November 2005, the prosecutor filed an appeal in which he requested a modification of the first instance decision and the transfer of the acts back to him for further investigation.

¹⁰⁹ Chemical-legal analysis Act no. 281 of 2003.

¹¹⁰ The substance had been seized from the car of the accused person following his arrest to execute an order of detention on remand issued by the Shkodra District Court on suspicion that the latter had committed the criminal offence of cultivation of narcotic plants (article 284/1 of the CC).

¹¹¹ Law no. 7975, dated 26 July 1995, "On narcotics and psychotropic substances", Table 1, list IV.

¹¹² The chemical forensic analysis stated that the two samples had been examined already once – chemical forensic analysis act no. 4173 dated 14 September 2005 – and thus could not be examined a second time.

¹¹³ Chemical forensic analysis act no. 4910 of the Institute of Scientific Police in Tirana, 24 October 2005.

¹¹⁴ CPC article 388, section 1 (c).

¹¹⁵ CPC article 377.

On 28 February 2006, the Shkodra Court of Appeals upheld the first instance court's decision of acquittal. In a two-page decision that mostly recounts the facts as stated in the first instance decision, the court of appeals reasoned that the district court had "fairly decided on the innocence of the defendant" as the fact did not represent a criminal offence under the law. It also stated that, while the prosecutor had requested the return of the acts for further investigation, he did not give any reasons as to why the case against Guri should remain open, as further investigations could be carried out independently of the outcome in the specific case.

It appears that the appellate court failed to acknowledge procedural errors committed by the first instance court.

Firstly, the decision by the first instance court to destroy the material evidence – i.e., the powder the nature of which was at issue in the case – upon conclusion of the trial hearing should be regarded as awkward and illogical, if not ill-motivated. According to Article 190, section 1 (b), of the CPC, the court or the prosecutor, in the *final decision* or in the decision dismissing the case, may order that items the "maintenance or transfer of which is prohibited shall be returned or destroyed".¹¹⁶ The court decisions to destroy the evidence in this case seems to be illogical where it refers to evidence the "maintenance or transfer of which is prohibited" under the law. If indeed the court concluded that the substance was not drug, acquitting the defendant, then it should have returned its possession to the person to whom it belonged – i.e., the accused person, in accordance with the law.¹¹⁷

Secondly, it appears that the Shkodra Court of Appeals failed to correct the first instance decision rejecting a prosecutor's request to transfer the acts to him for further investigation. Article 377 of the CPC states that, in cases where the prosecutor withdraws the charge and requests the return of the file in order to continue investigations, the court should return this file to him. Whereas, if at the time the charge is withdrawn the defendant is proved not guilty, the court does not return the file and acquits the defendant.¹¹⁸ In a 2002 decision on this point, the High Court found in favour of the prosecutor and amended a decision by the same court (i.e., the Shkodra Court of Appeals) pointing out that "...the court should not accept the withdrawal of the charge only when it is clearly established that the person accused is innocent...". The High Court went on to state that, if the innocence of the accused

¹¹⁶ The commentary to the CPC states that the order to destroy the evidence should only be issued "at the end of the criminal case". Commentary to the CPC, pp. 252-53.

¹¹⁷ See CPC article 190, section 1 (c).

¹¹⁸ See CPC article 377. See also CPC Commentary, p. 499. The Commentary to the CPC also states that, if at the time the charge is withdrawn, it is proved that the defendant is not guilty, then the court does not return the file but acquits the defendant or dismisses the case. See *id.*

is doubtful, then the court must accept the application of the prosecution office.¹¹⁹ It seems that, in the present case, given the contradictory outcome of the toxicological reports mentioned in the first instance decision, the innocence of the defendant could have been reasonably doubted by the court, and that the latter should have sent back the file to the prosecutor for further investigations. The Shkodra Court of Appeals, by failing to correct the first instance decision in this respect, perpetuated mistakes made by the trial court in the interpretation and application of the procedural law.

Thirdly, and perhaps most importantly, the appellate court could have repealed the district court's decision for contradictory or insufficient reasoning. According to article 383 of the CPC, to be valid, a judicial decision must contain, *inter alia*, the evidence on which the decision is based as well as the *reasons why the court considers unacceptable the contrasting evidence*.¹²⁰ As the district court decision failed clearly to indicate why it considered valid and reliable the results of the second analysis conducted by the Tirana Police Forensics Institute and not the first one that had been conducted by the Forensics Institute in Tirana, the appeals court could have invalidated it.

E. Problems with the Evaluation of Evidence by the Courts of Appeal

1. International and Albanian Legal Framework

During the trial, evidence is normally introduced on the request of the parties. The court decides on the admissibility of evidence by an order, excluding evidence that is prohibited by law or that is patently unnecessary.¹²¹ In addition to evidence introduced by the parties, the court may also take new evidence on its own initiative.¹²² The court evaluates the evidence, i.e., its accuracy, its authenticity as well as its evidentiary value, after having examined it in its entirety.¹²³ Whereas it is generally up to the national courts to assess whether it is appropriate to call witnesses¹²⁴, the European Commission of Human Rights has stated that, under article 6, "a court must give the reasons for which it decides not to summon those witnesses whose examination has been expressly

¹¹⁹ See Criminal Chamber of the High Court, Decision no. 157, dated 28 February 2002, in CPC Commentary, pp. 499-500.

¹²⁰ CPC article 383 (ç).

¹²¹ CPC article 151, section 2.

¹²² CPC article 367.

¹²³ CPC article 152. See also CPC Commentary, p. 504.

¹²⁴ *Vidal v. Belgium*, ECtHR, 22 April 1992, para. 33. Article 6, section 3 (d), does not require the attendance and examination of every witness on the accused person's behalf, the essential aim of the article being that of guaranteeing a full equality of arms in the matter. See *Engel and Others v. the Netherlands*, ECtHR, 8 June 1976, para. 91.

requested".¹²⁵ The ECtHR reached a similar conclusion in the case of *Vidal v. Belgium*.¹²⁶ In that case, apart from the oral statements of the two defendants, the applicant (who had originally been acquitted in the first instance after several witnesses had been heard) was convicted by an appellate court exclusively on the basis of the evidence in the case file, without calling those witnesses whom the defence had asked to hear. The Court found that an unjustified refusal by the appellate court to hear defence witnesses was inconsistent with the fair trial guarantees embodied in article 6.¹²⁷ Although the court's judgement focused on the national court's failure to give reasons for the refusal, the case can also be read as one in which the ECtHR questioned the very decision to exclude testimony that might have provided evidence helpful to the accused person, who was then sentenced to four years of imprisonment for a serious offence.¹²⁸

A court of appeals must assess the evidence introduced in the first instance trial and may, exceptionally, supplement the judicial fact finding conducted by the trial court.¹²⁹ Thus, depending on the character of the case and on the grounds of appeal, the court of appeals may rely on the evidence obtained in the first instance trial, *order the re-performance, in whole or in part, of the judicial examination*, and may also obtain new evidence, on motion by the parties or even on its own initiative.¹³⁰

2. Findings

In Albania, the lack of developed and appropriate skills in questioning witnesses leads sometimes to the evaluation of irrelevant evidence and the failure to examine relevant issues in the course of criminal proceedings. This in turns compromises the right of the accused person to a fair hearing, in accordance with article 6, section 1, of the ECHR.

The OSCE Presence in Albania has observed that, at trial hearings, witnesses are often asked only cursory and superficial questions about crucial events. For instance, basic questions regarding the exact location where a crime

¹²⁵ *Bricmont v. Belgium*, A 158 (1989).

¹²⁶ *Vidal v. Belgium*, ECtHR, 22 April 1992, para. 34.

¹²⁷ See *id.* The Court stated that "the complete silence" of the judgement of the Court of Appeals on the defendant's request to hear witnesses at the appeals hearing was not consistent with the concept of a fair trial, which is the basis of article 6. This was all the more the case as the Brussels Court of Appeals (to which the case had been remitted by the Court of Cassation) had increased the sentence that previously had been passed by the Liège Court of Appeals by substituting four years for three years and by not suspending the sentence as the Liège Court of Appeals had done.

¹²⁸ D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights* (London, Butterworths, 1995), p. 269.

¹²⁹ CPC article 152. See also CPC Commentary, p. 504.

¹³⁰ CPC article 427. CPC Commentary, p. 558.

allegedly took place, the presence of other potentially relevant witnesses, as well as clarifications regarding the precise causes of specific facts are often missing. This practice translates into a failure of the trial courts correctly and completely to ascertain the facts under judicial scrutiny. This failure at the trial stage obviously impacts any subsequent criminal appeals hearing. While a court of second instance does have a duty to correct first instance decisions where the facts appear to have been incorrectly or incompletely established, they frequently fail to do so. Despite their broad power under the law, appeal courts often abdicate their duty to undertake a “thorough review” of the case, and in practice fail to inquire into, or develop further, the evidence they have a power to examine.¹³¹ It has been noted that in the context of appellate hearings, following the rapporteur’s introduction of the case to the panel and the parties’ requests, few questions are posed by the panel to the defendant, and virtually never is the court’s power to request a re-examination of the evidence or additional evidence exercised. Although, as in other legal systems, the repetition of the judicial examination should be considered as exceptional, it appears that there might well be cases in which the appellate panel should exercise this power in order to come to a fair resolution of the case.

Further, it has been observed that, in some cases, where courts of appeal refused to hear evidence requested by a party, they failed to justify and properly to reason their decision on the request of evidence, in violation of Albanian and international law.

For example, in the case of **Altin Diko**, who appealed against a decision sentencing him to 9 years of imprisonment for rape, the defendants’ lawyer argued that the case should have been dismissed by the Tirana District Court, as the victim had on 26 May 2004 –in the course of the trial – withdrawn her complaint. The lawyer argued that, while the defendant had been convicted of rape by the court of first instance according to article 102, section 2, of the CC (which concerns repeated cases of sexual relations through the use of violence), the victim had at the trial stated to the court that she had been raped by the defendant only once, though this had not been reflected in the court record. Had her statement been considered, defence counsel argued, the charge should have been reclassified accordingly from that of article 102, section 2, to that of article 102, section 1, of the CC (ordinary rape), which can only be prosecuted on the basis of a criminal complaint filed by the victim, and the case consequently should have been dismissed.

¹³¹ CPC article 427.

Against this background, the defence counsel submitted a preliminary request to the Tirana Court of Appeals to re-examine the victim in order to clarify her statement and the circumstances of the case, and argued that the conviction should be reversed on appeal. This submission, if accepted, certainly would have been decisive for the outcome of the case. Nonetheless, the court of appeals rejected it as unfounded in the course of the appellate hearing, without giving any reasons or explanations whatsoever for this outcome, in violation of Albanian law and of article 6, section 3 (d), of the ECHR.¹³²

Whereas, in order to clarify circumstances and assess the credibility of the parties, all witnesses who may have relevant testimony must be heard, it has been observed that, in some cases and for reasons that remain unclear, appeals courts did not even attempt to hear potentially crucial witnesses in cases where these had not been heard by the trial panel.

The following examples illustrate this point.

Gazmir Koleci was convicted on 11 March 2005 by the Tirana District Court of illegal weapons possession on the basis of article 278, section 2, of the CC and sentenced to three years of imprisonment. In the same decisions, the court re-qualified a prosecutor's charge of attempted murder into non-serious intentional injury,¹³³ and dismissed the latter charge following the withdrawal of the complaint by the victim. According to the trial indictment, the victim was at a bar with two friends, E. Denaliaj and S. Dorzi, when a fight broke out between the latter and the defendant. When the victim intervened to separate them, the defendant allegedly hit him. Later that day, after the fight resumed between the defendant and the victim outside the same bar, the former allegedly fired a gunshot, injuring the victim on the right shoulder. While the testimony of Dorzi might have been helpful in clarifying the circumstances of the case, for reasons that remain unclear, he was not heard as a witness at the trial.¹³⁴ Upon careful inspection, the court file did not seem to contain any information on whether either of the parties to the trial attempted to locate and summon this key witness.

¹³² Under this provision, everyone charged with a criminal offence has the right, *inter alia*, to examine or to have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. ECHR article 6, section 3 (d).

¹³³ CC article 89.

¹³⁴ The court file does not contain any information on whether either of the parties or the trial panel attempted to locate and summon the witness.

At trial, one of the witnesses who was also the victim's friend, and who had intervened to separate the victim and defendant, stated that both were drunk when the incident happened. In the course of the trial examination, the victim stated "I was shot by the defendant who is a friend of mine. I don't know how the gun went off...He shot into the air and I tried to take his weapon, so I was shot and injured... ." On the basis of this statement, among other pieces of evidence, the trial court found that there was not enough evidence to support a charge of attempted murder.

The first instance decision was appealed by the prosecutor (who asked to change the decision and to convict the defendant of attempted murder) and, on 12 October 2004, by the defence counsel (who requested that the sentence be modified and that the defendant be placed on probation for a period of five years).¹³⁵

On 11 March 2005, the Tirana Court of Appeals reversed the part of the first instance decision that had dismissed the charge of "non-serious intentional injury",¹³⁶ and sentenced the defendant to six years of imprisonment for attempted murder. The court modified the first instance decision on the ground that this was not properly reasoned. It then argued that

the fight between the victim and the defendant, the use of the weapon by the defendant, aiming at the victim's body and causing light injuries, show that the intention of the defendant was to kill the victim, not to injure him. The manner and circumstances of the incident, the means used by the defendant, and the place of the injury, as well as the fact that the consequence did not derive from causes independent of the defendant, create the full conviction that the defendant should be held responsible for the criminal offence provided by article 76 of the CC [emphasis added].

In taking the decision, the appellate court neither re-performed a part of the judicial examination nor examined any new evidence. Once again, the witness Dorzi, whose testimony might have shed light on the circumstances of the case, including on a potential motive for the attempted murder, was not heard.

¹³⁵ The defendant's appeal argued that the sentence should have been changed by considering a series of mitigating circumstances, such as the young age of the defendant, the absence of previous convictions and his repentance.

¹³⁶ The prosecution of the criminal contravention "non-serious intentional injury" (CC article 89) may commence only with the complaint of the injured person, who may withdraw it at any stage of the proceedings. See CPC article 284, section 1.

F. Case Study

An analysis of the case discussed below illustrates some of the problems identified in the quality of the review exercised by the courts of appeals and in the legal reasoning adopted by them.

Taulant Saçaj was convicted of “exploitation of prostitution” by the Vlora District Court on 8 July 2005 and sentenced to 3 years of imprisonment. While he was initially charged with the “exploitation of prostitution under aggravated circumstances” by forcing or coercing the victim to prostitute herself overseas¹³⁷ (which carries a punishment seven to fifteen years of imprisonment), the prosecutor later requested his conviction for simple “exploitation of prostitution”, which carries a lighter punishment.¹³⁸

The case revolved around a statement made by the victim to the Vlora police in which she claimed that the accused person, taking advantage of her young age (she was 14 at the time of the incident), had in 1998 persuaded her to go to London and, once there, had convinced her to prostitute herself, henceforth subjecting her to repeated acts of physical violence.¹³⁹ Mainly relying on these statements of the victim statement to the police, the first instance court found the defendant guilty of “exploitation of prostitution” and sentenced him to three years of imprisonment. In determining the punishment, the court considered the dangerousness of the offence, as well as that of the defendant whom—by deceiving the victim with a marriage proposal—had pushed her to prostitute herself. Concerning the punishment, the court stated that the request of the prosecutor was “fair”, as this reflected the dangerousness of the offence and of its author. No other considerations were made in weighing the aggravating circumstances and in assessing how these could justify what seems to be a relatively light sentence.

On 11 July 2005, the defendant appealed against the sentence and asked for a reduction of the three-year prison term on the grounds that he was married to the victim, that they were expecting a child and that he had repented.

On 23 September 2006, the Vlora Court of Appeals found in favour of the appellant and reduced the prison term from three to two years.

¹³⁷ CC article 114/a, section 5.

¹³⁸ CC article 114 provides that “soliciting prostitution, mediating or gaining from it is punishable by a fine or up to five years of imprisonment”.

¹³⁹ Other evidence supporting the prosecution case included the hearsay statement of the victim’s mother, as reported in the trial record.

The appeals court decision can be criticized under several aspects.

Firstly, it appears that, in the specific case, the first instance court erred in qualifying the fact as simple “exploitation of prostitution” as opposed to aggravated “exploitation of prostitution”, which carries with it a harsher punishment. As ascertained by the trial panel and reflected in the court decision, the repeated exploitation had occurred vis-à-vis a victim who was underage at the time of the crime, and had been deceived by her abuser. Against this background, it seems that the court could have convicted the defendant of exploitation of prostitution by considering the above aggravating circumstances, and sentenced him to a harsher prison term than the one inflicted (the punishment for aggravated exploitation of prostitution ranges from seven to fifteen years of imprisonment).¹⁴⁰ While, the prohibition of *reformatio in pejus* prevented the court of appeals from pronouncing a harsher sentence following the appeal by the defendant, the Court at least could have confirmed the sentence (i.e., three years) given by the district court. At the same time, it could have acknowledged the error made by that court in the qualification of the crime and consequent sentencing. More generally, it could have instructed lower courts properly to exercise their obligation to consider and balance all factors in a case, not least aggravating factors, affecting decisions on punishment, and properly and fully to reason decisions in that respect.

Secondly, the appellate decision modifying the Vlora District Court decision with respect to the measure of punishment appears to be ill reasoned, if not completely incomprehensible. By reducing the prison term from three to two years, the decision further weakens what it appears to be an already lenient punishment. The appellate decision reads

[...] *the way in which the offence was committed, the relationships that were created, the fact the offence was committed and even initiated through the will of the injured, her reaction, for a relatively long period of time and when they were married, and the effect a punishment should have as educational tool for recreating family relationships, it is considered, also based on the repenting stance demonstrated during the court hearing, as well as other circumstances, that such a measure of punishment, with an educational effect, should be given to the defendant. [emphasis added]*

The court did not elaborate on the mitigating factors, explaining how these affected the punishment. While appeals courts do not have a duty to give reasons as detailed as those of first instance courts, and while they can, to a degree, refer to reasons provided by first instance courts in cases in which they endorse their decisions, the reasoning of the appeals court in this case appear nonetheless to be problematic. While the “deep

¹⁴⁰ CC article 114/a, sections 1, 4 and 6.

repentance” by the author of a crime may represent a mitigating factor,¹⁴¹ the court did not provide any indications that this repentance was in fact present in the specific case. Indeed, repentance shown exclusively at trial may be considered not to be genuine.¹⁴² In addition, while the reference to “the way the offence was committed and the relationships that were created” is too general, the reference to the punishment as an “educational tool” to recuperate family ties does not reflect any legal principle and should be rejected. While, under the law, the courts have discretion in considering aggravating and mitigating circumstances in determining a punishment, the court in this case considered circumstances that appeared to be irrelevant. It is also worth noting that, in the introductory part of its decision, the appeals court erred in finding that both the defendant and the victim had profited from her activity as a prostitute. This is quite striking, as it contradicts facts ascertained by the Vlora District Court; moreover the appeals court did not point out any errors that were made by the district court when the latter made its decision, nor did it consider any new evidence.

V. CONCLUSION AND OUTLOOK

Despite their broad power under the law thoroughly to review cases on their merit, appeals courts often abdicate their duty to undertake a comprehensive review of the cases before them, and in practice fail to inquire into, or develop further, the evidence they have a power to examine.

As described in the analysis of the above cases, one of the most significant shortcomings is the failure of Albanian appeals courts properly and fully to reason their decisions. This is a serious violation of the right to a fair trial. In some cases, the OSCE Presence in Albania has observed that the appeals courts have failed to recognize and remedy first instance court decisions where the reasoning appeared to be manifestly illogical or contradictory. In others, appellate courts have failed to address the arguments presented by the appellant, or have provided erroneous interpretations of the procedural and substantive law.

¹⁴¹ CC article 48 section (ç). According to the CC Commentary, deep repentance may be indicated by the accused fully accepting the charge, providing a clear explanation of the circumstances in which the criminal offence was committed, indicating the potential collaborators as well as clarifying the motives of the crime. Ismet Elezi, Skënder Kaçupi, and Maksim Haxhia, *Komentari i Kodit penal të Republikës së Shqipërisë (Pjesa e përgjithshme)*, [Commentary of the Criminal Code of the Republic of Albania, (General Part)], (Tiranë, GEER, 2006), p. 238

¹⁴² See id.

It is likely that a combination of several possible factors, including low professional standards, insufficient legal argumentation skills, the sometimes inadequate knowledge of substantive and procedural provisions, as well as a general disregard for the basic tenet of the presumption of innocence, contribute to the poor reasoning in judicial decisions. While this is sometimes reflected in first instance decisions, it is even more striking when it affects appellate court decisions, given the guiding role such courts should play in a modern and fair justice system.

While they should not be considered a panacea, adequate education and professional training may contribute to address some of the issues/factors mentioned above. Starting in July 2005, all sitting judges in Albania have been required to participate in continuing legal education programs (CLE) offered by the School of Magistrates, for a maximum of twenty days per year. While, until recently, only three training sessions a year were dedicated to the topic of legal/judicial reasoning and writing, this subject has, since October 2006, been incorporated into all training offered by the School of Magistrates under the CLE programme, and is taught for about an hour and a half in the context of each training module.¹⁴³ The topic of “judicial reasoning and writing” is also part of the regular school curricula at the School of Magistrates, where first-year students must take thirty-two credit hours on this topic. Second- year students undergoing the pre-professional internship programme are subject to practical, on-the-job training including on how to reason and legally articulate court decisions.¹⁴⁴

While CLE training is in general well attended, judges of the courts of appeals reportedly rarely participate. Even though attendance at CLE is in practice optional,¹⁴⁵ it is recorded in each magistrate’s personal file and is taken into consideration for future promotions and assignments.¹⁴⁶ In addition, it is a category in the new evaluation system which is being implemented in pilot courts.¹⁴⁷

¹⁴³ The training is based on theoretical lectures, case studies and class discussion. Interview with Ariana Fullani and Arta Mandro (January 2007).

¹⁴⁴ School of Magistrates’ Curricula 2006-2007, available at <http://www.magistratura.edu.al> (last accessed on 19 November 2007).

¹⁴⁵ Recent changes in the law have made continuing legal education mandatory for judges, but no sanctions have been provided for failure to attend. See Law no. 8136, dated 31 July 1996, “On the School of Magistrates of the Republic of Albania”, articles 2, 23.

¹⁴⁶ OSCE Presence in Albania, *Legal Sector Report for Albania* (Tirana, OSCE, 2004), p. 257.

¹⁴⁷ ABA/CEELI, *Judicial Reform Index for Albania*, volume III (Washington D.C., ABA, October 2006), p. 17 (referring to “The evaluation system on the professionalism and ethics of judges”, ch. 12).

VI. RECOMMENDATIONS

- Appeals judges should fully reason their decisions in compliance with domestic and international law. This means that:
 - Courts of appeals must abide by their duty to systematically *address each ground of appeal raised by the parties* in their submissions. Appellate court decisions must mention and give a solution to all the grounds of appeal, even if in concise form. If an appeals panel rejects grounds of appeal, it must indicate reasons why it did so.
 - If appellate courts give sparse reasons for their decisions (for instance when, in upholding a lower court's verdict, they incorporate the reasons of a lower court), they must nonetheless *address all the essential issues* which were submitted to their jurisdiction without *merely* endorsing the findings reached by a lower court.
 - Court decisions – both by the district and by the appellate courts – must include a *description of the factual circumstance and the evidence upon which the decisions are based, as well as the reasons why the court has not accepted contrary evidence*. They must also include the claims of the parties and the reasons for accepting or rejecting them.
 - If appellate court decisions reverse, or modify, decisions issued by the lower court, they need to provide sound and clear reasons for this action. More specifically, appellate courts need to indicate clearly:
 - which considerations brought them to a different evaluation assessment of the facts and evidence from that reached by the lower court;
 - the results of the new judicial examination (in the exceptional cases in which this was undertaken); and
 - the reasons for not accepting the claims/arguments of the parties
 - The appellate court must give the *reasons for which it decides not to summon those witnesses* whose examination has been expressly requested.
 - Appellate courts must undertake a “thorough review” of the case put before them by addressing issues that go beyond the grounds of appeal, where this is deemed necessary.

