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INTERNATIONAL LAW

STATE GUARANTEED LEGAL AID IN THE CONTEXT OF THE RIGHT TO FAIR TRIAL

Master Thesis

Master Thesis
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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ICCPR - The International Covenant on Civil and Political Rights

ECHR - The European Convention on Human Rights

ECtHR - The European Court of Human Rights

UK - The United Kingdom

US - The United States

UN - The United Nations

CCBE - Council of Bars and Law Societies of Europe

Recommendation No. R (93) 1 - Recommendation No. R (93) 1 "On Effective Access to the Law and to Justice for the Very Poor"

Directive (EU) 2016/1919, Directive 2016/1919 - Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

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

UN Principles and Guidelines, Principles - United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

CM - Committee of Ministers

UN Basic principles - The United Nations Basic Principles on the Role of Lawyer

MCILS - Maine Commission on Indigent Legal Services

INTRODUCTION

The relevance of this topic. For many centuries in Europe, legal aid was provided on a charitable basis and was not the responsibility of the state[1]. As early as the second half of the 19th century, the legal systems of many European states obliged lawyers to provide legal services to the people in poverty on a pro bono basis.[2] The modernisation of a legal aid's form took place in Germany in 1919 and in the Great Britain in 1949.[3]

Today, state-guaranteed legal aid is an integral part of the right to a fair trial. This right is reflected in such norms of International Law as Art. 14 of the International Covenant on Civil and Political Rights (ICCPR), Art 8 of the American Convention on Human Rights, Art. 7 of the African Charter on Human and Peoples' Rights. A similar requirement is stipulated in para. 4 of Art. 47 of the Charter of Fundamental Rights of the European Union, paragraph "c" of para. 3 of Art. 6 of the European Convention on Human Rights (ECHR), which includes the part stating that the state is obliged to provide accused with free legal aid if they do not have the financial means to cover the cost.

In spite of the fact that the Art. 6 of the ECHR is directly related only to free legal assistance in criminal cases, the practice of the European Court of Human Rights (ECtHR) obliges, in addition, under certain circumstances to provide such assistance in civil cases, cases on bringing persons to administrative responsibility, administrative cases.

The countries of European Union have various normative acts regulating provision of the legal aid[4].

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[1] Mauro Cappelletti,"Legal Aid in Europe: A Turmoil." *American Bar Association Journal* 60, no. 