- If the facts do not appear to have been correctly or fully ascertained, appellate courts must exercise their authority to order the re-performance of the judicial examination (in whole or in part), or obtain new evidence, even on their own initiative.
- Appeals courts should *adequately justify decisions on sentencing* (the type and measure of punishment) by providing proper and *individualized reasoning and indicating how aggravating and mitigating factors have been evaluated*. In their decisions, appeals courts must consistently instruct lower courts to do the same. In deciding on punishments, appellate courts should:
 - consider the dangerousness of the criminal act, the dangerousness of the person who committed it, the level of guilt, as well as mitigating and aggravating circumstances;
 - give proper consideration to alternative forms of punishment, including non-custodial measures. Punishment by imprisonment should represent the extrema ratio where no other sentences appear adequate in the specific case; and
 - provide full reasoning when deciding on a mitigated punishment, including pointing out specific circumstances that make a more lenient punishment appropriate in a given case.
- To assist judges in improving their legal reasoning skills, additional training on legal/judicial writing and reasoning should be provided by the School of Magistrates, both in the context of its CLE program and the regular school curricula. Given the financial constraints under which the School operates, proper consideration should be given to increased assistance by international donors and the government in this area. The training should be:
 - Tailored to address deficiencies identified in this report, and should not be held in isolation but in conjunction with training and lectures on judicial examination and evaluation of evidence, as well as general principles of justice.
 - Practice-oriented and conducted by using case studies embodying “best and worst practices”; to the extent that it is possible, those should be drawn from real cases.
- The law should be amended so as to make attendance to CLE courses compulsory for all sitting judges.

-
- In evaluating the professional ability and competence of judges of the courts of appeal, inspectors of the High Council of Justice should clearly identify in their reports deficiencies and problems with regard to the quality of work performed by the former in the context of appellate proceedings.¹⁴⁸

¹⁴⁸ Law no. 8436, dated 28 December 1998, "On the organization of the judicial power in the Republic of Albania", article 45; see also Law no. 8811, dated 17 May 2001, "On the High Council of Justice", article 16, section 1 (b).

CHAPTER 2

APPEALS AGAINST DECISIONS ON DETENTION ON REMAND

I. INTRODUCTION

People awaiting trial on criminal charges should not, as a general rule, be held in custody. This is in line with the pre-eminent principle of the presumption of innocence¹⁴⁹ and the right to liberty¹⁵⁰ as spelt out in international conventions to which Albania is a party.

Under international and Albanian domestic law, all decisions regarding pre-trial detention, including those reached on appeal, must be properly grounded, and sufficiently and clearly reasoned. When deciding on appeals against decisions ordering detention on remand, appellate courts have an obligation genuinely, thoroughly and scrupulously to review the existence of concrete facts and grounds that warrant the imposition of pre-trial detention, and to repeal relevant decisions where they are not fully reasoned and based on sufficient legal grounds. It is the duty of appeals courts consistently to instruct lower courts to include in their decisions on pre-trial detention detailed and individualized reasoning that takes into account the existence of the substantive grounds for ordering such a measure as well as the proportionality of detention in the specific case.

This chapter discusses issues related to the need for adequate justification and the existence of sufficient legal grounds for the application of the precautionary measure of detention on remand, with an emphasis on the appeals courts' duty to provide guidance in this context and to reverse first instance decisions where they are deficient in this respect. As observed by the OSCE Presence in Albania, courts frequently fail properly and fully to reason their initial decisions on pre-trial detention/detention on remand. In practice, they fail to state which specific facts justify the recourse to pre-trial detention as opposed to release pending trial and they fail to show that this was a measure of "last resort". In some cases, courts even fail to address the arguments put forward by the defence or to substantiate

¹⁴⁹ ECHR article 6, section 2; ICCPR article 14, section 2.

¹⁵⁰ ECHR article 5, section 1; ICCPR article 9, section 1.

why a “reasonable suspicion” existed.¹⁵¹ Where appeals courts merely confirm and “rubber stamp” decisions on detention on remand that are inadequately or insufficiently reasoned, instead of correcting these decisions, they abdicate their review power. With these practices, appeals court contribute to perpetuating insufficiently reasoned decisions in contradiction of domestic and international law, and in violation of fair trial and due process standards.

This chapter starts with a presentation of the international and domestic legal framework on pre-trial detention, with special emphasis on the need for proper and adequate justification of such decisions, and the type of review power exercised by appellate courts in this context. The chapter then reviews the practice of the Tirana District Court and Court of Appeals in this area, highlighting serious shortcomings in the type of legal reasoning and justification provided in the concrete cases analysed. The analysis is based on an in-depth review of ten decisions on detention on remand issued by the Tirana District Court, the appeals made against them, and the relevant rulings by the Tirana Court of Appeals.¹⁵² Finally, the chapter presents some concluding observations and a practical, comprehensive set of recommendations aimed at addressing the problems identified.

II. INTERNATIONAL AND ALBANIAN LAW ON PRE-TRIAL DETENTION

A. Permissible Grounds for Decisions on Pre-Trial Detention

People awaiting trial on criminal charges should not, as a general rule, be held in custody. Under international fair trial standards, there is a presumption in favour of releasing a defendant pending trial. This is in line with the pre-eminent principle of the presumption of innocence¹⁵³ and with the right to liberty.¹⁵⁴ The International Covenant on Civil and Political Rights (ICCPR) demands that deprivation of liberty be carried out based on such grounds and in accordance with such procedures as

¹⁵¹ For instance, the Shkodra Court of Appeals has noted with concern that, in the context of pre-trial detention, there continue to be instances in which first instance courts fail adequately to substantiate, with facts and evidence, the existence of a “reasonable suspicion” that the person concerned has committed a crime. See Annual Report of the Shkodra Court of Appeals, February 2007, p. 11.

¹⁵² For a discussion on the methodology followed in analysing the cases, see “Methodology”, *supra*, pp. 8,9.

¹⁵³ ECHR article 6, section 2; ICCPR article 14, section 2.

¹⁵⁴ ECHR article 5, section 1; ICCPR article 9, section 1.

established by domestic law (principle of legality).¹⁵⁵ Similarly, under article 5 (1) of the European Convention on Human Rights (ECHR) a person can be deprived of liberty only in exceptional circumstances, in accordance with, and for the exclusive purposes enumerated by, the law. Such exceptional circumstances include the lawful arrest or detention of a person for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.¹⁵⁶ As the European Court of Human Rights (ECtHR) has pointed out, a person charged with an offence must always be released pending trial unless the state can show that there are “relevant and sufficient” reasons to justify his or her continued detention.¹⁵⁷ In addition to the existence of a “reasonable suspicion”,¹⁵⁸ the Court has recognized four reasons as relevant for permitting a person’s pre-trial detention. These are: the risk of flight, the risk of interference with the course of justice, the need to prevent crime, and the need to reserve public order. Limitations on the right to liberty pending trial should thus be seen as exceptional and should be permitted only where a cogent justification for them is provided in a court decision.

Article 27 of the Albanian Constitution reiterates the principle of legality and further states that the deprivation of liberty may only be justified, *inter alia*, when

¹⁵⁵ ICCPR article 9, section 1 reads: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”. It then states:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

See *id.*, article 9, sections 3-5.

¹⁵⁶ ECHR article 5, section 1 (c).

¹⁵⁷ *Wemhoff v. Germany*, ECtHR, 27 June 1968, para. 12. See also *Jablonsky v. Poland*, ECtHR, 21 December 2000, para. 80.

¹⁵⁸ To substantiate the existence of a “reasonable suspicion”, there needs to be evidence of actions directly implicating the person concerned or documentary or forensic evidence to a similar effect. See Monica Macovei, *The right to liberty and security of the person – A guide to the implementation of Article 5 of the European Convention on Human Rights*, Human Rights Handbooks, No. 5 (Strasbourg, Council of Europe, 2002), p. 25.

The mere fact that a person has committed some offence – even similar – in the past will not, therefore, be a sufficient basis for a reasonable suspicion. *Fox, Campbell and Hartley v. the United Kingdom*, ECtHR, 30 August 1990.

there is “reasonable suspicion” that a person has committed a criminal offence.¹⁵⁹ Under the Albanian CPC, requests for detention on remand and the grounds on which these are based are submitted by the prosecutor to the competent court.¹⁶⁰ The existence of a reasonable suspicion must be based on evidence and not on mere suppositions or beliefs held by a judge.¹⁶¹ While the existence of a “reasonable suspicion based on evidence” that a person has committed a criminal offence is always a necessary element of detention, this is not sufficient, *per se*, to justify pre-trial detention, even where a person has been caught *in flagrante delicto*.¹⁶²

Detention on remand, according to the Albanian CPC, may thus be ordered on the basis of the following *cumulative conditions*:

- firstly, that there is a “reasonable suspicion based on evidence”¹⁶³ that a person has committed a criminal offence [the reasonable suspicion criterion];
- secondly, that: either (a) there are important reasons which put into danger obtaining evidence or the truthfulness of that evidence; or (b) that the defendant has absconded or there is fear that he may abscond; or (c) due to the circumstances of the act or the defendant personality, there is the danger that he may commit serious crimes or other similar criminal offences.¹⁶⁴ [the specific criterion]

Further, under Albanian law, an order of remand in custody may only be issued by a court as a *last resort* where no alternative, less restrictive, measures appear

¹⁵⁹ Constitution article 27. This article reads:

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

¹⁶⁰ CPC article 244, section 1.

¹⁶¹ Halim Islami, Artan Hoxha, and Ilir Panda, *Criminal Procedure Commentary* (Tiranë, Botimet Morava, 2003), p. 319 [hereinafter CPC Commentary].

¹⁶² This would be a violation of the presumption of innocence (Article 6 (2) of the ECHR). See Nuala Mole and Chatarina Harby, *Right to a fair trial – A guide to the implementation of Article 6 of the European Convention on Human Rights*, Human Rights Handbooks, No. 3 (Strasbourg, Council of Europe, 2006), p. 26.

¹⁶³ CPC article 228, section 1.

¹⁶⁴ CPC article 228, section 3. Constitution article 27.

to be appropriate in the specific case due to the particular danger posed by the offence and the defendant.¹⁶⁵ These alternative measures have been provided in the Criminal Procedure Code (CPC) to minimise the use of detention on remand and include, for instance, house arrest, a prohibition to leave the country or to reside in a specific place, or an obligation to report to the police.¹⁶⁶ The provision establishing pre-trial as the measure of last resort should be read in conjunction with article 229 of the CPC, which clearly establishes the “proportionality principle” in the determination of the most appropriate security measure. Thus, in issuing remand orders, the court must consider the appropriateness of each of them in relation to the degree of security needs warranted by the specific case. Each measure must be proportionate to the “importance of the act and sentence provided for the actual criminal offence”. In making such determination, the court must take into account continuity, repetition and other aggravating and mitigating factors.¹⁶⁷ These factors need to be proved in each case and reasons should be provided of which security measure appears to be more appropriate under the circumstances.¹⁶⁸ For instance, in determining the inadequacy of house arrest in a specific case (and thus, in turn, the ultimate necessity of detention on remand), the court will need to refer to specific elements, related to the fact, its motives and the personality of the individual, to indicate that, for example, he or she shows a propensity to leave his or her domicile to commit criminal activities.¹⁶⁹

In summary, the judge must adopt a two-step test prior to ordering detention on remand in a specific case. He must:

- (a) verify the existence of a “reasonable suspicion” (supported by evidence) that the accused has indeed committed the offence, and that there is a *concrete and specific* risk of escape, and/or interference with the course of justice, and/or further criminality;
- (b) decide whether detention on remand is indeed (bearing in mind the concrete circumstances of the crime and the personality of its author) the last resort measure, and proportionate in the specific case. This in turn, requires an evaluation of whether other less restrictive measures could be applied in the specific case.

¹⁶⁵ CPC article 230, section 1.

¹⁶⁶ Under the Albanian CPC, coercive remand orders are: prohibition to leave the country, requirement to appear before the judicial police, prohibition or obligation to reside in a certain place, property security (i.e., bail), house arrest, remand in custody and temporary recovery in a psychiatric hospital. See CPC article 232.

¹⁶⁷ CPC article 229. The CPC Commentary also states that security concerns are mainly related to the character of the offender, the degree of danger the he/she poses, the risk of further criminality. CPC Commentary, p. 326.

¹⁶⁸ *Id.*

¹⁶⁹ See, e.g., Italian Court of Cassation, sez. II, 21 October 1997 – 21 November 1997, n. 5699, CED 209281.

All factors and criteria indicated above are cumulative, objectively verifiable reasons that must support the deprivation of liberty and must be pronounced by the court on each occasion.

When, on the basis of the evaluation hearing, the arrest or detention are deemed unlawful, the court must immediately release the person arrested or detained, and the prosecutor may appeal the decision to the court of appeals or directly to the Supreme Court.¹⁷⁰

B. Reasoning and Justification of Decisions on Detention on Remand

International standards and case law require courts to give reasons for their decisions and judgements.¹⁷¹ A reasoned decision demonstrates to the parties that they have been heard and allows public scrutiny of the administration of justice.¹⁷² In the context of pre-trial detention, the court is obliged to pay due regard to the presumption of innocence, and must record the arguments for and against release in a reasoned ruling.¹⁷³ It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals that the court is called upon to decide whether or not there has been a violation of article 5 (3) of the ECHR (i.e., whether detention is unlawful).¹⁷⁴ Further, it is only by means of a reasoned decision that the accused may effectively exercise his or her right to have the lawfulness of his or her detention speedily reviewed by a higher court.

The European Court of Human Rights (ECtHR) has in its case law consistently emphasised the importance of adequate justification and reasoning in the context of decisions on pre-trial detention. The ECtHR has stated on a number of occasions that the reasoning of domestic courts will always be regarded as inadequate if it is “abstract” or “stereotyped”.¹⁷⁵ For instance, in *Yağcı and Sargin v. Turkey* the Court made clear that a ruling based on a stereotyped form of words without any explanation as to why the risk of absconding exists will never be considered acceptable by the Court.¹⁷⁶ In discussing the *risk of flight*, the ECtHR has also

¹⁷⁰ CPC article 259, section 4.

¹⁷¹ See *Hood v. The United Kingdom*, ECtHR, 18 February 1999, para. 60; *Smirnova v. Russia*, ECtHR, 24 October 2003, para 71. Continuation of detention must be subjected to prompt judicial scrutiny which should not only consider whether it was justified in the first place but also whether it is still appropriate.

¹⁷² *Suominen v. Finland*, ECtHR, 1 July 2003, paras. 34 -37

¹⁷³ *Letellier v. France*, ECtHR, 26 June 1991, para. 35; *Yağcı and Sargin v. Turkey*, ECtHR, 23 May 1995 paras 50-52. See also *Labita v. Italy*, ECtHR, 6 April 2000, para. 152.

¹⁷⁴ See *Labita v. Italy*, ECtHR, 6 April 2000, para. 152.

¹⁷⁵ *Clooth v. Belgium*, ECtHR, 12 December 1991, para.44; *Yağcı and Sargin v. Turkey*, ECtHR, 23 May 1995, paras 52.

¹⁷⁶ *Yağcı and Sargin v. Turkey*, ECtHR, 23 May 1995, para.52.

stated that this cannot be gauged only on the basis of the severity of the possible sentence risked, but must be assessed with reference to a number of other relevant factors such as, in particular, the *character of the person involved, his morals, his home, his occupation, his assets, his family ties and all his links with the state in which he is being prosecuted, as well as his international contacts*.¹⁷⁷ Previous instances when the person had fled after being charged with an offence, or specific evidence of a plan to flee, also would be relevant in suggesting a risk of flight.¹⁷⁸ In *Českz v. the Czech Republic*, for instance, the Court found that there was a risk of flight where the applicant had entrusted a large sum of money to an acquaintance, bought a car using another person's identity card, and obtained a false passport.¹⁷⁹ In *Letellier v. France*, by contrast, the court found that there was no risk of flight where the applicant was a mother of minor children and manager of a business representing her sole source of income.¹⁸⁰ The Strasbourg Court has also emphasised that *arguments for and against release must not be "general and abstract"*.¹⁸¹ *Courts have a duty to explain why such risk exists in specific cases*, and, as in other cases, the use of any stereotype wording in this context would be deemed unacceptable.¹⁸² The severity of the potential sentence, though important, is not an independent ground and cannot per se justify the refusal of bail.¹⁸³ Finally, the fact that it is *possible* for the accused to escape does not of itself warrant the conclusion that he or she *would abscond* if released.¹⁸⁴

As for the *risk of interference with the course of justice*, bail (i.e., freedom) may be refused where there is a well-founded risk that the accused, if released, would take action to prejudice the administration of justice (e.g., by warning other suspects, destroying documents, or trying to influence witnesses).¹⁸⁵ The ECtHR has found that, whereas such risk may be genuine at the outset of the detention, it may

¹⁷⁷ *Neumeister v. Austria*, ECtHR, 27 June 1968, para. 10; *Smirnova v. Russia*, ECtHR, 24 July 2003, para. 60. See also *Yağcı and Sargin v. Turkey*, ECtHR, 9 June 1995, para. 52; *Letellier v. France*, ECtHR, 26 June 1991, para. 43.

¹⁷⁸ *Matznetter v. Austria*, ECtHR, 10 November 1969.

¹⁷⁹ *Českz v. the Czech Republic*, ECtHR, 6 June 2000.

¹⁸⁰ See *id.*

In another case, the applicant (who had a pilot's license) had flown abroad several times during a period of provisional release and had always returned. See *Stögmüller v. Austria*, ECtHR, 10 November 1969.

¹⁸¹ See *id.* at para. 63, quoting *Clooth v. Belgium*, ECtHR, 12 December 1991, para. 44.

¹⁸² See *Yağcı and Sargin v. Turkey*, ECtHR, 9 June 1995; see also *Tomasi v. France*, ECtHR, 27 August 1992, para. 98.

In *Letellier v. France*, for instance, the court considered that the risk of flight did not exist for a woman, mother of minor children and the manager of a business representing her sole source of income. See *Letellier v. France*, ECtHR, 27 June 1968, para. 41.

¹⁸³ *Neumeister v. Austria*, ECtHR, 27 June 1968, para.10; *Letellier v. France*, ECtHR, 27 June 1968, para. 43.

¹⁸⁴ *Stögmüller v. Austria*, ECtHR, 10 November 1969.

¹⁸⁵ *Wemhoff v. Germany*, ECtHR, 27 June 1968, para. 14.

gradually diminish or even disappear altogether with time.¹⁸⁶ The possibility of such risk cannot be relied upon *in abstracto* – a generalized risk being insufficient, and there must be supporting evidence.¹⁸⁷

With regard to the *risk of further offences* as a ground for pre-trial detention, the ECtHR has stressed that such risk must be a plausible one, and that the measure be appropriate in view of, among others, the *past history and personality of the individual concerned*. Such would be the case, for instance, when the person concerned had previous convictions for the same offence or others similar to the one under investigation.¹⁸⁸ By comparison, pre-trial detention would likely not be deemed appropriate where the offences concerned were not comparable in either their nature or degree of seriousness to those committed in the past.¹⁸⁹ Yet, a risk of further offences cannot be automatically assumed from the fact that the accused has a criminal record.¹⁹⁰

In a similar manner, the Albanian CPC requires that courts' decisions assigning personal remand orders (i.e., coercive and restraining remand orders) indicate the "special grounds and information that legally justify" their adoption.¹⁹¹ In elaborating on this aspect, the Commentary to the CPC states "it is important that the grounds be real" and ascertained during a detention hearing. As the Commentary goes on to explain, it is not sufficient merely to state that, if the defendant is free, he or she may damage the evidence, flee or commit other crimes. These claims should not be just "unsubstantiated suppositions", but must be based on "convincing information", whose existence must be verified by the judge.¹⁹² In all cases, the existence of these conditions must be argued in the act setting the personal security measure. That is, the basis for believing that the accused has absconded or will likely abscond should be discussed, or facts should be set out showing that he or she may commit other offences of the same or a more serious type.¹⁹³ Orders issued on the ground that the accused may interfere with the evidence should also indicate the duration of the measure.¹⁹⁴

¹⁸⁶ See *Tomasi v. France*, ECtHR, 27 August 1992, paras. 92-95.

¹⁸⁷ *Clooth v. Belgium*, ECtHR, 12 December 1991, para.43.

¹⁸⁸ *Id.*

¹⁸⁹ In *Cloth v. Belgium*, involving a murder and arson case, the applicant had previous convictions for attempted aggravated theft and desertion. See *Clooth v. Belgium*, ECtHR, 12 December 1991.

¹⁹⁰ *Muller v. France*, ECtHR, 17 March 1997, para. 44.

¹⁹¹ CPC article 245, section c.

¹⁹² CPC Commentary, pp. 321-22.

¹⁹³ This, for instance, could be argued for a person who is a habitual burglar. See CPC Commentary, p. 325.

¹⁹⁴ *Id.*

C. Appeals Against Decisions on Detention on Remand

International standards provide for the right of everyone deprived of their liberty to have the lawfulness of their detention speedily reviewed by a court.¹⁹⁵ Under Albanian law, detention orders may be appealed to a higher court. This right may be exercised by the defendant or his defence counsel *within ten days* from the execution, or service of notice, of the decision on detention.¹⁹⁶ The appeal is filed with the secretariat of the court that issued the decision, which must *transmit the file to the court within five days*.¹⁹⁷ The appeal must then be *heard within ten days* from reception of the documents.¹⁹⁸ On appeal, the court examines the case in its entirety, regardless of the grounds of appeal or those stated in the reasoning part of the decision appealed.¹⁹⁹ This means that the court examining the appeal must decide whether or not all the grounds and criteria for applying the security measure exist, regardless of whether these have been raised on appeal. In doing so, the court must rely on previously existing or new evidence.²⁰⁰ On appeal by the defendant, the court may overrule, modify, or uphold the decision ordering detention on remand even on different grounds from those indicated in the reasoning part of the decision.²⁰¹ When the decision is not taken within the legal time limit, the decision ordering detention on remand is void.²⁰² Similarly to initial orders on detention (and orders extending detention), decisions on appeal must be properly justified and reasoned. The CPC Commentary further emphasises the special responsibility of appeals courts to verify that detention on remand is only used as a measure of last resort where all other, less restrictive measures, appear to be inappropriate in the specific case.²⁰³

III. JUSTIFICATION OF DETENTION ORDERS: FINDINGS

A decision on pre-trial detention must contain a summary description of the facts and the accusation, including reference to the criminal offence of which the

¹⁹⁵ ECHR article 5, section 4.

¹⁹⁶ Where the court decision has rejected a request of detention on remand, an appeal can also be made by the prosecutor. See CPC article 249, section 1.

¹⁹⁷ CPC article 249, section 3.

¹⁹⁸ CPC article 249, section 5.

¹⁹⁹ CPC article 249, section 6.

²⁰⁰ CPC Commentary, p. 339.

²⁰¹ CPC article 249, section 6.

²⁰² CPC article 249, section 7.

²⁰³ CPC Commentary, p. 328. When an order is issued on the grounds that the acquisition or accuracy of evidence would be endangered, the prosecutor should establish these grounds, while the judge should verify them and provide arguments for the application of the security measure. *Id.*, p. 338.

arrested person is accused in order to meet the “reasonable suspicion” criterion, and a presentation of the specific grounds and concrete information that legally justify an order of detention on remand. In addition, decisions must expressly indicate that pre-trial detention is indeed proportionate to the precautionary needs in the specific case, and is being applied as a measure of last resort. Bearing in mind the underlying principles of presumption of innocence and of the right to liberty of an individual pending trial, the burden is on the court to establish that all the above criteria are present in the specific case.

In the majority of the ten cases reviewed, the OSCE Presence in Albania has observed that, contrary to procedural requirements and to international law, there is a lack of proper substantiation and justification in decisions initially ordering pre-trial detention. As a general pattern, the order simply states that, based on the documentation submitted by the police, there is a “reasonable suspicion based on evidence” that the suspect has committed the criminal act.²⁰⁴ Instead of providing specific information of the grounds and the particular circumstances that warranted and justified the suspect’s pre-trial deprivation of liberty, the court often merely paraphrased the procedural provisions and/or used standard phrases. For instance, by reiterating the letter of the law, the decision might state that, in the specific case, “there is a risk that the accused might escape”, or that, due to “his dangerous personality and the danger posed by the criminal offence”, he might commit other crimes. Even worse, in most cases, decisions might generally refer to the existence of the criteria spelt out in articles 228, 229 and 230 of the CPC without any reference to the specific facts and circumstances of the case. This lack of specificity violates international and domestic procedural law and hinders the possibility effectively to appeal such decisions because it makes it difficult, if not impossible, for defence lawyers to object to specific legal grounds.

While, similarly to initial orders on detention (and orders extending detention), decisions on appeal must be properly justified and reasoned, the OSCE has observed that this is rarely the case. In most of the cases analysed, the Tirana Court of Appeals has failed to verify the continued existence of the grounds for pre-trial detention, or specifically to indicate additional or new reasons to justify the adoption of such measure. The court mostly seems to only undertake a simplistic and superficial review of the content of orders of detention, failing to exercise the watchdog function that is the embodiment of its role. In practice, while many decisions on detention on remand are inadequately reasoned (they

²⁰⁴ In practice, the detention hearing is mostly seen as a mere formality. Of those interviewed by the OSCE in the context of a pre-trial detention survey, only 8 percent reported that the reasons for the decision to detain on remand were mentioned by the judge when the decision was rendered. Forty-five per cent of those interviewed stated that they were informed that the decision could be appealed. See OSCE Presence in Albania, *Analysis of the Criminal Justice System of Albania* (Tiranë, OSCE, 2006), p. 34 [hereinafter *Analysis of the Criminal Justice System of Albania*].

merely refer to the enumerated grounds for pre-trial detention without indicating specific circumstances to support them), the Tirana Court of Appeals has almost invariably confirmed them, failing to acknowledge this procedural violation. Instead of functioning as an effective mechanism of review of the legality of pre-trial detention, the court frequently merely “rubber stamps” the appealed decision, by reiterating the existence of the substantive grounds for detention on a similarly inadequate and flimsy basis. Finally, it should be noted that, while defence counsel often fails to present well-argued, convincing appeals against pre-trial detention, this is no excuse for the shortcomings in the practice of the court as outlined above. Indeed, as mentioned above, article 249, section 6, of the CPC empowers courts of appeal to review decisions on pre-trial detention in their entirety, and regardless of the grounds for appeal.

Below are selected examples of the relevant practice as observed through an analysis of ten decisions on detention on remand issued by the Tirana District Court, as well as on the respective appeals against them and relevant decisions by the Tirana Court of Appeals.²⁰⁵ The decisions analysed have been randomly selected. The text has been divided into sections discussing each of the problems observed: (a) the use of stereotyped wording in detention on remand orders; (b) the failure properly to assess the proportionality criterion; (c) the failure of the courts to address the arguments of the defence.

A. Use of Stereotyped Wording in Detention on Remand Orders

As exemplified below, first instance and appellate courts frequently use a stereotyped, standardized wording or merely paraphrase the relevant procedural provisions when referring to the legal grounds for pre-trial detention.

On 24 March 2006, the Tirana District Court extended the detention of **Gjok Biba**, who had been arrested *in flagrante delicto* and accused of vehicle theft and illegal possession of hunting rifles.²⁰⁶ After a concise exposition of the facts as indicated in the police report, the first instance court validated the arrest and ordered detention on remand. The court’s reasoning is reduced to two lines reading “based on what is indicated above [the police report], the court evaluates that the request made by the prosecutor should be accepted, *as the grounds and criteria provided for by articles 228 and following of the CPC exist*”. No specifics were given as to those grounds. On appeal, counsel for the defendant asked for the

²⁰⁵ For an explanation on the methodology used to analyse the decisions on pre-trial detention, see section on “Methodology”, pp. 8,9.

²⁰⁶ CC articles 134 and 280.

detention on remand to be replaced with the security measure “obligation to appear before the judicial police”.²⁰⁷ Defence counsel argued that, as the accused had no prior criminal record, had a family and children, there were no indications that he might have tried to escape justice or that he was dangerous, such as to warrant his detention prior to trial.

On 10 April 2006, the Tirana Court of Appeals upheld the first instance decision by using a similarly succinct, standardized wording. After stating that, on the basis of the facts as recounted in the police report, “a reasonable suspicion” existed that the accused had committed the crimes, the appeals court found that the security measure had been fairly imposed by the lower court as the latter had “fairly applied the criteria provided for by articles 228, 229, 230”, and that the measure was appropriate in view of the “*dangerousness of the offence and of its author*”. It is obvious that, in the present case, both courts completely failed to discuss the existence of the specific grounds for pre-trial detention, as well as the proportionality and appropriateness of the measure in the specific case. The use of such standardized wording is unacceptable under both domestic and international law.

On 27 August 2006, the Tirana District Court extended the detention of **Ferik Tafa**, who was suspected of manufacturing and selling drugs in collusion with others,²⁰⁸ and had been arrested reportedly while committing this act on 24 August 2006. While the first instance decision discussed in details the existence of a reasonable suspicion (mainly based on the drug seized at the moment of the arrest and in the course of the ensuing house search, as well as on the environmental interceptions between the accused person and his accomplice),²⁰⁹ it did not substantiate the existence of grounds (i.e., specific criteria) for pre-trial detention – it only referred to articles 228 and 229 of the CPC. The Tirana Court of Appeals appears to have confirmed the first instance decision on pre-trial detention by relying on the same sketchy, inadequate arguments. More specifically, the appellate ruling stated that the first instance court had appropriately considered the existence of the general conditions and criteria of articles 228, 229 and 230 of the CPC, that the social danger posed by the perpetrator and the criminal offence were in line with the above provisions, and that the measure appeared to be proportionate to

²⁰⁷ CPC article 234.

²⁰⁸ CC article 238, section 2.

²⁰⁹ It is worth noting that the authorization for the environmental interception was listed in the documents supporting the request for pre-trial detention. However, it is not clear from the record whether the interceptions were made while the accused was at the police station or at another location.

the security needs in the specific case and provided for by article 229, section 1. The existence of individualized, substantive risks was nowhere pointed out by the appellate court in its ruling.

On 8 February 2006, the Tirana District Court ordered detention on remand of **Elvis Ismailsufaj**, accused of having stolen a car in cooperation with others. According to the police report, the suspect, in cooperation with other individuals, had stolen a car on 2 February 2006, and was arrested two days later while trying to sell it. While the police arrest was deemed to be illegal, the court ordered detention on remand of the suspect while clearly failing to indicate specific facts to support the order – it only referred to the social dangerousness of the criminal offence, the personality of the defendant, and the existence of the “general and specific criteria” of articles 228 and 229 as elements in support of the measure. On appeal by the defendant (who asked that the decision be changed to impose simply a reporting obligation), the Tirana Court of Appeals upheld the first instance ruling. It should be noticed that, while in its discussion of the “reasonable suspicion criteria”, the decision on appeal provides a long list of the evidentiary elements supposedly in support of its existence, the decision fails to indicate how these were relevant. For instance, the decision referred, *inter alia*, to the minutes of the inspection of the garage where the stolen car was supposedly kept, as well as to statements of a number of individuals (including the presumed accomplices) without providing any hint about how these elements would substantiate an evidentiary cadre in support of the existence of a “reasonable suspicion”. In discussing the other grounds for ordering pre-trial detention, the Court then stated that, due to the suspect’s repeated involvement in stealing cars and his personality, there was a risk that he may commit the same criminal offence *as well as* “leave and hide” from the investigation. While, assuming the recidivism, the risk of further criminality might have seemed justified in the specific case, a generalized, unsubstantiated belief that the defendant might escape justice does not, *per se*, suffice to justify pre-trial detention.

On 20 August 2006, the Tirana District Court extended the detention of **Nasser Almalak**, a suspect charged with sexual and homosexual intercourse in public places (article 107/25 of the CC) and prostitution in collusion with others (article 113/25 CC). The prosecutor requested the court to confirm the arrest *in flagrante delicto* of the suspect and to impose the precautionary measure of detention on remand. The court validated the arrest and ordered detention on remand. The decision reads “from the [police] report it is evident that homosexual intercourse took place against payment in public spaces”. While the accused was arrested

together with four other individuals (all accused of the same crime), the decision does not discuss in any way how the accusation relates to each one of them. The decision does not explain how it may be possible for the police to catch five persons at the same time all engaged in accepting payment, or negotiating for payment, for homosexual intercourse – and to do so without having received the kind of report from a third party that would have necessitated the issuing of an arrest warrant. While it is not necessary for the court to prove at the hearing on security measures that the offence actually occurred, it must show that the evidence produced shows that *each* individual defendant is sufficiently likely to have committed the act.

After discussing what the court considered the reasonable basis for the arrest, the decision merely stated “*based on the social dangerousness of the criminal offences, the court evaluates that the request made by the prosecution is grounded on law and has to be accepted*”. The District Court otherwise failed to substantiate the order of detention on remand, i.e., to indicate the evidence that supported the existence of “a reasonable suspicion”, and to refer and specifically support with information the existence of a risk of flight, risk of interference with the course of justice, or risk of repetition of the same or other crime. As the dangerousness of the criminal offence is not sufficient, *per se*, to justify pre-trial detention, the decision appears to have been issued in violation of Albanian and international law.

On 7 September 2006, an appeal against the decision by the suspect was dismissed by the Tirana Court of Appeals, which upheld the first instance decision on pre-trial detention following a very brief hearing. The appellant denied having committed the acts of which he was accused and claimed that, at the moment of arrest, he had been engaged in the distribution of condoms on behalf of the NGO he represented. Similarly to the first instance decision, that of the Tirana Court of Appeals was not reasoned and failed to address or respond to the appellant’s request, namely to replace the measure of detention on remand with the less drastic measure of house arrest. While the decision seems at least to have tried, to a degree, to explore and justify the existence of the “reasonable suspicion” criterion,²¹⁰ it failed to substantiate in an intelligible way, and

²¹⁰ In addition to the fact that the individuals involved (including the appellant) were, allegedly, arrested *in flagrante delicto* by the police (i.e., in the commission of the act of prostitution and sexual and homosexual intercourse in public place), the decision with regard to Mr. Almalak argued that the “reasonable suspicion” criterion also was supported by the statement of an individual who claimed he was having intercourse against payment with the accused at the moment they were caught by the police.

specifically to spell out, the existence in the concrete case of the other additional, necessary grounds for pre-trial detention (i.e. the risk of flight, the risk of interference with the evidence, or the risk of relapse into the crime). *Strikingly, those grounds were not even mentioned by the decision, which only claimed the existence of the “conditions provided for by article 228”*. The decision also failed to indicate why the application of other less restrictive security measures was deemed inappropriate at that stage of the proceedings. More specifically, the appellate court paraphrased some of the wording used by the Criminal Procedure Code, where it reasoned “*when imposing detention on remand against Nasser Almalak, in addition to the conditions provided for article 228, there exist also the criteria for issuing the remand order specified by article 229 of the CPC*”. The measure detention on remand with regard to the petitioner, with regard to the criminal offences of homosexual intercourse in public places and prostitution, *coincides with the degree of security needed and is in proportion with the importance of the fact and sentence provided for these two criminal offences*. These criteria coincide with the requirements of article 229 of the CPC”.²¹¹ It should be noted that the latter refers to the “proportionality criterion” in determinations regarding personal remand orders. While the same provisions refers to the continuity, repetition and other aggravating or mitigating factors as criteria on which to base decisions on the applicable measures, the court neglected even to consider any such factor.

As mentioned above, the ECtHR has made clear that court reasoning will always be regarded as inadequate if it is “abstract” or “stereotyped”.²¹² The OSCE Presence in Albania believes that, by failing to provide specific information justifying pre-trial detention, and by using the stereotyped wording shown above, the decision does not comply with the requirements of domestic and international law. The same observation can be made in the case outlined below.

On 4 January 2007, the Tirana Court of Appeals upheld the pre-trial detention of **Arben Çela**, who was accused of falsification of documents after he was arrested in *flagrante delicto* on 13 December 2006.²¹³ Whereas the Tirana District Court had discussed in its initial decision the existence of the proportionality criterion, it failed to discuss the existence of the other grounds for pre-trial detention. Far from remedying this obvious

²¹¹ Indeed, article 229 of the CPC states, *inter alia*, “[t]he court issuing remand orders shall take into account the appropriateness of each of them with the *degree of security needed to be taken in the actual case*. Each remand order must be in proportion with the importance of the act and sentence provided for the actual criminal offence”. CPC article 229, sections 1 & 2.

²¹² *Clooth v. Belgium*, ECtHR, 12 December 1991, para.44; *Yağcı and Sargin v. Turkey*, ECtHR, 23 May 1995, para. 52.

²¹³ CC articles 186, 187, 188, 190, 191 and 192.

shortcoming, the Court of Appeals made only a general reference to the existence of requirements under articles 228 and 229 of the CPC. It then pointed out that the accused person presented a high social danger, as he was suspected of “having committed six criminal offences” (presumably the offences related to the falsification of documents).

B. Proportionality of Detention on Remand

The OSCE Presence in Albania has also observed that, in addition to insufficiently substantiating, if providing any substantiation at all, the legal grounds for pre-trial detention, initial decisions on detention consistently fail properly to assess the proportionality of pre-trial detention in specific cases and, in turn, to consider the adoption of less restrictive measures. In practice, they fail to indicate the reasons for which alternative, less restrictive measures are deemed insufficient at that stage of the proceeding. Appeals courts, in turn, fail to remedy this obvious shortcoming.

On 27 January 2006, the Tirana District Court extended detention in the case of a minor accused of repeated theft (of a computer and a fax) in collusion with others.²¹⁴ After listing the evidence in the police file, the first instance court argued for the existence of a grounded suspicion. By using the most standardized wording, the court then stated that, given the existence of the circumstances indicated in article 228, section 3 (a) and (b) [risk of interference with evidence and risk of flight], 229, section 2 [proportionality], and 230 [necessity of remand in custody], the personal remand order in article 238 of the CPC [custody on remand] should be applied. The decision failed to provide any kind of individualized information justifying the arrest.

On 1 February 2006, counsel for the defendant appealed the decision arguing that the first instance court had failed to indicate the legal grounds for pre-trial detention. Counsel also argued:

- (a) that the low value of what stolen (an old computer) by the accused, who was in dire economic conditions, did not justify the recourse to such a harsh measure

²¹⁴ CC article 134, section 2. The minor was arrested on the basis of article 253 of the CPC, which provides for the arrest of a persons suspected of having committed a crime punishable with at least two years of imprisonment when there is a risk of flight. According to the prosecution, the accused and his accomplice had stolen, on 22 September 2005, a fax machine, reselling it the next day, and a month later a computer and hard disk, which were later thrown away when found broken.

- (b) that the accused did not have prior criminal convictions;
- (c) that the defendant had not absconded or tried to abscond since the commission of the alleged crime (the theft allegedly happened on 24 October 2005, while he was arrested on 24 January 2006); and
- (d) that the court had not justified the existence of a risk that he might interfere with the evidence.

On 15 February 2006, the Tirana Court of Appeals upheld the lower court decision insofar as the latter had ordered detention on remand due to the existence of a risk of flight, while it rejected the argument based on a risk of interference with the evidence in the specific case. While the appellate court stressed that the lower court had failed adequately to justify its decision on pre-trial detention,²¹⁵ the appellate court likewise failed to do the same. The Court of Appeals only argued in, fact, that due to the recidivism and the personality of the accused, there was a risk that the latter might repeat the same crime and a danger that he may abscond. No further reasons were given to explain the risk of escape, and no balancing of factors for and against such a risk appears to have been made.

Further, in discussing the element of proportionality, the Court of Appeals argued, among others, that: (a) without considering that such a term should be reduced by half in the case of a minor, detention on remand was proportionate to the sentence faced for the crime (six months to five years); (b) the criminal offence was widespread in Tirana. This fact that should not count towards determination of detention on remand, as the commonness of the crime is not among those aggravating circumstances that the court may take into consideration in deciding on the proportionality of the security measure in a specific case.²¹⁶ Furthermore, it should be noted that many petty crimes, for which detention on remand would appear disproportionate, are also common.

²¹⁵ The appellate court found that the lower court had failed to indicate the special grounds and information justifying application of detention on remand in violation of CPC article 245, section 1 (c).

²¹⁶ CPC article 229, section 2, provides that, in determining the proportionality of a personal remand order, the court may take into account, *inter alia*, the mitigating and aggravating circumstances provided for by the Criminal Code. CC article 50, which provides an exhaustive list of aggravating circumstance, does not include the commonness of the crime, or the fact of it being widespread. However, the commentary to the Criminal Code seems to indicate that the court might consider additional, non specified aggravating circumstances. See Ismet Elezi, Skënder Kaçupi, and Maksim Haxhia, *Komentari i Kodit penal të Republikës së Shqipërisë (Pjesa e përgjithshme)* [Commentary of the Criminal Code of the Republic of Albania (General Part)] (Tiranë, GEER, 2006), p. 246 (last paragraph).

More strikingly, the appellate court rejected as unfounded, on the basis of the above, the defence lawyer's argument that the education of the accused, a minor attending the second year of secondary school, should not be interrupted, and that the application of a less severe measure would therefore have seemed more appropriate.²¹⁷ This interpretation is in direct violation of the procedural law, which sets special conditions for the determination of precautionary measures against minors. Article 229 of the CPC, in fact, states that, when the defendant is a minor, in determining which measure to apply, the court must take into consideration the minor's need for uninterrupted education.²¹⁸

In short, despite the lower court decision ordering pre-trial detention not being fully substantiated (with regard to the risk that the accused might escape), the appellate court did not reverse the decision. If the appellate court had reassessed and properly justified the existence of the legal ground for security measures, it seems that it could have applied a less restrictive measures available to it (e.g., obligation to report to the police), in accordance with article 249, section 6.²¹⁹

C. Failure to Consider Defence's Arguments

Frequently, appellate courts fail to consider or even mention the arguments presented by the appellant. While these arguments may or may not be valid and sufficiently grounded, the courts' failure to address them is in violation of international and Albanian law.

On 24 March 2006, the Tirana DC extended detention of **Gjok Biba**, who had been arrested *in flagrante delicto* and had been accused of vehicle theft and illegal possession of hunting guns. On appeal, counsel for the defendant asked for detention on remand to be replaced with the security measure "obligation to appear before the judicial police". Defence counsel argued that, as the accused person had no prior criminal record and had a family, there were no indications that he might try to escape justice or that he was so dangerous as to warrant his detention prior to trial.

²¹⁷ The court also rejected the defence lawyer's argument that a suspect's education (i.e., second year of high school) should not be interrupted by stating that the special dangerousness of the offence and its author did not allow for a milder security measure than the one of custody on remand.

²¹⁸ CPC article 229, section 3. The Commentary further emphasises that, where minors are involved, the criteria and conditions for setting security measures should be evaluated, while closely taking the age of the accused person into consideration, so that he is not hampered in attending school or professional training. CPC Commentary, p. 327.

²¹⁹ CPC article 249, section 6.

Defence counsel also argued that the accused person had been engaged in the process of buying the vehicle by another individual and was not aware that the vehicle had been stolen,²²⁰ and that the gun he possessed was a shotgun, and not a hunting gun, as allegedly proved by a certificate of entrance issued by the Gjirokastra Customs office. On 10 April 2006, the Tirana Court of Appeals upheld the first instance decision without explaining why the milder security measure (i.e., obligation to report to the police) requested by the appellant was deemed to be inappropriate. The appeals court did not address any of the arguments submitted by the appellant and telegraphically dismissed them by stating that they could not be considered as they would “serve at another phase of the trial”.

It is unclear why the appellate court reviewing the appeal on detention did not examine the arguments of the defence against the existence of reasonable suspicion and of the risk of flight. The ECtHR has found that, while article 5 (4) of the ECHR does not impose an obligation on a judge examining an appeal against detention to address every argument contained in the appellant’s submissions, its guarantees would be deprived of their substance if the judge could treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting into doubt the existence of the conditions essential for the lawfulness of the deprivation of liberty.²²¹

On 12 March 2006, the Tirana District Court ordered detention on remand of **Bilbil Tota**, who was accused of stealing, in co-operation with another unidentified individual, an espresso machine from a bar.²²² According to the investigation, on 2 December 2003, the bar owner had seen two individuals leaving with the coffee machine. Upon pursuing them, he had retrieved the coffee machine that had been abandoned some 70 meters away from the crime scene. Fingerprints found on the coffee machine almost three years after the fact²²³ had led to the arrest of the accused person on 10 March 2006. Upon confirming the validity of the arrest, the Tirana District Court ordered detention on remand. Without providing any indication whatsoever of the specific and individual circumstances supporting the legal grounds for the application of detention on remand (i.e., the existence of the “reasonable suspicion” criteria accompanied by the risk of flight and/ the risk of interference with the course of justice and/ the risk of relapse

²²⁰ As proven by the fact that he kept it in plain view in front of his house, and that he had neither changed the colour nor the chassis of the vehicle.

²²¹ *Ilijkov v. Bulgaria*, ECtHR, 26 July 2001, para. 94.

²²² Theft, when committed in collusion with others, is punishable by five to fifteen years of imprisonment. See CC article 134, section 2.

²²³ Dactyloscopic expertise act no. 1065, 3 March 2006.

in criminal activity), the single judge ordered detention on remand of the suspect by stating that “in the concrete case, *the social dangerousness of the offence and the perpetrator fulfil the general and special grounds and criteria to set a personal precautionary measure of a coercive character, as provided for by articles 228, 229 and 230 of the CPC*”. Besides failing to justify the existence of the specific criteria, the court failed to justify why other less restrictive measures were deemed inappropriate and why the offence and the accused presented “a particular danger”.

Finally, the court seems erroneously to have qualified the fact as theft instead of attempted theft (the crime not having been completed as the machine was in the end not stolen but abandoned in the street).

On 21 March 2006, the defendant appealed against the decision on pre-trial detention. The appeal argued that detention on remand had been ordered in disregard of the criteria and grounds of pre-trial detention,²²⁴ and requested that the order be changed into the measure “obligation to appear before the judicial police”, as provided under article 234 of the CPC.²²⁵ More specifically, the appeal argued:

- (a) that the offence should have been qualified as “attempted theft”, not theft, the former having a lower social dangerousness (the facts indeed indicated that the suspects had not completed the crime as they were drunk and could not carry away the machine, which they had abandoned in the middle of the street upon being pursued by the bar owner);
- (b) that, in the determination of the precautionary measure, the court also should have considered the measure of punishment applicable to the concrete case, thus opening the space for the application of alternative, less restrictive measures;
- (c) that a variety of factors deposed in favour of the application of less restrictive precautionary measures, such as: the long time that had elapsed between the commission of the crime and the order of detention on remand; the questionable educational character of this measure; that the defendant -- who was under

²²⁴ I.e., the grounds provided by CPC articles 228 -230.

²²⁵ CPC article 232 provides for a variety of coercive remand orders: prohibition to leave the country, obligation to appear before the judicial police, prohibition and obligation to reside in a certain location, bail, house arrest, remand in custody; temporary hospitalization in a psychiatric hospital. Under article 234 of the CPC, the court may order the accused person to appear on specific days and times before the judicial police. See CPC article 234.

age at the time of the crime -- was entitled to benefits under the law and did not fully appreciate the consequences of his actions; the good character of the accused person (proved by him having repented and having no prior conviction and excellent work references).

On 10 April 2006, the Tirana Court of Appeal upheld the first instance decision ordering detention on remand. By using virtually the same standardized wording that had been used by the first instance judge, the appeals court merely declared that "reasonable suspicion" existed that the defendant had committed the criminal offence, and that the *first instance court had "fairly evaluated the grounds and criteria for defining the personal precautionary measure provided by articles 228, 229 and 230 of the CPC"*. It also stated that the measure was proportionate to the dangerousness posed by the offence and its author. It finally discarded the grounds of appeal by categorically stating "*the claims of the defendant mentioned in the appeal do not belong to this stage of the trial, but to the trial phase, and as such must not be accepted*". It should be noted that the court made no effort to argue against the notion that this was simply attempted theft. No further explanations were provided.

It appears that, in this case, the appeals court failed to acknowledge and correct the virtually complete lack of justification of the first instance decision on detention on remand. In so doing, the appeals court failed to address any of the arguments raised on appeal by the defendant – some of which were relatively well articulated and may have been valid. More specifically, by inappropriately using a standardized, stereotyped wording, the court failed to indicate any evidence supporting "a reasonable suspicion" and to substantiate any of the other grounds for pre-trial detention. Surprisingly, the court failed to question the value of fingerprints found on the coffee machine almost *three years later* as the only evidence on which the reasonable suspicion was grounded. It also failed to evaluate the "proportionality argument" by neglecting to consider the argument relevant to the qualification of the crime as attempted theft, and the mitigating circumstances indicated in the appeal. It is worth noting that, while some of the defendant's arguments on appeal were formulated in general terms, they had substantive underpinnings in the law. For instance, article 229 of the CPC states that, in deciding on the precautionary measure where the defendant is a minor, the court should consider the necessity of an uninterrupted educational process. Article 51 of the CC also states that the imprisonment term for minors may not exceed half of the term normally provided for by law, a fact that should be taken into consideration in considering the seriousness of the offence as one of the factors on which to fashion the precautionary measure in the specific case.

Strikingly, the appeals court failed even to indicate why the alternative, less restrictive measure “obligation to appear before the judicial police” would not be appropriate in the concrete case. As already mentioned earlier in this chapter,²²⁶ because it lacked justification and failed to address the appellant’s arguments, the appellate court decision was in violation of international and domestic legal provisions on pre-trial detention.

The OSCE Presence in Albania has noted that, on the rare occasions in which the Tirana Court of Appeals has found the detention on remand ordered by the first instance court to be disproportionate in light of the concrete circumstances, it has in turn failed properly to evaluate the existence of this and other criteria for pre-trial detention, and to set appropriate guidance in this respect.

On 22 January 2006, the Tirana District Court validated the arrest on the spot and ordered pre-trial detention of **Fatmir Lala**, who was accused of stealing road signs more than once.²²⁷ According to the preliminary investigation, while trying to steal a road sign in front of the Tirana NATO building, the suspect had been filmed by video cameras and was immediately apprehended by the complainant [presumably a NATO officer]. In the course of the ensuing search of the defendant’s house, police found and seized a two road signs. Upon validating the arrest, the first instance court found that, due to the “social threat posed by the offence” [*sic*], the age of the accused, the circumstances of the fact, the fact that the offence was committed more than once,²²⁸ and the amount of punishment “*there exist the conditions and the criteria provided in article 228, 229, 230 and 238 of the CPC for ordering remand in custody*”. No further indication was given of which specific circumstances warranted the application of such a restrictive security measure.

Following appeal by the accused (who asked to replace detention on remand with the “obligation to appear before the judicial police”), on 13 February 2006, the Tirana Court of Appeals reversed and modified the first instance decision in the part ordering detention on remand,

²²⁶ See above, section III “Justification of Detention Orders: Findings”, p. 60 et seq.

²²⁷ CC article 134, section 2.

²²⁸ It seems that the District Court erroneously qualified the fact as theft committed more than once. While the decision stated that, according to the preliminary investigation findings, the accused appeared to have stolen road signs on two occasions –on 11 June and 20 January 2006 – it is evident that, in the latter case, the fact should have been qualified as “attempted theft”, as the accused had been promptly stopped by the NATO officer while trying to remove the street sign. As for the claim that the accused had previously stolen a road sign in the same location (on 11 June 2006), the District Court does not indicate any evidence to support such an allegation – it merely refers to findings of the preliminary investigation.

and replaced this with the security measure of “house arrest”.²²⁹ In its decision, the appellate court rightly censured the first instance court for not having considered the proportionality criteria as spelt out in articles 229 and 230 of the CPC when ordering pre-trial detention. In doing so, it rejected notions that the type of offence might present “special social danger”, and stressed the absence of criminal record of its author as well as pointers that he might evade justice. While the above observations appear to be correct, the OSCE Presence would also note that, on the basis of the same, the new security measure of “house arrest” appeared to be disproportionate in the absence of further justification. The appellate court did not indicate why the security measure requested by the appellant (i.e. “obligation to appear before the police”) was not deemed appropriate. Finally, the appellate court could have presented more thorough arguments against imposition of detention on remand so as to provide future guidance to lower courts on this matter.

IV. CONCLUSION

As the deprivation of liberty pending trial should be only used as a last resort measure, every decision ordering detention on remand must be fully and clearly reasoned by indicating the specific evidence, the facts and the circumstances that substantiate the legal grounds for its adoption.

As can be seen from the examples outlined above, both the Tirana District Court and the Tirana Court of Appeals fail to reason their decision on detention on remand. The Appeals Court frequently “rubber-stamp” first instance court’s decisions ordering detention on remand and fail to intervene to correct them where they are insufficiently grounded and reasoned. By not properly reasoning their rulings, and by failing to address the deficient reasoning in the decisions under their review, appeals courts operate in disrespect of fair trial and due process standards, even when a decision on pre-trial detention would appear to be proper in the specific circumstances. By failing to delineate the contours of permissible limitations to liberty of the individual who is awaiting trial, the appeals courts also fail to provide guidance to the lower courts in this critically important context. The practice discussed above puts the accused person in an unjustifiable position, where the burden of proof is shifted and basic principles of justice, such as that of the presumption of innocence and of liberty pending trial, are neglected. This is especially troubling in light

²²⁹ CPC article 237.

of the Albanian reality concerning pre-trial detention, where the recourse to this drastic measure seems to be quite common, far from representing an exception.²³⁰

Against this background, concrete and pragmatic measures need to be taken to address the problems highlighted above. Appellate courts must more vigorously and effectively carry out their review functions in this important context, and provide real guidance to the lower courts by recalling their duty to comply with the law. The legal requirements of decisions on pre-trial detention must be reaffirmed by the higher official authorities. Training oriented toward practice on the underlying principles and legal framework on pre-trial detention must be delivered to first instance and appellate judges alike.

In November 2006, a joint OSCE Presence in Albania-Council of Europe initiative provided training to judges, criminal defence lawyers, prosecutors, and police, on the international and domestic legal framework on arrest and pre-trial detention.²³¹ The training seminars were delivered to fifty-eight participants in Tirana and Vlora. While the training can be regarded as having been highly successful in terms of the degree of participation and interest shown by those attending it, training discussions have also demonstrated the need for better understanding among some participants of both basic principles of justice underlying pre-trial detention proceedings, and of the specific legal requirements for the adoption of such measures in concrete cases (i.e., the existence of a “reasonable suspicion”, plus one or more of the three grounds justifying pre-trial detention, plus the proportionality of the measure in a given case). Furthermore, while a valuable initiative, the training was limited in its reach – indeed, out of twenty five judges participating to the training, none were from the courts of appeals.

²³⁰ In 2005, 16,987 criminal proceedings were pending, involving 9,439 defendants, of whom 2,984 (roughly one third) were detained on remand. See “Information from the general prosecutor of the republic on the state of criminality in Albania for 2005” (8 May 2006). Available at <http://www.pp.gov.al/eng/shtypi/inform.in%20englisht.html> (last accessed on 19 November 2007).

²³¹ Each training session lasted two days.

V. RECOMMENDATIONS

- All courts should provide adequate and appropriate reasoning when issuing decisions on detention on remand, be they the initial rulings, extensions or decisions on appeal.
- Appeals courts have a duty properly and effectively to exercise their review powers, including in the context of appeals made against remand orders. They have an obligation genuinely and thoroughly to review the existence of concrete facts and grounds that warrant the imposition of pre-trial detention, in line with Albanian law and international fair trial standards, and to repeal orders where a fully reasoned decision is missing.
- Appeals courts must examine decisions on pre-trial detention in their entirety, regardless of the grounds of appeal or those stated in the decision reviewed.
- In their decisions, appeals courts should consistently instruct lower courts that decisions on pre-trial detention should include a detailed and individualized reasoning that takes into account the existence of substantive grounds for ordering detention on remand in the specific case.
- Appellate courts should not abdicate their review function, and should consistently issue well-reasoned decisions instructing lower courts properly to justify rulings related to detention on remand in accordance with Albanian and international law.

More specifically, appellate courts should require lower courts to:

- Cite relevant material evidence and the specific circumstances of the case that led to the conclusion that detention on remand is warranted.
- Examine the continued existence of reasonable suspicion against the defendant whenever detention is ordered, in combination with one of the three legal grounds (i.e. risk of flight, risk of interference with the evidence, risk of further criminality).
- Substantiate the determination that alternative measures to detention are not appropriate in the case at issue, namely that pre-trial custody is, indeed, the last resort in the given circumstances.

- Indicate that defence arguments on appeal have been appropriately considered, by specifically and expressly addressing them.
- Rely more on the alternative coercive precautionary measures such as those indicated in articles 233-237 and 239 of the CPC where appropriate.
- The High Council of Justice should consider issuing a circular notice reminding the courts that all decisions on detention must be made on the basis of a fully reasoned written decision detailing the grounds for detention and any evidence relied upon in support of those grounds. The circular should expressly mention that the absence of a justification in a decision on detention on remand, the mere paraphrasing of the law, or the use of a standardized wording, constitute a violation of criminal procedure and, consequently, a ground for appeal. The circular should expressly mention the duty of the appellate courts scrupulously to consider the existence and substantiation of such grounds (beyond arguments raised on appeal), and to modify or repeal such decisions if they are insufficiently grounded or lacking in justification.
- The Magistrate School's basic curricula and continuing legal education courses covering judicial/legal reasoning and writing should specifically deal with this requirement in the context of decisions on detention on remand. In that context:
 - Best samples of decisions on detention on remand (i.e., properly reasoned decisions) should be distributed to all judges, including appellate judges, as an indication of best practices in this area, and practical exercises and case studies relying on realistic scenarios should be used as the main pedagogical tool.
 - A booklet on judicial reasoning in the context of detention on remand should be distributed to all judges. The booklet would highlight: relevant international and domestic law and case-law (including on appeal); appropriate, user- friendly guidelines and check lists of factors and grounds to be considered under domestic law; best practices and copies of model decisions, both from Albania and other countries. International donors could provide funding and advice in the production of the booklet.

- Appellate court judges should receive training on issues related to pre-trial detention, including on how to evaluate the existence, in individual cases, of:
 - The reasonable suspicion criterion;
 - the risk of escape, interference with the course of justice, the risk of further criminality; and
 - the proportionality and necessity criteria.
- The training should rely, among others, on the discussion of ECtHR cases discussing legal reasoning in the context of detention on remand orders and the individual substantiation of the grounds for detention on remand. Discussion should rely, as much as possible, on the analysis of the concrete facts and circumstances in individual cases.
- Practical exercises on how to draft decisions on detention on remand should be used as one of the pedagogical tools, and appellate court judges should be provided with a model sample decision instructing lower courts specifically to indicate the existence of the relevant grounds in each case.
- The People’s Advocate should, on his own initiative or on the basis of individual complaints, carry out full investigations into alleged mishandling of pre-trial detention cases by the competent judicial authorities, and recommend remedies where violations have been ascertained.²³²
- The Inspectorates under the High Council of Justice and under the Ministry of Justice should carry out regular inspections on how issues related to pre-trial detention are handled by the courts.²³³

²³² See Law no. 8454, dated 16 February 2000, “On the People’s Advocate”, articles 12, 21.

²³³ Law no. 8436, dated 28 December 1998, “On the organization of the judicial power in the Republic of Albania”, article 17, states that the inspectors are appointed by the President of the Republic on the proposal of the Minister of Justice. It provides, *inter alia*, that:

inspectors have the duty of inspecting the courts of the first level and of appeals, verifying the complaints of citizens and other subjects about judges, checking the organization and work of the judicial services, taking evidence about the professional capabilities of judges, within the meaning of article 45 of this law, the work load, verifying and evidencing the property declared, of questions of compatibility of activity and the behaviour of judges, and as a whole the efficiency of the courts.

See also Law no. 8811, dated 17 May 2001, “On the High Council of Justice”, article 16, section 1 (a), providing that the Inspectorate of the High Council of Justice:

verifies or sends to the Minister of Justice for handling complaints of citizens and other subjects that are directed to the High Council of Justice about actions of judges considered to be in conflict with the proper fulfilment of duty. The Inspectorate verifies only those complaints that cannot be solved through a judicial appeal or for the exclusion of the members of the judicial body. It verifies the complaints of citizens and other subjects that are directed to the Minister of Justice and that are judged by him to be followed up by the Inspectorate of the High Council of Justice.

CHAPTER 3

PROCEDURAL DELAYS IN CRIMINAL APPELLATE PROCEEDINGS

I. INTRODUCTION

The right to be tried within a reasonable time is recognized under international law and reflects “the importance of rendering justice without delays that might jeopardise its effectiveness and credibility”.²³⁴ Delays in the processing of criminal cases and increases in court backlog foster impunity and reduce public confidence in the justice system. Legal proceedings must be reasonably short in order to guarantee legal certainty for citizens and for the State. The principle of legal certainty is of particular significance in criminal cases, where the reasonable time requirement not only protects the accused persons from unduly protracted anxiety about their future, but also ensures that justice is served and is seen to be done.

To guarantee the smooth performance of judicial proceedings, the transmission and circulation of documents such as summonses, decisions, notices of appeal – regardless of whether these are circulated within a court or between courts – needs to be done efficiently and in a timely manner. Inconsistencies and delays in the practice with which these operations are performed have the potential effect of impairing the courts’ compliance with due process and fair trial standards. More frequently, however, postponements and delays simply result in wasted time, repetitive procedures and additional costs associated with rescheduled hearings.

In Albania, delays in the disposition of criminal appellate cases are mainly due to the failure to observe the procedural time frames in the delivery of written court judgments and in the transfer of files between courts, as well as to frequent unjustified postponement of hearings, both at trial and on appeal. Such delays are, for the most part, attributable to excessive workload, lack of co-operation between court authorities, archaic and inefficient court administration procedures, as well as the failure of the parties or witnesses to appear.

²³⁴ H v. France, ECtHR, 24 October 1989, para. 58.

The purpose of this chapter is to present information on the frequency and main causes of delays in Albanian criminal appeals courts and to make concrete recommendations for improvements in this area. Statistical information is provided on the progression of criminal appeals with reference to the procedural time frames set forth in the Criminal Procedure Code (time periods for the delivery of written decisions and for the delivery of the case file from the first instance to the second instance court).

II. APPLICABLE INTERNATIONAL AND ALBANIAN LAW

The right to be tried without undue delay is enshrined in international law. Both article 6, section 1, of the ECHR, and article 14, section 3 (c) of the ICCPR guarantee to everyone the right to a hearing within a reasonable time. The purpose of this guarantee is to protect “all parties to court proceedings... against excessive procedural delays”.²³⁵ In *H. v. France*, the ECtHR emphasised “the importance of rendering justice without delays which might jeopardise its effectiveness and credibility”.²³⁶ In criminal cases, this guarantee serves the additional function of protecting individuals from remaining too long in a state of uncertainty about their fate.²³⁷ A speedy trial is particularly important when the accused person is in custody. In such a case, the law mandates that a detainee has the right to be tried within a reasonable time or to be released from detention. The reasonable time guarantee runs from the date of charge²³⁸ until the final disposition of the case, including the exhaustion of all ordinary avenues of appeal.²³⁹

²³⁵ *Stögmüller v. Austria*, ECtHR, 10 November 1969, para. 5.

²³⁶ *H v. France*, ECtHR, 24 October 1989, para. 58.

²³⁷ *Stögmüller v. Austria*, ECtHR, 10 November 1969, para. 5.

²³⁸ *Imbroscia v. Switzerland*, ECtHR, 24 November 1993, para. 36. Under the ECHR, the word “charge” usually indicates the official notification given to an individual by the competent authority of an allegation that he or she has committed a criminal offence. Charge, however, is to be given a “substantive” rather than a formal meaning, so that it is necessary to “look behind the appearances and investigate the realities of the procedure in question”. When deciding whether there has been a charge, the test is whether the suspect is “substantially affected by the steps taken against him”. See *Deweere v. Belgium*, ECtHR, 27 February 1980, paras. 42, 44 and 46. In practice, a person has been found to be subject to a charge when, for instance, arrested for a criminal offence, when officially informed of the prosecution against him or her, or when he or she has appointed a defence lawyer after the opening of a file by the public prosecutor’s office following a police report. See D.J. Harris, M. O’Boyle, C. Warbrick, *Law of the European Convention on Human Rights* (London, Butterworths, 1995), pp. 171-172.

²³⁹ *Eckle v. Federal Republic of Germany*, ECtHR, 15 July 1982, para. 76; *Neumeister v. Austria* ECtHR, 27 June 1968, para. 19. See also Human Rights Committee General Comment 13, para.10, stating that the guarantee to be tried without undue delay attaches “not only to the time when the trial should commence, but also the time by which it should end and a judgment be rendered; all stages must take place without undue delay”.

Authorities are under an obligation to ensure that all proceedings are completed, and final judgments issued, within a reasonable time. In determining what constitutes a “reasonable time” for the purposes of article 6 of the ECHR, circumstance of each case must be taken into account including, in particular, the complexity of the case, the conduct of the accused person and the *conduct of the authorities in the case*, as well as the importance of what is at stake for the defendant.²⁴⁰ Some jurisdictions have held that, in order to establish a breach of article 6 of the ECHR through unjustified procedural delay, it is not necessary to show that the accused person has suffered prejudice in the preparation or presentation of his defence.²⁴¹

Only delays that are attributable to the State may be taken into account when determining whether there has been a breach of the guarantee of a hearing within a reasonable time. Thus, state authorities are not responsible for delays attributable to the defendant or his lawyers.²⁴² However, the state will be responsible for delays attributable to the prosecution or the court.

In order to make possible the prompt administration of justice, states must guarantee efficient court services. In *Muti v. Italy*, the ECtHR held that states have a duty “to organize their legal systems so as to allow the courts to comply with the requirements of article 6, section 1, including that of a trial within a reasonable time”.²⁴³ Thus, severe caseloads and limited numbers of judges can justify a delay only if such circumstances are exceptional, temporary, and not institutional. In such cases, appropriate measures – such as the appointment of additional judges or administrative staff – must be taken promptly to address the problem.²⁴⁴ Delays resulting from a long-term backlog of work in the court system coupled with the failure of the state to take remedial measures have been considered to be breaches of the ECHR.²⁴⁵ Such delays have included those in the transfer of cases between courts, in the communication of judgment to the accused person, and in the making and hearing of appeals.²⁴⁶ In *Agga*

²⁴⁰ *Buchholz v. the Federal Republic of Germany*, ECtHR, 6 May 1981, para. 49. In other cases, the ECtHR has made an overall assessment rather than referring to such criteria.

²⁴¹ *Crummock LTD v. HM Advocate*, *The Times*, 9 May 2000; cf. Att.-Gen.’s Ref. (No. 1 of 1990) [1992] Q.B. 630.

²⁴² *König v. Federal Republic of Germany*, ECtHR, 28 June 1978. See also *Balliu v. Albania*, ECtHR, 16 June 2005.

²⁴³ *Muti v. Italy*, ECtHR, 23 March 1994, para. 15; *Süßmann v. Germany*, ECtHR, 16 September 1996, paras 55-56. See also *Boddaert v. Belgium*, ECtHR, 12 October 1992, para. 39 (stating that domestic courts are under a duty to deal properly with the cases before them).

²⁴⁴ *Buchholz v. Germany*, ECtHR, 6 May 1981, para. 51; *Horvat v. Croatia*, ECtHR, 26 July 2001, para. 59.

²⁴⁵ *Zimmerman and Steiner v. Switzerland*, ECtHR, 13 July 1983, paras 27-32; *Guincho v. Portugal*, ECtHR, 10 July 1984, paras 40-41.

²⁴⁶ *Id.* See also *Orchin v. United Kingdom* (1983), 6 E.H.R.R. 391 (entering of a *nolle prosequi*).

v. Greece, for instance, the European Court of Human Rights found that state authorities were responsible for delays caused by the failure of the prosecution witness to appear, and industrial action by the clerks in the course of first instance hearings, as well as the court backlog resulting from a lawyers' strike that had caused delays in second instance proceedings.²⁴⁷ While the right to be tried within a reasonable time has a central importance in ensuring that justice is administered fairly, this right needs to be balanced against the right of the accused person to have adequate time and facilities to prepare his or her defence.

Mirroring international standards, article 42 of the Albanian Constitution states that everyone has the right to a fair and public trial within a reasonable time.²⁴⁸ It is the responsibility of the judges and court staff to ensure that all those who play a role in the proceedings do their utmost to avoid any unnecessary delay.²⁴⁹

III. DELIVERY AND COMMUNICATION OF COURT DOCUMENTS

The delivery and communication of court documents in a prompt and an efficient manner is a central facet of modern and functioning judicial systems, and a responsibility of the judicial authorities. Under current Albanian law, the chair of the court is primarily responsible for the direction and supervision of its activities, as well as for the organization and functioning of the court administration.²⁵⁰ In order to guarantee the smooth performance of judicial proceedings, the transmission and circulation of documents such as summonses, decisions, notices of appeals (within and between the courts), need to be done in a timely manner. Not doing so risks compromising due process standards.

A. Delivery of Written Judgments by the First Instance Courts

One of the shortcomings observed in the context of criminal appellate proceedings is the frequent delays and inconsistencies in practices related

²⁴⁷ *Agga v. Greece*, ECtHR, 27 January 2000, paras. 24-26.

²⁴⁸ Albanian Constitution article 42, section 2.

²⁴⁹ The management and organization of the activity of the judicial administration are carried out by the chairman of the court, the deputy chairman and the chancellor. See Minister of Justice Order no. 1830, dated 3 April 2001, "Regulation on the organisation and functioning of the judicial administration", article 2.

²⁵⁰ See *id.*, article 7. The chairman can be substituted by the deputy chairman.

to the delivery of written decisions by the courts of first instance. Delays in issuing written decisions can compromise the right of an accused person to be tried without undue delay, because they may delay the time within which an appeal filed by the accused person is processed and heard by a higher court. It may also hamper the ability of a defendant effectively to exercise his or her right of appeal where he or she does not have access to the written decision, limiting his or her ability to write arguments against it. This is especially true if the procedural requirement to deposit a judicial decision “immediately” is considered in light of the short legal timeframe to file an appeal, i.e., ten days after the day on which a decision has been pronounced or notified.²⁵¹ While delays in the delivery of written judgments are the responsibility of court authorities, the Albanian CPC provisions that discipline the timeframe for the delivery of written decisions and for the submission of appeals seem to be inadequate. When combined and read together, these provisions provide for unrealistically short deadlines that may *de facto* compromise the exercise of the right of appeal.

1. Applicable Albanian and International Law

The Human Rights Committee has argued that the right to trial within a reasonable time includes the right to receive a reasoned judgment, at trial and at appeal, within a reasonable time. It further has held that the *failure of a court to render a reasoned written judgment within a reasonable time has the effect of preventing the defendant from enjoying the effective exercise of his or her right to have the conviction and sentence reviewed by a higher tribunal.*²⁵² Similarly, in *Adjianastassiou v. Greece*, the ECtHR found that the failure to provide a reasoned judgment to a defendant in time so as to allow him fully to set out his grounds for review before the Court of Cassation denied him adequate time and facilities to prepare his defence.²⁵³ In that case, the Greek Martial Appeals Court had rendered its judgment orally in the presence of the accused person (a military officer convicted of disclosing military secrets), but only in a summary fashion and without disclosing a series of questions that had been considered in reaching the decision. By the time the accused person received the full record of the court’s judgment, he was barred from expanding the grounds for his appeal to the Court of Cassation. In addition to the unavailability of a reasoned judgment, the existence of *unreasonably short*

²⁵¹ CPC article 415, section 1.

²⁵² See Report of the Human Rights Committee in the case of *Currie v. Jamaica*, 29 March 1994 (Communication No. 377/1989); see also *Victor Francis v. Jamaica*, Human Rights Committee, 24 March 1993 (Communication No. 320/1988); *Little v. Jamaica*, Human Rights Committee, 1 November 1991 (Communication No. 283/1988).

²⁵³ *Hadjanastassiou v. Greece*, ECtHR, 16 December 1992.

timeframes for lodging an appeal can represent obstacles to the realisation of the right to appeal.²⁵⁴

The Albanian CPC provides that a decision shall be taken by the court promptly after the closure of the trial.²⁵⁵ After being pronounced, the decision must be drafted and reasoned based upon the evidence and upon the criminal law, as well as signed by all members of the panel.²⁵⁶ Further, article 386, section 1, of the CPC requires that a decision be filed with the court's secretariat *immediately* after its pronouncement.²⁵⁷ The court's clerk must then endorse the signature and write down the date of the filing.²⁵⁸ As neither the Albanian Criminal Procedure Code nor its commentary states anything to the contrary, it is reasonable to assume that it is a copy of the whole, fully reasoned decision that needs to be deposited with the court secretary in a timely manner after its pronouncement in session. In interpreting the term "immediately", the commentary to the CPC states that judicial decisions should be deposited with the secretariat within five days from their issuance.²⁵⁹ More importantly, it appears that the strict procedural time frame set by article 386, section 1, of the CPC – requiring that decisions be filed with the court's secretariat immediately after their pronouncement – imposes too stringent a requirement, with which Albanian courts have in practice been unable to comply. The findings below seem to support this argument.

2. Findings

As mentioned above, Albanian law requires that decisions be deposited at the court's secretariat *immediately* after pronouncement.²⁶⁰ Nonetheless, the OSCE Presence in Albania has observed that there is inconsistency in the timing with which Albanian courts deliver written judgments. In addition, delays in the deposit with the court secretariat of first instance judicial decisions on the merits of a case are a common occurrence.

As in other countries, in Albania first instance courts rarely issue in writing fully reasoned decisions immediately after they are announced. Indeed, it is common practice for decisions to be read and pronounced publicly on the

²⁵⁴ Report on The Situation of Human Rights in Panama, OEA/Ser. L/V/II.44, doc. 38, rev. 1, 1978.

²⁵⁵ The issuance of decisions cannot be postponed except in cases of objective impossibility. CPC article 379.

²⁵⁶ CPC articles 379 and 382.

²⁵⁷ CPC article 386, section 1.

²⁵⁸ When the defendant has been tried *in absentia*, he should be sent notification of the filing together with a copy of the decision. CPC, article 386.

²⁵⁹ CPC Commentary, p. 192.

²⁶⁰ CPC article 386, section 1.

basis of handwritten notes made by the presiding judge, and for the notes later to be given to the court secretaries to type in the standard format. Often, decisions are read only in a summary fashion at the end of a trial, with the judge reading aloud the “*dispositivi*”, i.e., the conclusion of the decision stating the verdict and the sentence. The reasoning part of the decision is frequently not read out, or it is only partially. Depending on the nature and complexity of the case, as well as other factors such as the commitments and availability of individual judges, the amount of time it can take to deliver a fully reasoned decision varies in practice, ranging from a few days to a few weeks.

Delays and inconsistencies in the time needed to issue written decisions can compromise the right of the accused person to be tried without undue delay, in that these factors may delay the time in which an appeal filed by the accused person is processed and heard by a higher court. While such delays are the responsibility of individual judges, it appears that procedural provisions disciplining the timeframe for the delivery of written decisions, and for the submission of appeals, are inadequate. More specifically, the law requires that an appeal be filed within ten days after that on which the decision has been pronounced or notified.²⁶¹ Especially where combined and read together, the above provisions provide for unrealistically short deadlines. While the law allows the party who has filed an appeal the right to amend it by mentioning other grounds up until five days prior to the appellate hearing,²⁶² delays and inconsistencies across courts in the delivery of written decisions may hamper the ability of defendants effectively to exercise their right of appeal. If the defendants, their legal representatives or prosecutors do not have access to formal, written copies of reasoned decisions, their ability to draw up arguments against the decision and find flaws in the judge’s interpretation of the law is compromised.²⁶³

Against this background, lawyers have indicated to the OSCE Presence in Albania that frequently they have to submit a “simplified” appeals notice drafted on the basis of their recollection of the decision as it was publicly pronounced in order to exercise the right within the prescribed legal term (i.e., ten days). While they often obtain copies of the decision before the appeal is heard, this is not always the case. In at least one case, no grounds of appeal were mentioned by the appellant as a direct result of such delays.²⁶⁴

²⁶¹ CPC article 415, section 1.

²⁶² CPC article 415, section 2.

²⁶³ Although none of the appeal notices examined for this report mention this problem, complaints have been received from a number of lawyers that delays in accessing the written decision prevents them from effectively doing their work.

²⁶⁴ See the Guri case, discussed at pp. 37-40, in which the prosecutor appealed without mentioning any grounds.

The interviews conducted in June 2006 by the OSCE Presence in Albania better illustrate the problem.²⁶⁵

In **Tirana**, criminal defence lawyers indicated that, with the exception of appeals against a decision ordering detention on remand, delays in obtaining copies of Tirana District Court decisions are the rule, and not the exception. Reportedly, it is virtually impossible to get access to such decisions within 10 days after their pronouncement, therefore compromising the possibility properly to prepare the case for appeal. The lawyers interviewed indicated that the time needed for the production of written court decisions depends on the workload and willingness of court secretaries to fulfil their duties, while it is also somehow up to the individual capacity of the lawyer to persuade the latter to do so. According to the Chief of the Tirana District Court, while the dispositive part of the decision²⁶⁶ is frequently posted on the court webpage the day after that in which the decision was pronounced, the time frame for delivery in writing of the entire decision varies from case to case.²⁶⁷ The Chancellor of the Tirana District Court stated that he frequently has to solicit the delivery of written decisions from the presiding judge within the 10-day timeframe for submitting an appeal. He also stated that the Ministry of Justice has issued an instruction to produce written decisions within five days. While, despite several attempts at doing so, the OSCE Presence in Albania was not able to confirm this, it is worth noticing that the existence of an instruction from the Ministry of Justice, i.e., an executive authority, would not supersede the law, i.e., the term contained in the CPC. The secretary of the court confirmed that she only receives the decision and the relevant case files days after the pronouncement.

In **Shkodra**, delays in the delivery of written decisions are a matter of serious concern. According to both the chancellor and the chief secretary of the Shkodra District Court, the delivery of written decisions by courts of first instance can take five to seven days, but also up to one and a half months. As a result of these delays, court decisions are not sent in a timely manner to the prosecution office for enforcement. Lawyers lamented that, under the circumstances, they are not able properly to prepare and substantiate their appeals.

²⁶⁵ Those interviewed included criminal defence lawyers, judges, and administrative personnel of the courts.

²⁶⁶ This part indicates the crime charged, the verdict and the sentence.

²⁶⁷ Interview with Mr. Albert Meçe, Chair of the Tirana District Court, June 2006. The Chair of the Tirana District Court informed OSCE officials that he has issued a verbal instruction to deliver a decision in writing within 10 days from its pronouncement.

In **Kukës**, district court decisions are reportedly delivered in writing between 20 days and up to four months after their pronouncement. In such cases, the prosecutor's appeal is only based on the information contained in the court file. Under an internal regulation adopted by the Tropoja District Court, the court secretary should deliver the written decision to the chancellor's office within 5 days from its pronouncement. According to the Chair of the Tropoja District Court, when a party intends to appeal against a decision, the court makes available to him or her the relevant court file.

According to the Chancellor of the Court of Appeals in **Durrës**, decisions by the district court are delivered in writing within a month from their pronouncement.

3. Statistical Information on the Time Needed for Delivering Written Judgments

The OSCE Presence in Albania has collected statistical data on the number of days between the date on which a decision was pronounced at the conclusion of the main trial and the date on which this decision was deposited in writing at the court secretariat.

While information was requested from six Albanian district courts (Tirana, Kukës, Durrës, Shkodra, Vlora and Gjirokastra), it was not possible to obtain the information from district courts in Vlora, Gjirokastra and Shkodra.²⁶⁸ The tables below show that, in the majority of cases, the written decisions of the Albanian district courts that were taken as a sample were issued after a delay, and after the 10-day deadline for filing an appeal had passed.

Tirana District Court

In order to obtain information on the time lapse between pronouncement of the judgment and the delivery of the written decision, 60 cases were taken as references from the register called "Directory of criminal decisions for the first instance courts" (*"Numerator i vendimeve penale për gjykatat e shkallës së parë"*).

²⁶⁸ For the purpose of collecting data, the chief secretaries and the chancellors of six district courts (Tirana, Kukës, Durrës, Shkodra, Vlora and Gjirokastra) were asked to provide the relevant information as contained in the court registers. For an explanation on the impossibility of accessing the information in Shkodra, Vlora and Gjirokastra, see *infra*, p. 90.

-In 18 criminal cases (30%), the court files (including the decision) were submitted to the secretary of the court between 2 and 10 days from the date on which the decision had been pronounced.

-In 32 cases (53%), i.e., a majority of cases, court files were submitted 11-20 days after the date on which the decision had been pronounced.

-In 7 cases (12%), court files were submitted to the secretariat 21-30 days after the date on which the decision had been pronounced.

-In 3 cases (5%), the file reached the secretary 31-40 days after the date on which the decision had been pronounced.

The file was submitted to the court secretary:	No. of cases	Percentage
on the day the decision was pronounced	0	0%
1 day after	0	0%
2-10 days after	18	30%
11-20 days after	32	53%
21-30 days after	7	12%
31-40 days after	3	5%
41-50 days after	0	0%
more than 50 days	0	0%
Total cases	60	100%

Durrës District Court

Thirty cases were taken as a reference from the register called “Register of criminal cases”.²⁶⁹

-In 28 criminal cases (93%), i.e., the vast majority of cases, the court files were submitted to the secretary of the court 2-10 days after the day on which the decision had been pronounced.

-In 2 cases (7%), the court files reached the secretary of the court 11-20 days after the day on which the decision had been pronounced.

The file was submitted to the court secretary:	No. of cases	Percentage
on the day the decision was pronounced	0	0%
1 day after	0	0%
2-10 days after	28	93%
11-20 days after	2	7%
21-30 days after	0	0%

²⁶⁹ Durrës District Court has a special register called “Register of criminal cases” (“Regjistri i çeshtjeve penale”), which contains, *inter alia*, information on the date and number of the decision, the verdict and sentence given to the defendant, the appellant, number and date of any decision rendered by a higher court. This register also contains the handwritten date on which the case file (including the first instance decision) is submitted to the chief secretary.

31-40 days after	0	0%
41-50 days after	0	0%
more than 50 days	0	0%
Total cases	30	100%

Kukës District Court

Thirty cases were taken as a reference from the “Register of files submission” of Kukës District Court.²⁷⁰

-The statistics show that only in 1 case (3 %) was the court file received the day after that on which the decision had been pronounced, while no case was received on the same day. In 1 case (3%) the court file was submitted to the secretary of the court between 2 and 10 days after the date on which the decision had been pronounced.

-In 9 criminal cases (30%), court files were submitted to the secretary of the court between 11 and 20 days after that on which the decision had been pronounced.

-In 5 cases (17%), the case file was received 21-30 days after that on which the court decision had been pronounced.

-In 4 cases (13%), the file reached the secretary 31-40 days after that on which the decision was pronounced.

-In 1 case (3%), the file reached the secretary 41-50 days after that on which the decision had been pronounced.

-In 9 cases (30%), it took more than 51 days before the chief secretary received the case files.

The file was submitted to the court secretary:	No. of cases	Percentage*
on the day the decision was pronounced	0	0%
1 day after	1	3%
2-10 days after	1	3%
11-20 days after	9	30%
21-30 days after	5	17%
31-40 days after	4	13%
41-50 days after	1	3%
more than 50 days	9	30%
Total cases	30	100%

²⁷⁰ In Kukës, the district court register is called “Register of the submission of the files” (“*Libri i dorëzimit të dosjeve*”). This register contains, *inter alia*, the name of the defendant, the charge, the name of the presiding judge, the date on which the decision was pronounced and the date on which the completed file was submitted to the chair secretary.

* Due to rounding, the percentages listed in the table add up to only 99%, though the total otherwise would be 100%.

The Shkodra District Court does not have a register reporting the date on which a case file is deposited at the secretariat. According to the chancellor of the Vlora District Court, while no such register exists (i.e., registers provided by the Ministry of Justice), the court secretaries might write down this date unofficially in their private notebooks. In the Gjirokastra District Court, the secretariat of the court keeps a register indicating the date on which the case is concluded as well as the date on which the case file is handed over to the chief secretary. The secretary of the court denied the OSCE Presence in Albania access to this register, claiming that it was only for “internal use”.

4. Potential Remedies Regarding the Inadequacy of Procedural Time Lines for Issuing Written Decisions and Filing Appeals

The OSCE Presence in Albania believes that delays in the delivery of written decisions may be reduced partly by clarifying and modifying the procedural provisions on the timeframe for the production of written decisions. As mentioned above, the Albanian CPC states that a decision is to be filed with the court’s secretariat immediately after its pronouncement.²⁷¹ This requirement has proved too stringent and has been disregarded in practice, creating uncertainty and confusion. The Albanian CPC also provides for a peremptory and fixed deadline (i.e., ten days) to file an appeal. This deadline appears to be too short, especially where delays in the delivery of written decisions are a common occurrence. As mentioned above, unreasonably short timeframes for lodging an appeal have been regarded by the ECtHR as obstacles to the realisation of the right to appeal.²⁷² It can be argued that the ten-day legal time limit for filing an appeal is unreasonably short in a context where fully reasoned written court decisions are often delivered after these ten days have passed.

A better solution could be specifically to modulate the timeframe for the production of the written decision where this might require more time (e.g., when reasoning the decision may require more time in complex cases),²⁷³ and to have the timeline for submitting an appeal start running from the moment a written decision is delivered. Doing so may reduce delays and inconsistencies in the practice related to the delivery of written decisions, in turn guaranteeing

²⁷¹ CPC article 386, section 1.

²⁷² Report on the Situation of Human Rights in Panama, OEA/Ser. L/V/II.44, doc. 38, rev. 1, 1978.

²⁷³ For example, the Albanian Civil Procedure Code provides that decisions in civil cases be submitted to the secretariat following the proceedings or, in complicated cases, within 10 days. See Albanian Civil Procedure Code article 308.

the effective exercise of the right of appeal. As indicate below, the procedural codes of some countries allow for more flexibility in setting the timeframe for the delivery of written court judgments and for the filing of appeals.

The **CPC of Bosnia and Herzegovina**, for instance, provides that the **decision must be prepared in writing within 15 days from its announcement, and in complicated matters and as an exception, within 30 days.**²⁷⁴ If the decision is not written within the prescribed timeframe, the presiding judge has the obligation to inform the chair of the respective court about the reasons for the delay. Ultimately, the chair shall, if necessary, undertake the measures necessary for having the decision written as soon as possible.²⁷⁵ A certified copy of the decision is delivered to the Prosecutor and to the injured party, to the accused person and to the defence attorney, together with instructions on the right to appeal.²⁷⁶ In addition, the CPC of Bosnia and Herzegovina modulates the timeframe for lodging an appeal by taking as a reference the date of delivery of the written decision, while at the same time providing for a longer time limit. According to **the Bosnian CPC, while generally an appeal may be filed within 15 days from the date when the copy of the decision was delivered, in complex matters, the court may, on the motion of the parties or of the defence attorney, extend the deadline for filing an appeal for a maximum of 15 days.**²⁷⁷ The deadline for filing an appeal only starts running when the court decides on this motion.²⁷⁸ The other party and the defence attorney may file their response to the appeal with the court within 8 days of the date of receipt of the appeal.²⁷⁹

Similarly, the **CPC of the Republic of Serbia** states that a **written judgement should be prepared within 8 days after being pronounced, and exceptionally within 15 days in the case of complex matters.** If justifiable due to the number of defendants or the number of criminal offences, the complexity of the presented evidence and other important circumstances which clearly account for the extraordinary complexity of the case, the President of the Trial Chamber shall request from the President of the Court to approve the extension of the time limit for up to one month. If the judgement is not written within the prescribed timeframe, the President of the Trial Chamber has the obligation to inform in writing the President of the Court about the reasons for the delay and, ultimately, the president of the Court is required to take the necessary

²⁷⁴ Bosnia and Herzegovina CPC, article 289 section 1.

²⁷⁵ Id.

²⁷⁶ Bosnia and Herzegovina CPC article 289, sections 3 & 4.

²⁷⁷ Bosnia and Herzegovina CPC article 292.

²⁷⁸ Bosnia and Herzegovina CPC article 292, section 3

²⁷⁹ Bosnia and Herzegovina CPC article 302.

measures to ensure that the judgement is prepared as soon as possible.²⁸⁰ As far as delivery of the certified copy of the judgement is concerned, this also lies within the responsibility of the court.²⁸¹ Furthermore, the law states that the right to file an appeal against a judgement rendered by a court of first instance shall be exercised within 15 days from the date the copy of the judgement was served.²⁸²

The Italian CPC contemplates a flexible timeframe for producing as well as depositing the decision, and articulates the term for filing an appeal on the basis of the date of delivery of the decision. Whereas, as a general rule, a reasoned decision needs to be deposited at the court chancellery immediately after its publication, exceptionally, it can be deposited within 15 days from the date on which it was pronounced, or within a longer term indicated by the judge. Such a longer term may under no circumstances exceed 90 days (running from the date on which a decision was pronounced).²⁸³ Where the decision is not deposited within 30 days or within the longer term indicated by the judge, the notice of deposit is communicated to the prosecutor and notified to the private parties who have a right to appeal the decision as well as to the defendant's defence counsel.²⁸⁴ The term for the appeal is then: (a) 15 days where the decision is delivered *in camera* or when the reasoned decision is produced in writing immediately upon deliberation; (b) 30 days where the reasoned decision is delivered in writing within 15 days after the deliberation; and (c) 45 days where the written decision is deposited within the longer term established by the judge, and in any case not exceeding 90 days from the actual deliberation.²⁸⁵ **The terms for filing an appeal starts running:** (a) from the notification of the deposit of the decision pronounced *in camera*; (b) from the reading of the reasoned decision at the hearing session with regard to the parties who are present or are deemed to be present, even though they may not be present at the reading of the decision; (c) from the longer term when the reasoned decision has been produced (as established by the judge) or from the notification of its deposit in case of article 548, section 2 (i.e., a decision reasoned within 15 days); (d) from the date on which the decision has been notified (or the deposit communicated) to the accused person tried *in absentia* and the prosecutor to the court of appeals.²⁸⁶

²⁸⁰ Republic of Serbia CPC article 384, sections 1-4.

²⁸¹ Id. article 384, sections 6-8.

²⁸² Id., article 387, section 1.

²⁸³ Italian CPC articles 548 and 544. The longer term established by the judge applies where the drafting of the reasoning part of the decision is particularly complex due to the number of the parties involved or the number and seriousness of the accusations. See CPC article 544, section 3.

²⁸⁴ Italian CPC article 548, section 2. Article 548, section 3, states that the notice of deposit together with an excerpt of the decision are delivered to the accused person tried *in absentia* and communicated to the general prosecutor to/of the court of appeals.

²⁸⁵ Id., article 585.

²⁸⁶ CPC article 585.

Under the **Swedish Code of Judicial Procedure**, the judgment in a criminal case, if possible, is made and delivered in open court. When additional time is unavoidably required for the determination or writing of the judgment, the court may decide to defer it; however, **unless there is an extraordinary impediment, the judgment must be written and delivered within one week** of the conclusion of the hearing if the defendant is detained, or otherwise, within two weeks of the conclusion of the hearing. If the judgment is not delivered at the main hearing, it must be delivered at another session of the court or pronounced by being made available at the court's registry.²⁸⁷

5. Conclusion

Delays and inconsistency in the timeframe for the delivery of written decisions may affect the right to be tried without undue delay, as they may delay the time when a decision is reviewed by a higher court, or impede the meaningful and effective exercise of the accused person's right to appeal to a higher court. This is especially so considering the short term provided by Albanian law to submit an appeal. While the law allows the party who has filed an appeal to amend it until five days prior to the appellate hearing,²⁸⁸ delays and inconsistencies across courts in the delivery of written decisions create confusion and uncertainty and may affect the quality of the appeal. In view of what has been stated above, the OSCE Presence in Albania is of the opinion that consideration should be given to amending the Albanian CPC so that a more flexible timeframe is envisaged for submitting written judgments and notices of appeal, and that the criteria for extending it in exceptional cases be clearly established by law. On the one hand, doing so would help to ensure the timely delivery of written decisions in "simple cases" and eliminate the judge's discretion on this matter; on the other hand, it would allow parties the necessary time to prepare their cases for appeal.

B. Transfer of Court Files from the First Instance Courts to the Courts of Appeals

1. International and Albanian Law

Court authorities have a general duty to expedite proceedings. If they fail to do so at any stage due to neglect, or take excessive time to complete specific measures, that time might be deemed unreasonable. The jurisprudence of the

²⁸⁷ Swedish Code of Judicial Procedure, Ch. 30, section 7.

²⁸⁸ CPC article 415, section 2.

European Court of Human Rights seems to indicate that, as a general matter, administrative and logistic difficulties in the management of a case will be deemed to be responsibility of the court authorities.²⁸⁹

In the context of criminal appellate proceedings, the Albanian CPC states that the secretariat of the first instance court that rendered the decision should send the documentation of the proceedings (i.e., the case file) and the appeal to the court of appeals within ten days from the date in which the appeal was filed.²⁹⁰ The secretary of the court of appeals should then register the appeal and the file belonging to it. Similarly, the Rules on the Organization of the Judicial Administration state that the judicial secretary is responsible for sending cases to the court of appeals and the High Court.²⁹¹ A violation of these Rules entails disciplinary responsibility.²⁹²

The chancellor of the court organizes and oversees the daily activity of the judicial secretariat.²⁹³ The chair of the court, in collaboration with the chancellor, is responsible for supervising the delivery of completed judicial files to the judicial secretariat in accordance with the procedural deadlines provided by law.²⁹⁴ The former also exercises oversight to ensure that procedural timelines are respected.²⁹⁵ Recommendations for improving the structure and organisation of the judicial administration can be submitted periodically by the chancellor to the chair of the court.²⁹⁶

2. Findings

The OSCE Presence in Albania has observed that procedural timeframes for the transfer of court files from the district court to the court of appeals are only rarely observed. Often, such delays are a direct consequence of delays in the delivery of written court decisions. Delays in the transfer of court files between courts may cause undue delays in the holding and conclusion of appellate proceedings, which in turn may negatively impact on the time needed for the overall completion of court proceedings in a case.²⁹⁷

²⁸⁹ *Agga v. Greece*, ECtHR, 25 January 2000, paras. 24-26.

²⁹⁰ CPC article 419. CPC Commentary, p. 553.

²⁹¹ Minister of Justice Order no. 1830, dated 3 April 2001, "Regulation on the organisation and functioning of the judicial administration", article 19, section 15.

²⁹² *Id.*, article 27, section 1.

²⁹³ *Id.*, article 9, section 1.

²⁹⁴ *Id.*, article 8, section 9.

²⁹⁵ *Id.*, article 8, section 1.

²⁹⁶ *Id.*, article 10, section 14.

²⁹⁷ The OSCE Presence in Albania has examined the court register at both district and appellate courts.

Reportedly, in the majority of cases, court files are delivered to the secretary of the district court by the secretary of the presiding judge after the legal term of ten days has expired. This, in turn, causes delays in the transmission of the case file and the related appeals notice from the first instance to the appellate court.

It is worth noting that there also seems to be some confusion as to the operation of time limits as prescribed by law. The Chair of Tirana District Court, for instance, has told OSCE officials that the term of ten days for the transmission of the court file runs from the moment the appeal is notified to the other party.²⁹⁸ While article 419 of the CPC is formulated in a vague manner, stating only that the court rendering the sentence shall send, within ten days, to the relevant court of appeals the documentation of the proceedings and the appeal, without indicating from which moment the ten days run, this reading contradicts the interpretation given by the CPC commentary, where it is stated that the term starts running from the day on which the appeal is filed.

Statistics on the Number of Days Necessary to Transfer Case Files from the Courts of First Instance to the Appeals Courts

The table below contains data on the number of days it took to transmit case files from first instance district courts to courts of appeals in Tirana, Durrës, Gjirokastra, Vlora and Shkodra. Each court of appeals provided the OSCE Presence in Albania with information on 20 cases for which the appeal was decided in the course of 2006,²⁹⁹ as reflected in the “Fundamental Criminal Register” (“*Regjistri themeltar penal*”).³⁰⁰

As indicated above, the Albanian CPC states that an appeal must be filed within ten days after the day on which the decision was pronounced or notified.³⁰¹ The secretariat of the first instance court that rendered the decision should then send the documentation of the proceedings (i.e., the court file and the relevant

²⁹⁸ Interview with Albert Meçe, Chair of the Tirana District Court, June 2006.

²⁹⁹ In Gjirokastra, the cases considered were decided between 2006 and 2007.

³⁰⁰ The register contains detailed information on criminal appeals forwarded to the higher courts, such as the date of registration of the appealed case with the secretariat of the court of appeals, the name of the defendant, the party submitting the appeal, the charge, an indication of the number, date, judge and court of first instance that have issued the decision, the verdict and sentence, data on the file (e.g., case file number), number and the type of decision taken in the case by the court of appeals together with the name of the rapporteur judge or the chair of the appellate court panel. The register also contains an indication of the date, number and means of delivery of the letter sending the file back to the first instance court.

³⁰¹ CPC article 415, section 1.

appeal) to the court of appeals within ten days from the filing of the appeal.³⁰² Thus, assuming the worse case scenario, i.e., that a decision is appealed at the end of the tenth day (starting to run from the date after that on which the decision was first pronounced), and that the court secretariat sends the relevant case file to the court of appeals on the tenth day after that on which the appeal was filed, it appears that the maximum period between the day of the pronouncement of the first instance decision and the day on which the appeals court must receive the case file should not exceed twenty-one days.

The table below indicates, in each of the twenty cases and for each appellate court, the number of days that passed between the date on which the first instance decision was pronounced at the relevant district court and the date on which the case was registered at the court of appeals. **Delays of more than 21 days in the transmission of court files, where they have been observed, are indicated in bold.**

At the Tirana Court of Appeals, delays were observed in 8 cases out of 20; at the Gjirokastra Court of Appeals, delays were reported in 15 cases out of 20; at the Vlora Court of Appeals, delays were reported in 17 cases out of 20. At the Shkodra Court of Appeals, delays were reported in 19 cases out of 20. At the Durrës Court of Appeals, no case files were delivered within the prescribed legal timeframe.

³⁰² CPC article 419. Commentary, p. 553.

Tirana Court of Appeals	Durrës Court of Appeals	Gjirokastra Court of Appeals	Shkodra Court of Appeals	Vlora Court of Appeals
<i>Number of days</i>				
14 days	2 months and 29 days	15 days	20 days	16 days
15 days	3 months and 3 days	17 days	26 days	18 days
15 days	3 months and 3 days	18 days	28 days	19 days
15 days	3 months and 4 days	19 days	28 days	23 days
15 days	3 months and 4 days	27 days	31 days	27 days
15 days	3 months and 5 days	27 days	33 days	28 days
15 days	3 months and 9 days	29 days	34 days	28 days
16 days	3 months and 26 days	31 days	38 days	29 days
20 days	3 months and 26 days	38 days	41 days	29 days
21 days	3 months and 28 days	41 days	42 days	29 days
21 days	4 months	43 days	46 days	32 days
21 days	5 months and 21 days	43 days	49 days	33 days
22 days	5 months and 22 days	43 days	54 days	34 days
22 days	5 months and 23 days	46 days	2 months and 4 days	42 days
28 days	5 months and 24 days	50 days	2 months and 6 days	67 days
28 days	5 months and 24 days	51 days	2 months and 13 days	2 months and 20 days
36 days	5 months and 26 days	56 days	3 months and 15 days	6 months
36 days	5 months and 28 days	59 days	4 months and 18 days	9 months and 15 days
1 year, 3 months and 15 days	6 months and 4 days	2 months and 2 days	7 months	1 year and 5 months
2 years and 1 month	6 months and 28 days	2 months and 4 days	1 year	8 years

The tables below indicate, for each court, a breakdown of the delays, taking as a reference the following timeframes of transmission of the court files:

- 1-21 days (i.e., file transmitted within the legal time limits);
- 22-30 days;
- 31-40 days; 41-50 days;
- more than 50 days.

Tirana Court of Appeals

The data concern cases that were tried in the first instance by the district courts of Tirana, Kurbin and Bulqiza. Out of 20 cases, 12 court files (60%) were submitted to the Tirana Court of Appeals within the legal time limit – i.e., in less than 21 days from the date on which the first instance decision had been pronounced; 4 case files (20%) were submitted between 22 to 30 days after the pronouncement of the decision; 2 files (10%) were submitted between 31 to 40 days after pronouncement of the decision. In 2 cases (10%), case files were transferred more than 50 days after.

Tirana Court of Appeals register

The file was submitted to the court of appeals after:	No. of cases	Percentage
1-21 days	12	60%
22-30 days	4	20%
31-40 days	2	10%
41-50 days	0	0%
More than 50 days	2	10%
Total cases	20	100%

Durrës Court of Appeals

The data concern cases that were tried in the first instance by the district courts of Durrës, Kavaja, Librazhd, Elbasan and Gramsh. All 20 cases taken as a reference (100%) were submitted by the relevant district courts to the Durrës Court of Appeals more than 50 days after the day on which the decision had been pronounced.³⁰³

Durrës Court of Appeals register

The file was submitted to the court of appeal after:	No. of cases	Percentage
1-21 days	0	0%
22-30 days	0	0%
31-40 days	0	0%
41-50 days	0	0%
More than 50 days	20	100%
Total cases	20	100%

³⁰³ Upon inquiry of the OSCE Presence in Albania about the delays, the Durrës District Court claimed that they transmit the case files within the legal timeline, and that delays with which the Durrës Court of Appeals registers the cases might be imputable to administrative problems or to the high workload. Conversely, the Durrës Court of Appeals claimed that the first instance court might need two to four weeks to produce written decisions. In addition, the Durrës Court of Appeals also lamented the considerable workload due to cases not only coming from the Durrës District Court, but also from other courts (Elbasan, Kavaja, etc.).

Gjirokastra Court of Appeals

The cases below were tried in the first instance by the district courts in Gjirokastra, Saranda, Përmet and Tepelena. Out of 20 cases (30%), 6 court files were submitted to the Gjirokastra Court of Appeals between 41 to 50 days after the day on which the decision of the first instance had been pronounced; 5 files (25%) were transmitted more than 50 days after the day on which the decision of the first instance was pronounced; 3 court files (15%) were submitted between 22 to 30 days later; and 2 (10%) were submitted between 31 to 40 days after the day on which the decision had been announced. Only 4 court files (20%) were delivered within 21 days.

Gjirokastra Court of Appeals register

The file was submitted to the court of appeal after:	No. of cases	Percentage
1-21 days	4	20%
22-40 days	3	15%
31-40 days	2	10%
41-50 days	6	30%
More than 50 days	5	25%
Total cases	20	100%

Shkodra Court of Appeals

The cases below were tried in the first instance by district courts in Shkodra, Lezha, Kukës, Tropoja and Puka. Out of 20 court files, 8 (40%) were submitted to the Shkodra Court of Appeals more than 50 days after the day on which the decision of the first instance had been pronounced; 4 (20%) were submitted between 31 and 40 days afterward; 3 (15%) took between 22 and 30 days to be delivered after the day on which the decision had been pronounced; 4 case files (20%) were transmitted 41 to 50 days after the day on which the decision was pronounced; and only one file (5%) was submitted within 21 days (i.e., within the legal time limit).

Shkodra Court of Appeals register

The file was submitted to the court of appeal after:	No. of cases	Percentage
1-21 days	1	5%
22-30 days	3	15%
31-40 days	4	20%
41-50 days	4	20%
More than 50 days	8	40%
Total cases	20	100%

Vlora Court of Appeals

The table below shows data on cases that were tried in the first instance by the district courts of Vlora, Fier, Berat, Skrapar, Lushnja and Kuçova and

were appealed to Vlora Court of Appeals. Out of 20 court files, 6 (40%) were submitted to the court of appeals more than 50 days after the day on which the decision of the first instance had been pronounced; 7 files (35%) were submitted between 22 and 30 days after that on which the decision had been pronounced; 3 (15%) were submitted between 31 and 40 days after that on which the decision had been pronounced; and 3 (15%) were transferred within the legal time period (i.e., between 1 and 21 days). In 1 case (5%), the case file was submitted between 41 and 50 days after the date on which the decision had been pronounced.

Vlora Court of Appeals register

The file was submitted to the court of appeal after:	No. of cases	Percentage
1-21 days	3	15%
22-30 days	7	35%
31-40 days	3	15%
41-50 days	1	5%
More than 50 days	6	30%
Total cases	20	100%

Interviews conducted by the OSCE Presence in Albania with court officials seem to confirm the above findings.

According to the Chancellor of the **Shkodra** Court of Appeals, delays in the transfer of court files of appealed cases from district courts within the territorial jurisdiction of the Shkodra Court of Appeals are a common occurrence. This is worrying in cases concerning appeals against precautionary measures, where the relevant file reaches the Court of Appeal well beyond the legal deadline.³⁰⁴ Delays in the transmission of the court file from the Shkodra District Court to the Court of Appeals are also caused by delays in the notification of the notice of appeal to the other party.

Delays in the transmission of court files from the appellate courts back to the relevant district courts have also been reported. In **Vlora**, such transfer has sometime reportedly taken up to 6 months. In **Shkodra**, it **takes generally about 15 days for decisions of the Court of Appeals** to be delivered in writing to the chief secretary's office. Delays can be longer depending on the workload of a specific judge's secretary. An appellate

³⁰⁴ The right of appeal against detention on remand may be exercised by the defendant or his defence counsel *within ten days* from the execution, or service of notice of the decision on detention. The appeal is filed with the secretary of the court that issued the decision, who must transmit the file to the competent court within five days. CPC article 249. Delays in the transfer of court files between courts may compromise the effective exercise of the right of appeal by causing undue delays in the holding and conclusion of appeal proceedings.

prosecutor has stated to the OSCE Presence in Albania that delays in the delivery of written decisions has serious repercussion for his work, as he may have to file an appeal (*rekurs*) to the High Court against the decision in a specific case within the 30 days established by law, without having at his disposal a copy of it.

While, as shown by the data reported above, delays in the transmission of court documents relevant to the cases appealed, far from being exceptional, occur frequently. This is not reportedly an issue that has been raised by Ministry of Justice inspectors in the context of their work.³⁰⁵

C. Postponements in the Scheduling of Hearings on Appeal

The timely, efficient and organized conduct of court hearings is a central facet of modern, well-functioning judicial systems, one of many aspects of due process and an indicator of the degree to which the rule of law is upheld.

The Albanian CPC provides that courts should strive to complete trials within one hearing or, if not possible, during the next working day and that only for good reasons can trials be postponed up to fifteen days.³⁰⁶ This provision is in line with international standards guaranteeing the right to be tried without undue delay.

Nonetheless, as already observed by the OSCE Presence in Albania, criminal proceedings frequently continue for extended periods of time and occasionally take years to complete. Only exceptionally are trials completed within one court hearing, and instead of continuing the next working day, trials are routinely postponed for the maximum period allowed by law, i.e., fifteen days. While this practice affects especially main trial hearings,³⁰⁷ the failure to observe the trial schedule and the delays in the holding of hearings are also common occurrences and have been observed at second instance courts throughout Albania.

³⁰⁵ Telephone interview with Ms. Enkelejda Hajro, Chief of the General Directorate for Justice Issues, Ministry of Justice (21 February 2006).

³⁰⁶ CPC article 342.

³⁰⁷ OSCE Presence in Albania, *Analysis of the Criminal Justice System of Albania*, (Tiranë, OSCE, 2006), p. 180 [hereinafter *Analysis of the Criminal Justice System of Albania*].

Causes of the delays have been identified in: failure to find/notify the persons involved; failure of persons notified to appear; failure of the police to bring persons detained on remand to court; failure of defence counsel to appear; failure of prosecutors to appear; lack of planning/preparation; unjustified prolongation of pre-trial investigations.

Such delays negatively impact public trust in the administration of justice and can result in infringements of the right to a trial without undue delay. Delays are due to factors such as poor planning of the trial schedules, difficulties linked to summoning defendants to the hearing, as well as unjustified failure of the parties to appear. As the OSCE Presence in Albania has observed “while increased efforts to ensure the timely participation of all involved, might require increased expenditure, shorter and more efficient trials would substantially reduce costs for all involved and would free resources to adjudicate more cases”.³⁰⁸ The following sections provide an account of delays as observed by the OSCE Presence in Albania at appellate courts hearings.

1. Summoning of the Parties and Scheduling of Appellate Hearings

Difficulties in summoning the parties to a case is one of the main factors causing frequent postponements and delays in the conduct of criminal appellate proceedings. According to article 140 of the CPC, notices of court documents are served to free defendants by delivering them copies of these documents. Where the defendant is not found, the document can be delivered to his residence or working place by handing over the document to a family member, a neighbour or a person who works with him. Where these persons are absent or refuse to accept the document, the defendant is sought in other venues. As a last resort, and where the defendant cannot be found in the other places indicated by law, the summons can be delivered to the administrative centre of the neighbourhood or village where the defendant lives or works, while the notice can be posted at the defendant’s house or working place.³⁰⁹ The court dispatcher then notifies the defendant of the delivery by registered mail, and effects of the notification start to run from the receipt of the registered mail.³¹⁰ The law requires the summons to be served by court clerks, the postal service or the judicial police.³¹¹ When a defendant is in detention, notice must be served to him at his detention place by handing over the document or, where he refuses to accept the latter or is absent for justified reasons, by delivering the document to the person in charge of the institution who needs to notify the defendant through the fastest means possible.³¹²

In many of the appellate proceedings monitored by the OSCE Presence in Albania, the hearing had to be rescheduled due to the failure of the defendant

³⁰⁸ *Analysis of the Criminal Justice System of Albania*, p. 179.

³⁰⁹ CPC article 140.

³¹⁰ CPC article 140, section 4.

³¹¹ CPC article 132.

³¹² CPC article 139.

to appear, with subsequent postponement of the hearing for a period of two weeks.³¹³ This is striking, especially given that, in many instances, the accused person was the party filing the appeal. In other cases, hearings had to be rescheduled due to the unjustified absence of others (such as the defence counsel or the prosecutor) to appear. While not the only cause of delays, the inadequate civil registry and address systems have posed significant challenges to the timely and proper delivery of notifications to the parties.

Other reasons for the frequent postponement of hearings are the poor management of the trial schedule by the court authorities. While the question of how each court in general, and each panel of judges in particular, organise and prioritise their work represents a constant challenge for any judicial system, unnecessary and unjustifiable delays should not be condoned.

The following is an example of a case in which the inadequate scheduling and planning of the hearing, coupled with the unjustified failure of the prosecutor and defence counsel to appear, have caused undue delay.

Altin Diko was convicted of rape by the District Court of Tirana on 14 July 2004 and sentenced to 9 years of imprisonment. An appeal against the decision was submitted by his defence counsel in a timely manner on 23 July 2004. For reasons that are unclear on the basis of the examination of the court file, the first hearing before the Tirana Court of Appeals was scheduled for 17 November 2004, four months later. This hearing was postponed due to the absence of defence counsel. On 15 December 2004, the second hearing was postponed due to the absence of the judges, who were reportedly abroad. The third hearing scheduled for 20 December 2004 was postponed again due to the absence of the defence counsel. On 14 January 2005, 6 months after the appeal had been filed, the Tirana Court of Appeals held the first hearing in which the Tirana DC decision to convict was upheld.

In the first case, the hearings had to be postponed due to the lack of adequate case management, as shown by the belated scheduling of the first hearing, and poor management of the judges' agenda. Because the absence of the judges (who were reportedly travelling abroad) had certainly been foreseen, the court should have informed the parties well in advance that it would not be possible to hold the session and should have rescheduled the hearing. On two additional occasions, the hearing had to be postponed due to the unjustified absence of the defence counsel. While this is a frequent cause of postponements of hearings in courts throughout Albania, and is reportedly

³¹³ CPC article 342.

often used for dilatory purposes, to date no disciplinary measures have been imposed by the National Chamber of Advocates against any lawyers.³¹⁴

In addition, it should be noted that, in the specific case, on 20 December 2004, the Tirana Court of Appeals suspended the time served by the defendant in pre-trial detention due to the failure of the lawyer to appear at the hearing, in accordance with article 265 of the CPC.³¹⁵ As previously indicated by the OSCE Presence in Albania, while this provision has the aim of barring defendants and defence counsel from using postponement as a dilatory strategy, it might also be used inappropriately to penalise defendants for facts and delays that are only attributable to defence counsel.³¹⁶

In other cases, delays were caused by the failure of the judges, the defence counsel or the prosecutor to appear.

In the case of **Ardian Guri**, who was acquitted of trafficking of narcotics following an accelerated trial, an appeal was filed by the prosecutor on 4 November 2005. The first appeals hearing, scheduled to take place three months after the initial appeal, on 10 February 2006, was postponed due to the prosecutor's absence as a result of an inspection by the Office of the Prosecutor General. On 15 February 2006, a second hearing was postponed due to the Prosecutor's absence for "unexpected urgent reasons". The last hearing was held on 28 February 2006, during which the Shkodra Court of Appeals upheld the first instance court's decision of acquittal.

On 21 December 2005, the two **Kovaçi** brothers (Pjetër and Gjon) were sentenced by the Shkodra District Court to 10 years of imprisonment for premeditated attempted murder committed in collusion with others. On 29 December, the defendants appealed against the sentence. On 27 March 2006, the appellate hearing was postponed due to the absence of one of the two co-defendants; on 12 May 2006, the hearing was postponed due to the absence of the judges (who were reportedly attending a seminar); on 24 May, the hearing was postponed due to the (unjustified) absence of one of the judges; on 31 May the hearing was postponed due to the absence of the Chair of the Court of Appeals (reportedly on a duty

³¹⁴ Telephone interview with Mr. Virgil Karaj, Secretary General of the National Chamber of Advocates (18 July 2007). In the course of the telephone conversation, Mr. Karaj categorically denied that lawyers ever contribute to delays in proceedings.

³¹⁵ According to this provision, the time served in pre-trial detention by an accused person may be suspended by a court decision, which may be appealed, for the time a judicial examination is adjourned or postponed, *inter alia*, due to the non-appearance or abandonment by one or more defence counsel whose absence leaves one or more defendants without assistance. CPC article 265.

³¹⁶ *Analysis of the Criminal Justice System of Albania*, p. 183.

trip); on 13 June, the hearing was postponed to give time to the defence counsel to prepare his conclusions in writing; on 19 June the hearing was once again postponed due to the absence of the defence counsel (reportedly at a family funeral); on 4 July, the hearing was postponed due to the absence of the Chair of the Appeals Court (reportedly for family reasons); finally, on 17 July, the hearing was adjourned to allow the court to take its decision.

In total, ten hearing sessions were held on appeal between 27 March and 18 July 2006. Out of these ten, six were adjourned due to either the unjustified or the easily predictable failure³¹⁷ of one of the parties, or the judges, to appear. Such unjustified delays should have not been permitted by the court.

2. Remedies

From what has been observed above, it appears that there is a tendency of the appeals courts to accept the unjustified failure of the prosecutors, defendants and defence counsel to appear at regularly scheduled hearings. The lack of any sanctions for the failure of defendants and attorneys to attend as scheduled contributes to inefficiency in the administration of justice and erodes the authority and credibility of the court.

The OSCE Presence in Albania believes that several steps could be taken to address the problems outlined above.

Firstly, it may be appropriate to amend Albanian criminal procedure provisions to *require that the appellant expressly state his address for service on the notice of appeal*. Any document concerning the appeal that is delivered to that address should be deemed to have been served on the appellant. Where the appellant is in custody at the time he files the notice of appeal, he should state the name of the institution at which he is in custody together with another address for service other than that of the institution.³¹⁸ When the notification of the date of the hearing is carried out by court clerks, by judicial police or by mail with confirmation of receipt, the subject of the notification should be required to confirm and provide additional contact information, in particular telephone numbers.

³¹⁷ I.e., where the failure to appear of the judges or the parties to the trial was either not reported on the record, or where was preventable because it was predictable, so that the concerned party could have given adequate and timely notice so as to avoid waste of time of the others involved (e.g., in the case where the judges attended the training).

³¹⁸ See, e.g., British Columbia Criminal Appeal Rules, article 5, sections 2 and 3.

Secondly, the code may be amended to empower the court to issue an order of apprehension of the defendant who, though duly summoned to a court hearing, without justification has failed to appear.³¹⁹

Alternatively, as pointed out by the OSCE Presence in Albania in a previous report, it should be considered whether after an initial notification to the parties concerning the proceedings, the parties could be notified in a simpler manner than that used for the first notification, e.g., through simple mail or technical means.³²⁰

The inadequate civil registry and address systems in Albania pose major obstacles to notifying persons involved in court proceedings. In January 2007, the EC Delegation to Albania and the OSCE Presence in Albania signed an agreement to provide technical assistance to the Albanian government in the modernisation of its address and civil registration system. A memorandum of understanding was signed between the OSCE Presence and the Albanian Ministry of Interior on the project implementation. This project is funded with EUR 2.5 million from the EU CARDS programme and will be implemented over a three-year period by the OSCE Presence in Albania in close co-ordination with the Council of Europe and Statistics Norway.³²¹ While it is too early to predict, it is hoped that improvements in this area will substantially enhance possibilities to summon persons to court.

The Albanian Chamber of Advocates should more responsibly exercise its role and take measures against lawyers who repeatedly fail to attend court proceedings, especially where there are indications that procrastination is used as a dilatory tactic.³²² Consideration should also be given to introducing disciplinary measures into the CPC. Measures that could be considered are the obligation to pay [part or all] procedural expenses, fines, prohibition to act as counsel in the particular case or before the court. The first and most important

³¹⁹ Id. article 125, section 1.

³²⁰ *Analysis of the Criminal Justice System of Albania*, pp. 181-182.

³²¹ The project started in February 2007 and will be completed by October 2009. The project is also partly supported through a contribution from the U.S. Government. See OSCE Presence in Albania, Press release, European Commission, OSCE support modernizing Albania's address and civil registration system (Tirana, 30 January 2007), available at http://www.osce.org/albania/item_1_23124.html?print=1 (last accessed on 19 November 2007).

³²² Article 38 of the Law on Advocates provides that an advocate will be subject to disciplinary proceedings, *inter alia*, if he has acted in contradiction with the legal provisions that regulate the activities of advocates, other rules established by the National Chamber of Advocates or the advocacy chambers, or with the rules contained in the Advocates' Code of Ethics. See Law No. 9109, dated 17 July 2003 "On the profession of advocate in the Republic of Albania", article 38, sections (a) and (b). See also the Advocates' Code of Ethics, which requires *lawyers to not cause unnecessary delays in the course of judicial proceedings*. Albanian Code of Ethics for Advocates, adopted by the National Chamber of Advocates in November 2005, article 34.

measure is, however, for the courts to make it absolutely clear to all parties that no stalling of the proceedings will be tolerated and that any delay that cannot be objectively justified will lead to disciplinary measures. Whereas the first unjustifiable absence or delay might lead to a fine, several unjustifiable delays should lead to an obligation to pay procedural costs. Systematic and repeated abuses should lead to a prohibition to continue as counsel in the case at hand, while when it is established that a particular lawyer has a record of stalling proceedings, he or she could be barred from acting before the court in question.³²³

As for problems related to poor management of the trial schedule and planning of the hearing by the court authorities, the latter should more responsibly schedule hearings. Before the start of the appellate hearing, the court should prepare a detailed draft plan indicating the envisaged number and content of each hearing. The plan should be discussed and agreed with the prosecution and the defence with a view to respecting it. When, due to either the parties or the judges, there is a need to change the plan or dates of the hearings, this needs to be communicated promptly so as to allow the court to reschedule the hearing.

IV. CONCLUSION

The timely resolution of criminal cases has three main purposes: to guarantee the right of the accused person to a speedy trial, thus putting an end to the uncertainty surrounding his state; to further the interest of the public (including victims and witnesses) in the fair and timely resolution of criminal cases; and to ensure the effective use of human and financial resources. The speedy resolution of criminal proceedings should always be balanced against the competing fundamental principles of fairness and accuracy of the criminal justice process.

In Albanian courts, delays are, for the most, attributable to excessive workload, lack of co-operation between court authorities, archaic and inefficient court administration procedures, as well as to failure of the parties or witnesses in a case to appear. More specifically, inconsistency and delays have been observed in the practice with which fully reasoned, first instance decisions are delivered in writing. Provisions disciplining the timeframe for the delivery of written decisions and for the submission of notices of appeal, especially

³²³ *Analysis of the Criminal Justice System of Albania*, pp. 183, 184.

where combined and read together, seem to provide for unrealistically short deadlines that have proved in practice to be difficult to respect. Delays and inconsistencies across courts in the delivery of written decisions, coupled with the short deadline to file an appeal, may hamper the ability of defendants effectively to exercise their right of appeal. Delays in the disposition of criminal appellate cases are also due to the failure to observe procedural timeframes for the transfer of files between courts, as well as to frequent unjustified postponements of appellate hearings attributable to the failure of the parties (prosecutor, duly summoned defendant, and defence counsel) to appear. In cases in which delays are attributable to the failure of the parties (prosecutor, duly summoned defendant, and defence counsel) to appear at appellate hearings, courts have been too accepting of such practices.

Delays in the processing of cases, however minor, impede the efficient use of administrative and financial resources that could otherwise be used to adjudicate more cases. When delays in the processing of court cases are significant, attributable to the state and avoidable, they may violate an accused person's right to a fair trial, including the right to be tried within a reasonable time. As the ECHR places a duty on the contracting parties to organize their legal systems so as to allow the courts to comply with the fair trial requirements of article 6, section 1, Albanian state authorities may be held liable for failure to increase resources and for structural deficiencies that cause procedural delays.

Improvements in this area could be achieved by identifying the practices used in courts with a higher level of efficiency and by transposing them to other courts. The following recommendations, were they to be implemented, might also reduce delays and enhance the courts' efficiency in handling criminal appeals.

V. RECOMMENDATIONS

Delivery of Written and Fully-reasoned Court Decisions (in the First Instance)

- The term “immediately” in article 386 (1) of the CPC (providing that a decision be filed with the court’s secretariat *immediately* after its pronouncement)³²⁴ should be clarified.
- Court authorities (president and chancellor) should be more vigilant in ensuring that decisions are deposited and delivered within the prescribed legal time period (i.e., immediately). Internal court circulars should be issued to condemn the practice of delivering written, fully reasoned court decisions with days or weeks of delay.
- The High Council of Justice should initiate disciplinary proceedings in cases where judges are responsible for unreasonable delays in delivering written decisions; priority should be given to cases where these delays prevent persons in pre-trial detention from having their decisions reviewed by a higher tribunal.
- The Albanian CPC provisions on the timeframes for producing and submitting a written decision and filing an appeal should be reviewed so as to make them more easily enforceable. Amendments should include:
 - A provision that provides for longer timeframes in producing written judgments in complex cases.
 - A provision that modulates the timeframe for lodging an appeal by taking as a reference the date of delivery of the written decision.
 - A provision that empowers the Chief Judge to undertake measures to have the judgement drawn up in the shortest period of time, in case the Chair of the panel has failed to do so within the legal time limit.

³²⁴ CPC article 386, section 1.

Delivery of Case Files Between First Instance and Appellate Courts

- Systems must be put in place to ensure that case files are transferred between the district courts and the courts of appeals in a timely manner, so as to avoid unnecessary delays in the processing and hearing of cases appealed. More specifically:
 - The Minister of Justice could issue a circular spelling out and underlying the legal duties of court officials to deliver case files in a timely manner to the respective appellate court in cases of appeals.
 - Systematic monitoring of these practices should be undertaken by the responsible authorities, including the Chief Judge and the Chancellor of the district courts, as well as inspectors of the Minister of Justice and of the High Council of Justice.
 - The Chief Judge should exercise his disciplinary power in cases where repeated delays are attributable to the responsibility of court staff.³²⁵
 - Court administrative staff should provide the Chief Judge with regular reports on functional and administrative issues and barriers they face in handling criminal cases that have been appealed. To the extent possible, such reports should also contain practical recommendations for the improvement of the system.

Planning and Scheduling of Appellate Hearings

- Each jurisdiction, including appellate jurisdictions, should establish procedures to monitor the performance of the system (and of each of the organizational entities that have responsibilities for particular aspects of processing cases) in relation to the aim of the timely resolution of cases. Regular feedback should be provided to the leaders of the courts, the prosecution offices, defence lawyers, law enforcement agencies and the government.

³²⁵ See Minister of Justice Order no. 1830, dated 3 April 2001, "Regulation on the organisation and functioning of the judicial administration", article 8, section 19, stating that the Chairman of the Court monitors the work discipline of judges and other court employees and that, in case of violations by the latter, he may take disciplinary measures.

- Information about the performance of the system in relation to the goal of timely resolution of criminal cases should be made available to the public on a regular basis, e.g., through the publication of statistics (on the number of criminal cases submitted to court, the number of cases decided, the number of cases appealed, the average hearing time, average time between date of submission and disposition, etc.).
- Effective case flow management practices and procedures should be adopted, such as the drafting of a plan for effective case management in all jurisdiction, including appellate jurisdictions. In line with the above, it is recommended that:
 - Upon receipt of a case file, the court should prepare a detailed plan for the hearing in consultation with the parties. The plan should detail the number of appellate hearings envisaged and their content. The draft plan should be agreed with the parties prior to the start of the trial and then adhered to.³²⁶
 - The court chair should set the trial schedule so as to enable the expeditious resolution of minor cases while allowing sufficient time for complex cases that may involve more thorough reviews and the re-performance of the judicial examination.
 - The courts of appeals should adopt a policy of granting postponements of appellate hearings only upon a having been shown good cause and only for as long as is necessary, taking into account not only the request of the prosecution or the defence, but also the public interest in the prompt disposition of cases.
 - Guidelines on what is a justifiable cause of prolongation/postponement of the hearing should be introduced.
 - The presiding judge should assume a more attentive role in scheduling appellate hearings and in ensuring an efficient administration of the trial schedule, e.g., by avoiding the rescheduling of hearings where judges cannot be present, or by promptly communicating changes in the hearing schedule due to supervening, extraordinary circumstances.

³²⁶ EURALIUS also recommends that (1) the file should be checked for any missing information; (2) the parties should indicate witnesses and the topic of their deposition where appropriate. See EURALIUS, *Feasibility Study on Measures to Shorten the Duration of Court Proceedings* (Tiranë, EURALIUS, 2006), p. 48.

- The responsibility of the courts to ensure efficient trials should be stressed and detailed in *administrative instructions* issued by the Minister of Justice.
- The Minister of Justice should conduct research to establish why certain criminal courts are more efficient in managing their case flow. Once identified, these administrative “best practices” should be shared with the chief judges of all courts. The latter should strive to adopt and implement these practices, by making better use of their resources, and to avoid unnecessary delays in processing case.
- Mandatory training seminars on procedures and techniques of case-flow management should be organised for criminal appellate courts’ judges and court administrators.
- Reports on the age and status of pending cases should be prepared regularly for the chief judge by the presidents of appellate panels.
- The chief judge of the court of appeals should closely monitor the size, age and status of pending caseloads to ensure that the case processing times in individual cases do not exceed the requirement of the speedy trial rule.

Notification of Summons

- All actors involved should strive to avoid any unjustified delays in the conduct of criminal appellate hearings, and appropriate measures should be taken by the competent authorities in responding to such delays.
 - Where delays are caused by the unjustified and repeated absence of defence counsel, the National Chamber of Advocates should take appropriate disciplinary measures (e.g., issuance of written warning) in accordance to the power with which it is vested under the law.³²⁷

³²⁷ The Law on Advocates calls on lawyers to respect, *inter alia*, the rules of professional ethics. It also states that, in case of violation of provisions regulating the activity of the advocates, the disciplinary commission of the advocacy chamber can take disciplinary measures, including written warnings, against the lawyer concerned. See Law No. 9109, dated 17 July 2003, “On the profession of advocate in the Republic of Albania”, articles 9 and 34, section (a).

- The CPC could be reviewed to include the possibility for the courts to impose fines for the duly summoned parties who, without acceptable justification, fail to appear.
- The CPC could be reviewed to include the possibility for the court to adopt disciplinary measures against defence lawyers who, without justification, fail to appear.
- The CPC could be reviewed to include the possibility for the court to replace prosecutors who, without justification, repeatedly fail to appear.
- The presiding judge should try to avoid postponements where duly summoned parties, without proper justification, have failed to appear.
- Rules of notifications should be revised:
 - The CPC may be amended to require that the appellant expressly state, on the notice of appeal, his address for future service of court notices. Any document delivered to that address should be deemed to have been served on the appellant. Where the appellant is in custody at the time he files the notice of appeal, he should state the name of the institution in which he is in custody together with another address for service other than that of the institution.
 - A new provision should be introduced to empower the court to issue an order of apprehension of a defendant who, duly summoned to a court hearing and without justification, has failed to appear.
 - Any notification should require the recipient to confirm and give additional information relevant for a successful notification.
 - All communications from courts should specify whom to contact in case of problems to appear as summoned.

CHAPTER 4 TRANSPARENCY AND ACCESS TO COURT PROCEEDINGS

“The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of power...Without publicity, all other checks are insufficient”.

In re Oliver, 333 U.S. 257, 68 S. Ct. 499 (1948)

I. INTRODUCTION

The openness and transparency of judicial activities and court proceedings are important principles that foster many fundamental values, including public confidence in the judicial system, understanding of the administration of justice and judicial accountability. Access to information from courts and court administrations is indispensable in preventing corrupt practices, protecting the right to a fair trial as well as guaranteeing genuine access to justice. The principle of “open justice” has been interpreted by some authoritative sources as conferring a public right to “discuss and put forward opinions and criticisms of court practices and proceedings”.³²⁸

Albanian law establishes a general duty on the judiciary, similarly to that of other government agencies, to provide access to information contained in

³²⁸ Canadian Broadcasting Corp v. New Brunswick (Attorney general) [1996] 3 SCR 480, [23]. See also the United States Supreme Court’s decision in *Richmond Newspapers v. Virginia*, 448 U.S. 444 (1980).

See also Jeremy Bentham for a non judicial interpretation of the principle of open justice: “Publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial” Jeremy Bentham, *The Works of Jeremy Bentham*, vol. 4 (London, John Bowring, 1838-1843), pp. 316-17.

official documents upon request.³²⁹ Beyond information about issues relating to daily judicial activities and proceedings, this also implies transparency about court decisions and other court documents. To guarantee this, courts must make information about oral hearings easily and promptly accessible, and facilitate public attendance at these hearings.³³⁰ Public access to court records and registers must also be guaranteed.

This chapter briefly introduces the international and domestic legal framework on the right to a public hearing and to information about judicial activities. It then discusses how these rights are reflected in the Albanian practice in relation to the right of public access to court proceedings and judicial decisions. The issues of transparency of trial records and court registers are also briefly discussed. Some recommendations are finally formulated to address the problems observed in these areas.

³²⁹ Law no. 8503, dated 30 June 1999, "On The Right of Information About Official Documents", article 3 states:

Every person has the right to request information about official documents that have to do with the activity of state organs and persons who exercise state functions, without being obliged to explain the motives.

A public authority is obliged to give all information related to an official document, except for cases when it is provided otherwise by law.

Every piece of information about an official document given to a person may not be refused to any other person who requests it, except when this information constitutes personal data of the person to whom the information was given.

It should be noted that the right of access to information contained in official documents might be more limiting than the right to access information held by public authorities. Indeed, the former might not include the obligation by public authorities to generate information they do not hold, when the answer to a request cannot be extracted from existing documents. While public authorities should not be required to generate new information in satisfying a request, they should not in principle be exempted from extracting information from documents they hold, even when this requires them to produce a new document. According to a commentator, "the usefulness of an access regime would be severely undermined if it were limited to reading, or making copies of existing documents". See "The importance of the right of access to information held by public authorities, and the need for the United Nations to take steps to further elaborate, codify, protect and promote this right", presentation by Sandra Coliver at the UN Conference on Anti-Corruption Measures, Good Governance and Human Rights, Warsaw, 8-9 November 2006, p. 9, available at <http://www.ohchr.org/english/issues/development/governance/docs/Coliver.pdf> (last accessed on 19 November 2007).

³³⁰ Van Meurs v. the Netherlands (215/1986), 13 July 1990, Report of the Human Rights Committee, (A/45/40), 1990, para.6.2.

II. TRANSPARENCY OF COURT ACTIVITIES AND PROCEEDINGS: THE RIGHT TO A PUBLIC HEARING

The right to a public hearing is enshrined in international law.³³¹ This right applies not only to the parties in the case, but also the general public, including representatives of the media, all of whom have the right to be present at oral hearings on the merits of a case. This right cannot be limited only to a particular category of persons.³³² The purpose of this guarantee is to “protect litigants from the administration of justice in secret with no public scrutiny”, thereby fostering public confidence in the courts and contributing to the achievement of a fair trial.³³³

The general principle of public hearings has few, limited exceptions. Courts can exclude all or part of the public only in the interest of justice, morality, public order, national security, or privacy of the parties.³³⁴ Further, under international law, the right can be limited in its application to appellate proceedings.³³⁵ If, however, a court of appeals has jurisdiction to decide questions of fact as well as law, an oral hearing in public may be required, depending on the

³³¹ International law prescribes that “everyone is entitled to a [...] public hearing”. See UDHR article 10; ECHR article 6, section 1; ICCPR article 14, section 1. Except in narrowly defined circumstances, court hearings and judgments must be public. Human Rights Committee General Comment 13, para. 6.

³³² Human Rights Committee General Comment 13, para.6.

³³³ *Pretto v. Italy* A 71 para 21 (1983). The Human Rights Committee has stated that the “publicity of the hearing is an important *safeguard in the interest of the individual and of the society at large.*” General Comment 13, para 6.

³³⁴ See ECHR article 6, section 1; ICCPR article 14, section 1. The European Court of Human Rights has considered permissible the exclusion of the public from divorce proceedings and from medical disciplinary proceedings for the protection of the private life of the parties, and has held that “the interest of justice” may justify the giving of evidence by witnesses *in camera* so as to ensure their safety. See D.J. Harris, M. O’Boyle, C. Warbrick, *Law of the European Convention on Human Rights* (London, Butterworths, 1995), p. 220.

See also CPC, arts. 339-340, according to which a judge may order to hold a criminal trial behind close doors: when publicity may offend societal morality or result in the disclosure of state secrets, if this is requested by a competent authority; to protect court order from incidents that might impair the normal conduct of the hearing; to protect the witness or the defendant; or, when necessary, to interrogate juveniles.

³³⁵ The European Court of Human Rights has held that, insofar as there has been a public hearing before the trial court, “the absence of ‘public hearings’ before a second or third instance court may be justified by the special features of the proceedings concerned”, such as the fact that proceedings may involve only an appeal on points of law. See *Ekbatani v. Sweden*, ECtHR, 26 May 1998, para. 31 (citing the *Monnell and Morris* judgment, regarding a leave to appeal, and the *Sutter* judgment, regarding proceedings before the Court of Cassation).

circumstances and on what is at stake for the defendant.³³⁶ To guarantee the right to a public hearing, courts must make information about oral hearings easily and promptly accessible and facilitate attendance by members of the public.³³⁷

A. Access to the Trial Schedule

The European Court of Human Rights has stated that “a trial complies with the requirement of publicity only if the public is able to obtain information about its date and place”.³³⁸ It follows that, as part of their obligation to ensure the publicity of a hearing, the authorities must make such information readily available to the public.

Article 24 of the Rules for the Organization and Functioning of the Judicial Administration provides that an office for public relations be established in every court to inform the public and the media about court activities. The office is tasked, *inter alia*, with the preparation and publication of information related to the list of trials.³³⁹ While the Rules seem to provide for the existence of a public relations or media information office in each court,³⁴⁰ no such facility seems to exist in Albanian courts of appeals. In Durrës and Vlora, the court chancellors are unofficially charged with acting as the contact persons in relationship with the public. At the Shkodra Court of Appeals, the chief secretary is responsible for contacts with the general public and responds to requests, whereas the chancellor maintains relationships with the media and prepares the trials schedule. In all cases,

³³⁶ In *Kremzow v. Austria*, the ECtHR held that the presence of the defendant was necessary where the Supreme Court had to examine whether the sentence against him should be increased from twenty years to life imprisonment and whether this should be served in a normal prison instead of a special institution for mentally deranged offenders. Given the gravity of what was at stake for the defendant, the ECtHR stated that he ought to have been able “to defend himself in person” as required by article 6, section 3 (c) of the ECHR, and that the State was under a positive duty to ensure his presence in court in such circumstances. The ECtHR thus found a breach of ECHR article 6, section 1, in conjunction with section 3 (c). See *Kremzow v. Austria*, ECtHR, 21 September 1993, paras. 67-69. See also *Ekbatani v. Sweden*, in which the main issue considered by the Court of Appeals was that of the applicant’s guilt or innocence. Proper consideration of that issue, in the ECtHR’s view, ought to have included a full rehearing of the applicant and the complainant by the court. Because the Court of Appeals had failed to do so, the ECtHR concluded that the Swedish government was in violation of article 6, section 1 of the ECHR. *Ekbatani v. Sweden*, ECtHR, 26 May 1998, paras. 32-33.

³³⁷ *Van Meurs v. the Netherlands* (215/1986), 13 July 1990, Report of the Human Rights Committee, (A/45/40), 1990, para 6.2.

³³⁸ See *Riepan v. Austria*, ECtHR, 14 November 2000, para 29.

³³⁹ Minister of Justice Order no.1830, dated 3 April 2001, “Regulation on the organisation and functioning of the judicial administration”, article 24, section 8.5.

³⁴⁰ *Id.*, article 24.

those involved have expressed their concern that these obligations burden them beyond their official duties.³⁴¹

While many Albanian appellate courts post public notices of criminal and civil appellate hearings, the degree of accuracy and consistency with which this is done varies in practice. As indicated below, a number of appeals courts have not been publicly displaying a complete, accurate and updated trial schedule. This may breach a defendant's right to a public hearing.

In **Tirana**, lots for establishing the trial panel are drawn once a month, after which the trial schedule is published. While, according to court officials, the information on the trial schedule is published regularly once a month, no efforts have been made to make this reasonably accessible to the public. The schedule of civil hearing is posted mixed with that of criminal hearings, making it difficult and time consuming for anybody who consults the lists to find out the date of a given hearing. Unlike the Tirana District Court, which has a computer terminal service at its entrance providing updated information to the public on the trial hearings, the hearing schedule at the Court of Appeals is not updated. Some judges seem to believe that anybody interested will obviously go to the first hearing and then find out there when the next one will be. A member of the general public who misses any hearing is thus hindered in his attendance of future hearings.

In **Vlora**, the schedule is posted every ten days on a billboard placed on the external walls of the courthouse. Nonetheless, consultation by the public is hampered by the hearing dates not being very clearly readable, whereas the continued display of the old schedule of hearings creates confusion. Essential information, such as the name of the judge or the courtroom number, is missing. In addition, the schedule is not updated when hearings are adjourned.

In **Shkodra**, the trial schedule is regularly posted outside the Court of Appeals on a weekly basis and updated whenever necessary. A copy of the schedule is also posted on the information board of the district courts located in the jurisdiction of the court of appeals. The trial schedule lists all necessary information, including the hearing date, the defendant's name, the judge's name, the crime charged as well as the courtroom where the hearing is to be held.

In **Durrës**, the schedule is posted once a month outside the Court of Appeals, making it easy and practical for the public to consult it. While the schedule is not updated where trial hearings are adjourned, parties to the trial are notified in writing.

³⁴¹ Telephone interviews conducted by OSCE Presence in Albania's Project Office's staff, 20 March 2007.

B. Public Access to Court Buildings

The right to a public hearing also requires that the relevant authorities provide adequate facilities for the trial attendance of interested members of the public.³⁴²

In Albania, although domestic law guarantees the publicity of hearings, the degree to which the public can actually participate at appellate hearings varies from court to court due to the limited space in the various courthouses. The OSCE Presence in Albania is concerned about the lack of waiting rooms for witnesses, which causes prosecution witnesses to have to wait together with the defendant to be called to give evidence at a hearing, raising serious security issues. For example, the Shkodra Court of Appeals does not have a waiting room inside the courthouse, so that people have to wait in the main corridor. Similarly, the Tirana Court of Appeals lacks a waiting room so that people have to wait in a bar adjacent to the courthouse until the name of the case is called by megaphone. While a new Court of Appeals was inaugurated in Vlora in late 2006, this has no waiting or witnesses' rooms.³⁴³

While, in some cases, the inadequate size of the courtrooms hinders access of the public to the hearings, in others, court policies and practices restrict access for specific categories of individuals. For example, according to a Tirana Court of Appeals written internal regulation, media representatives are allowed to attend hearings only after their presence has been notified to the presiding judge by the guard. On some occasions, it has been noticed that OSCE Presence in Albania's officials, but no members of the media, have been allowed to attend court hearings. On others occasions, members of the public have been asked why they wanted to observe a case, after which the secretary has inquired with the chair of the court before allowing them to enter.³⁴⁴

III. ACCESS TO AND PUBLICATION OF COURT DECISIONS

Broad access to judicial decisions allows public scrutiny of the work of the judiciary while at the same time fostering transparency and judicial accountability. The publication of court decisions educates the legal community

³⁴² Van Meurs v. the Netherlands (215/1986), 13 July 1990, Report of the Human Right Committee, (A/45/40), 1990, para. 6.2.

³⁴³ The new courthouse, opened on 3 November 2006, has four courtrooms, each of them able to accommodate 50-70 persons.

³⁴⁴ OSCE Presence in Albania, *Analysis of the Criminal Justice System of Albania*, (Tiranë, OSCE, 2006), p. 165.

and the wider public on legal and judicial matters while at the same time favouring the development of a country's jurisprudence. This principle has two corollaries: first, all court judgments must be made public except in narrowly defined circumstances³⁴⁵ and should be made available to any interested party; second, the most important (if not all) criminal appellate decisions should be published and widely disseminated.

A judgment is considered to be public if it is pronounced orally in a session of the court which is open to the public or if a written judgment is published. The requirement that judgments be made public applies even if the public has been excluded from all or parts of the trial.³⁴⁶

The ECtHR has held that the right to a public judgment is violated if judgments are made accessible only to a certain group of people or if only people having a specific interest are allowed to inspect a judgment.³⁴⁷ In Recommendation No. R (95) 12 on the Management of Criminal Justice, the Council of Europe has expressly recommended that the judiciary be committed to an information dissemination policy that includes an acceleration of information flow and the provision of better feedback on the outcome of the cases with which it deals. The Council of Europe also has suggested that the criminal justice administration put a stronger emphasis on "developing better relations, particularly to address specific needs and concerns of users of criminal justice, the mass media... citizens and their democratic institutions..."³⁴⁸ In addition, Council of Europe Recommendation R (2001) 3 on the Delivery of Court and other Legal Services through the Use of Technology states that it should be as easy as possible to communicate with the courts by means of new technologies, and calls on the court system of states parties to make their information, including case law, accessible to the public.³⁴⁹

³⁴⁵ ICCPR article 14, section 1; ECHR article 6, section 1. The exceptions to the requirement of a public judgment under article 14, section 1 of the ICCPR concern cases involving juveniles, whose privacy is to be protected, matrimonial disputes and cases about the guardianship of children. The right to a publicly read judgment applies to decisions rendered by all courts, including special and military courts and courts of appeals. See Human Rights Committee General Comment 13, para. 4.

³⁴⁶ Human Rights Committee General Comment 13, para. 6.

³⁴⁷ In the Sutter Case, in which a judgment was not read aloud in open court but the parties to a case received copies of it and the judgment was deposited in the court registry, available to anyone who could establish an interest, the European Court of Human Rights held that there was no violation of article 6, section 1, of the ECHR. *Sutter v. Switzerland*, ECtHR, 22 February 1984, para. 34.

³⁴⁸ Recommendation No. R (95) 12 on the Management of Criminal Justice, Committee of Ministers of the Council of Europe, September 1995.

³⁴⁹ Recommendation No. R(2001) 3 on the Delivery of Court and Other Legal Services to the Citizen through the Use of Technology, Committee of Ministers of the Council of Europe, article 3.

The Albanian Constitution provides that all judicial decisions must be publicly announced.³⁵⁰ In addition, as provided in the Law on the Right of Information on Official Documents, Albanian citizens can generally request information on official documents pertaining to the activity of state organs without explaining the motives of their requests.³⁵¹ Under the same law, final decisions on specific questions (such as, arguably, court decisions) shall be prepared in advance in anticipation of requests from the public. Furthermore, copies should be prepared in advance of official documents that previously have been given to at least one person and that might therefore be of interest to other persons.³⁵² The same law also requires public authorities to adopt “rules and create structural and practical facilities for the receipt by the public, in an exact, full, appropriate and speedy manner, of information about official documents”.³⁵³ While this is crucial for detailing and clarifying the contours of the right of access to official documents (including judicial decisions), so far no steps have been taken by the court authorities or the Ministry of Justice to spell out the details of such entitlements.³⁵⁴

The Albanian CPC provides that “whoever is interested” may obtain, at his or her own expenses, during or after the conclusion of judicial proceedings “copies, extracts or certificates of specific documents”.³⁵⁵ While the general term “documents” would certainly include judicial decisions, the wording of the provision seems to restrict the possibility to request these to those having an “interest”. The CPC Commentary, while it reiterates that such a request must be honoured only if it comes from an “interested party”, does not shed light on the nature of the interest nor on how this provision should be interpreted.³⁵⁶ While the request regarding preliminary investigation documents is examined by the prosecutor, and the request regarding judicial examination documents is examined by the court that rendered the decision, nothing is stated about other documents.³⁵⁷ Article 197 of the CPC states only that, on the request of an interested party, the proceeding authority “may” authorise the secretariat to issue certified copies of the document,³⁵⁸ opening the door to a degree of discretion.

³⁵⁰ Albanian Constitution article 146, section 2.

³⁵¹ Law no. 8503, dated 30 June 1999, “On the Right to Information About Official Documents”, article 3.

³⁵² *Id.*, article 9, sections (a) and (c).

³⁵³ *Id.*, article 6.

³⁵⁴ While the draft Model Regulation on the Right to Information prepared by the People’s Advocate in co-operation with USAID defines the meaning of official document and specifies how requests for information should be submitted, this does not cover documents such as final court decisions.

³⁵⁵ CPC article 105, section 1.

³⁵⁶ CPC Commentary, p. 188.

³⁵⁷ CPC article 105, section 2.

³⁵⁸ CPC article 197. Note, however, that the CPC Commentary states that the proceeding body issues certified copies of the document “in every case, on request of an interested person”, seemingly eliminating the discretion. CPC Commentary, p. 253.

Nevertheless, the Rules for the Organization and Functioning of the Judicial Administration state that the secretary of the court has the duty, *inter alia*, to issue copies of the decisions and other procedural documentation to citizens.³⁵⁹ This seems to be inconsistent with what is stated in the procedural code.

A. The Albanian Practice

In Albania, access by the public to appellate court decisions is limited, compromising the basic right of the public to scrutinize the work of the courts and to review decisions taken in its name. In fact, it is often difficult even for the parties in a case to obtain copies of decisions. Instead of making court judgments generally available to any interested party, decisions to provide access to them are often made by the relevant court authorities in each individual case, leading to *ad hoc*, discretionary practices that may affect the right to a fair trial.

For example, the Chair of the **Tirana Court of Appeals** told the OSCE Presence that, while parties to the case and their close relatives can get access to criminal appellate decisions, no such right would automatically apply to third parties (i.e., individuals without a relation to, or with a relatively narrow interest in, the case). In such cases, instead, the decision to provide access to a court decision is made by court officials on a discretionary, case by case basis. This is not in compliance with international fair trial standards. The ECtHR has held that the right to public judgment is violated if judgments are made accessible only to a certain group of people or *when only people having a specific interest are allowed to inspect a judgment*.³⁶⁰ Finally, there is a well-established practice of asking journalists who request copies of a court decision to enter their name and affiliation in a registry, and to expect them not to be critical of appellate decisions, so as not to compromise the court's reputation and credibility. This practice should be condemned, as it is exactly journalists who may, through their critical and informed writing, make the public aware of potential misdeeds and miscarriages of justice.

In **Vlora**, while journalists are normally provided with copies of decisions issued by the Vlora Court of Appeals upon submitting a written request, that court's secretary has stated to the OSCE her reluctance to provide decisions to individuals not related to the case, and has indeed done so rarely and on a discretionary basis. According to the same person, it would be "suspicious" to issue a decision to an individual who "has no links to the case".

³⁵⁹ Minister of Justice Order no.1830, dated 3 April 2000, "Regulation on the organisation and functioning of the judicial administration", article 19, section 18.

³⁶⁰ See *Sutter v. Switzerland*, ECtHR, 22 February 1984.

In **Shkodra**, decisions of the court of appeals are made available only to the interested parties upon a written request, despite the fact that this is not required by the law.³⁶¹ According to the chancellor of the court, the law prescribes that the name of the requester be entered into a special register. Within 24 hours from the submission of the request, the court decision is made available to the requester against payment of a fee.

In **Durrës**, five copies of appellate court decisions are made available upon request to the parties to a case. Other members of the public must submit a written request that needs to be approved by the Chair of the Court of Appeals. According to the Chancellor of the Court of Appeals, no such requests have ever been filed to date.

Unlike decisions of selected district courts³⁶² and the High Court, which are published, respectively, on the courts' website and in the High Court Case Law Reporter, decisions of the Courts of Appeals are to date not published.

IV. TRIAL RECORDS

The accurate keeping of court records provides the public with a means to scrutinize the performance of the judiciary, in order to ensure that the courts adjudicate cases in a fair, impartial and transparent way. In criminal cases, minutes of courtroom proceedings may be kept in a summary or verbatim form, and in handwriting, where technical means are unavailable.³⁶³ Where actions to be recorded are simple or when mechanical means are unavailable, the court may decide to keep them in a summarized form. In the latter case, the court must ensure that the essential parts of statements are reproduced.³⁶⁴ During the trial, it is the task of the court secretary to reproduce the questions asked by the parties and the chair of the panel as well as the answers of the interrogated persons. It is the responsibility of the chair of the panel to ensure that records are kept in an accurate and clear form.³⁶⁵

³⁶¹ The law only states "Every person has the right to request information about official documents...without being obliged to explain the motives". It does not prescribe any form for such request. See Law no. 8503, dated 30 June 1999, "On the Right to Information about Official Documents", article 3.

³⁶² The Tirana District Court publishes most of its decisions on its website and makes them available in hard copy. Other district courts that provide online access to texts or excerpts of selected decisions are Shkodra, Fier and Kavaja. See OSCE Presence in Albania, *Analysis of the Criminal Justice System of Albania*, (Tiranë, OSCE, 2006), p. 160.

³⁶³ CPC articles 115.

³⁶⁴ CPC article 120.

³⁶⁵ CPC article 345, section 2.

The maintenance of accurate and complete trial records is especially important in the context of appellate proceedings, where the court is called to scrutinize the performance of the first instance judges to verify that they have correctly interpreted and applied the law to the facts. Inaccurate trial records leave the trial process open to manipulation and deprive the parties of a critical tool for the preparation of any appeal.

The OSCE Presence in Albania has observed that, in several cases, the trial records kept by Albanian courts are incomplete in that they either fail to indicate the questions put to the witnesses by the parties, or to indicate which parties (e.g., the prosecutor, the defence counsel) had asked the question. Further, where witnesses or the parties are called to confirm or are confronted with allegedly contradictory statements given by them at the pre-trial stage, the records often fail to report altogether the content of the alleged contradictions.

In some cases, the poor quality of handwriting of the court secretary compiling the record hampers the right of any interested party effectively to have access to these records and to review them. In Shkodra, for instance, OSCE Presence in Albania's court observers have been limited in their capacity to consult files for this reason. A USAID-funded project to enable secretaries to type minutes by using computers was partly implemented at the District Courts of Tirana, Fier, Kavaje, Mat, Shkodra and Vlora, but later cancelled due to problems in donor co-ordination.³⁶⁶

V. ACCESS TO COURT REGISTERS

Included within the open courts principle and in the rights of access to official documents is the public's right of access to court registers.

When seeking access to consult court registers in the context of its analysis of criminal appellate cases, the OSCE Presence in Albania has sometimes encountered resistance and suspicion by court administrators. In some cases, the OSCE Presence in Albania has been denied access to consult even the most basic court registers and documents. For instance, the Chief Secretary of the Tirana Court of Appeals has repeatedly denied access to consult the register on criminal appeals, and it was only possible to receive copies of it after filing an official request with the chair of that court. In Gjirokastra, the secretary of the District Court has denied the OSCE Presence in Albania access to consult

³⁶⁶ ABA/CEELI, *Judicial Reform Index for Albania*, volume III (Washington, D.C., American Bar Association, October 2006), p. 51.

the register in which the date of reception of the case file by the secretariat was recorded, claiming that this was only for “internal use”.

Furthermore, the OSCE Presence in Albania has noted that practices in the keeping of court registers vary from court to court, creating confusion and *de facto* hampering equal access to judicial information and documents.

For instance, both the Tirana District Court and the Durrës District Court have registers indicating, among other information, the date on which the decision was taken in a case, and the date on which the case file (including the decision) is deposited with the court secretariat.³⁶⁷ The Shkodra District Court, however, does not have any register reporting the date on which the case file is deposited at the secretariat. According to the chancellor of the Vlora District Court, while no such register exists, the court secretaries might write down this date in their private notebooks. At the Gjirokastra District Court, the secretariat keeps a register indicating the date on which the case is concluded as well as the date on which the case file is handed over to the chief secretary. As already noted above, the secretary of that court denied the OSCE Presence in Albania access to this register, claiming that it was only for “internal use”.

VI. CONCLUSION

As mentioned above, public access to judicial activities and information serves important public functions, namely the promotion of an informed public and of a culture of openness and accountability in the judicial system. These, in turn, advance the fair and efficient administration of justice.

In ABA/CEELI’s 2006 Judicial Reform Index, the Albanian judiciary obtained a negative score in terms of transparency and accountability. According to ABA/CEELI, despite the legal guarantees of independence, the judiciary remains vulnerable to undue influence and is widely perceived as being corrupted.³⁶⁸ In a 2005 survey, Albanians citizens ranked the judiciary as one of the most corrupt institutions in the public sector, while only 35% of them stated that they trusted it to be able to deliver justice in criminal cases.³⁶⁹ As has been observed

³⁶⁷ In Tirana, the register is called “Directory of criminal decisions for the first instance courts” (“*Numerator i vendimeve penale për gjykatat e shkallës së parë*”); in Durrës, the register is called “Register of criminal cases” (“*Regjistri i çështjeve penale*”).

³⁶⁸ ABA/CEELI, *Judicial Reform Index for Albania*, volume III (Washington, DC, American Bar Association, 2006), p. 43-44 (also noting that despite the numerous reports and allegations of corruption, there were no criminal prosecutions of judges on corruption charges in 2006).

³⁶⁹ Casals & Associates and Institute for Development Research and Alternatives, *Corruption in Albania: Perception and Experience, SURVEY 2005- Summary of findings* (June 2006), pp. 6,14.

above, transparency of judicial proceedings in Albania is hampered by a wide range of practical and logistical difficulties, including inconsistent practices in providing updated information about court proceedings, inadequate court facilities and limited access to judicial decisions. Inconsistencies in the practice of keeping court registers and inaccurate trial records may also impair transparency of court activities.

While some of these issues can be addressed only by channelling adequate funding and resources into the court system – e.g., by setting up internet pages at the appeals courts similarly to what has been done at many district courts, or by enhancing public access to appellate trials by making available waiting rooms in all courthouses – others may require administrative interventions to clarify the scope and practical implications of the right of access to judicial information. A lack of specific and detailed rules and regulations that guarantee access to judicial information, coupled with the concrete difficulties encountered by the parties and the general public in obtaining that information, hampers the realisation of the principles of open and transparent justice and the consolidation of the rule of law in Albania.

VII. RECOMMENDATIONS

General

- All public officials, including court and justice officials, should be trained on the right to information about official documents.
- Through public awareness campaigns, the general public should be made aware of its right to attend trials and to obtain information about public documents, including court decisions.
- Each appellate court should have appropriate structures in place to respond to requests for information by the public. This could be done:
 - By establishing a press or information office in each court of appeals.
 - By appointing one of the court staff as a focal point or as a press officer.
- Court inspectors at the Ministry of Justice and at the High Council of Justice should take transparency issues into account when conducting their inspections.

Access to Judicial Information and Hearings of the Courts of Appeals

- All criminal courts, including appellate courts, must make available information on the date, time and venue of public hearings to the public on a regular and consistent basis.
 - The information should be posted in a place readily accessible to all members of the public, i.e., hearing schedules should be posted on a bulletin board in public view.
 - The information should be updated on a daily basis and for each trial.
 - The hearing schedule should be compiled and kept in a clear and orderly fashion.
- For this purpose, the Ministry of Justice should issue guidelines on public access to justice, requiring court administrators and court chairs to ensure that:

- Complete an updated hearing schedules are posted on a bulletin board in public view.
- As a general principle, and with the exception only of cases expressly provided by law, appellate proceedings are public, and that no members of the public can be excluded or limited in their access to them.
- Court practices requiring special “access permissions” for specific categories (i.e., journalists) should stop immediately.
- All appellate courthouses in Albania should be provided with adequate facilities for the attendance at appellate hearings by the public, and each should make available dedicated witness rooms inside the court buildings.

Court Decisions

- All appellate court officials should receive training specifically on the right to access court decisions.
- In the short-term, all appellate court decisions in criminal cases should be made available to any interested party on request and payment of a fee covering only costs, in accordance with the law. No restrictions whatsoever should be applied to members of the public who make such request. Thus, any policy asking the requester to provide justifications for such request should be avoided.
- In the longer-term, a website should become operational at all courts of appeals. The website should report summaries of the courts’ decisions, chronologies of the hearings and reasons of continuances, and provide the ability to see whether a case has been appealed to the High Court.
- Significant numbers of courts decisions should be published in their entirety in the longer term. Given that this is an ambitious undertaking, in the short term it would suffice if, at least, the most significant appellate court decisions were published in their entirety. This would include cases that either develop the law or introduce or enhance a new point of law. In addition, it would be useful to publish at least a certain number of randomly selected decisions in order to ensure that judges know that any decision they write could be subject to easy public scrutiny.

- The Ministry of Justice's guidelines on public access to justice proposed above should contain standardized rules and procedures on how to accommodate requests of the public for appellate court decisions. The standardized rules should emphasise that the principle of "open justice" is the general rule, and may be subject only to limited and carefully tailored exceptions when the principle needs to be balanced against other competing values, such as an individual's right to privacy or security.³⁷⁰ The guidelines should also set modalities for providing information on judicial decisions and other documents to the media.

Court Registers

- More consistency and accuracy is needed in the keeping of court registers relevant to criminal appellate proceedings, and uniform standards should be used to identify and record cases. Information in the court registers should include an indication of the hearing date, the file number, the parties, the court location, the criminal offence, as well as information about the document itself.
- The High Council of Justice should issue guidelines to clarify the meaning and scope of the right of public access to acts of the judicial administration. The model policy, while based on the core principle of equal access to judicial acts, should also recognize that there may be exceptions to this principle. These restrictions can be justified only when they are needed to address serious risks to individual privacy and security rights, or when there are other important interests at stake, such as those related to the proper administration of justice. Any restrictions must be carefully tailored so that the impact on the open courts principle is minimal and must be issued only when the benefits of the restrictions outweigh their negative effects.

Court Records

- Techniques for the preparation of trial and appellate records should be improved, and methods should be adopted that minimize the time necessary for the preparation of transcripts of trial court proceedings while ensuring their accuracy and completeness.

³⁷⁰ See, e.g., Canadian Judicial Council Model Policy, available at <http://www.cjc-ccm.ca/article.asp?id=3000> (last accessed on 19 November 2007).

- New electronic and technological processes for the preparation of minutes should be adopted in all courts of appeals so as to allow rapid and accurate record-keeping.³⁷¹
- The accuracy of trial records should be improved. More specifically, the practice of not reporting *verbatim* questions and answers asked at trial by the parties should be abandoned.

³⁷¹ According to CPC article 115, records may be kept in steno type, other technical means where these are available, or in handwriting. See CPC article 115, section 2.

ANNEXES

ANNEX A

**TABLE OF COURT FILES CONSULTED IN THE CONTEXT
OF CRIMINAL APPELLATE PROCEEDINGS**

Name of defendant	Case number and date of registration at the first instance court	Charge	Date of pronouncement of the first instance court decision	Date of filing of notice of appeal	Date of pronouncement of the appellate court decision
Tirana Court of Appeals					
Gazmir Koleci	481; 9 January 2004	Attempted murder; illegal possession of weapons (CC arts. 76, 22, 278/2)	4 October 2004	13 October 2004	11 March 2005
Leonard Hanku	440; 6 January 2003	Commission of sexual or homosexual intercourse by force with minors between the ages of fourteen and eighteen (CC art. 101/1)	22 May 2003	29 May 2003	6 October 2003
Altin Diko	757; 22 March 2004	Non-consensual sexual intercourse with a mature woman (CC art. 102)	14 July 2004	23 July 2004	14 January 2005
Tefta Dosti (withdrawn)	600; 4 February 2005	Passive corruption of persons who exercise public functions (CC art. 259)	3 March 2005	11 March 2005	14 July 2005
Gjir-okastra Court of Appeals					
Bledar Andoni	56; 9 March 2005	Trafficking of women (CC art. 114/b, para. 1)	20 June 2005	29 June 2005	24 November 2006
Arben Bardhi		Exploitation of prostitution under aggravating circumstances (CC art. 114/a, paras. 4 and 5)			
Sazan Hoxha		Exploitation of prostitution (CC art. 114)			
Rexhep Muçi	187 (48); 22 December 2005	Breach of traffic regulations causing death <i>changed into</i> murder upon negligence (CC art. 290/1 <i>changed to</i> art. 85)	6 February 2006	16 February 2006	29 March 2006

Shkodra Court of Appeals							
Ton Rroku	35/288; 28 May 2004	Intentional murder; illegal possession of weapons (CC arts. 76, 278/2)	28 February 2005	9 March 2005	7 June 2005		
Gjon Kovaçi Pjeter Kovaçi	234; 26 April 2005	Attempted premeditated homicide in collusion (CC arts. 78/1, 22, 25)	21 December 2005	29 December 2005	18 July 2006		
Sami Berisha	142; (the date is not available) ¹	Threat (CC art. 84)	3 October 2005	4 October 2005	23 January 2006		
Hamdi Paça Syl Hoxha	11/191; 22 March 2005	Abuse of office; falsifying or use of falsified civil records (CC arts. 248, 191/1)	11 February 2006	14 February 2006	31 May 2006		
Sirian Alia (withdrawn)	334; 12 September 2006	Threat; illegally possession of weapons (CC arts. 84, 278/2)	24 July 2006	28 September 2006	17 November 2006		
Ardian Guri	99/353; 2 September 2004	Traffic of narcotics (CC art. 283/a)	24 October 2005	4 November 2005	28 February 2006		
Vlora Court of Appeals							
Gjergj Selimaj	116; (the date is not available)	Intentional murder due to the special qualities of the victim (CC art. 79/e)	5 October 2004	13 October 2004	22 December 2004		
Taulant Saçaj	134; (the date is not available)	Exploitation of prostitution under aggravating circumstances (i.e., committed out of the country) (CC art. 114/a sect. 5)	8 July 2005	12 July 2005	23 September 2005		
Selvie Liçaj	332; 10 September 2004	Manufacturing and selling of narcotics; illegal possession of weapons and military ammunitions (CC art. 283/1, 278/2, 278/3)	6 December 2004	13 December 2004	3 June 2005		

¹ Note that the date when the case was registered at the first instance court was not found in the decision issued by this court.

ANNEX B
TABLE OF DECISIONS ON DETENTION ON REMAND CONSULTED IN THE CONTEXT
OF CRIMINAL APPELLATE PROCEEDINGS

Name of defendant	Registration number at the first instance court	Charge	Date of pronouncement of first instance court decision	Date of filing of notice of appeal	Date of pronouncement of appellate court decision
Tirana Court of Appeals					
Bashkim Ibi	341	Negligent medical care (CC art. 96)	31 March 2006	10 April 2006	14 June 2006
Nasser Almalak	966	Sexual or homosexual intercourse in public places in collusion; prostitution in collusion (CC arts. 107, 25; 113,25)	20 August 2006	25 August 2006	7 September 2006
Fatmir Lala	77	Theft more than once (CC art. 134/2)	23 January 2006	31 January 2006	13 February 2006
Bilbil Tota	281	Theft in collusion (CC art. 134/2)	12 March 2006	21 March 2006	10 April 2006
Kledion Shijaku	92	Theft in collusion (CC art. 134/2)	27 January 2006	1 February 2006	15 February 2006
Elvis Ismailisufaj	140	Theft causing serious consequences (CC art. 134/3)	8 February 2006	13 February 2006	20 February 2006
Gjok Biba	319	Theft; illegal manufacturing and keeping of hunting and sport guns (CC arts. 134, 280)	24 March 2006	30 March 2006	10 April 2006
Arben Çela	1423	Falsifying document; falsifying school documents; falsifying health documents; falsifying stamps; falsifying civil registry records; manufacturing of devices to falsify documents (CC arts. 186, 187, 188, 190, 191, 192)	16 December 2006	16 December 2006	4 January 2007
Ermal Dedei	916	Illegal possession of weapons, bombs, mines or explosive materials (CC art. 278/2)	10 August 2006	10 August 2006	12 September 2006
Ferik Tafa	998	Manufacturing and selling narcotics in collusion; illegal possession of military ammunition (CC arts. 283/1, 278/3)	27 August 2006	6 September 2006	14 September 2006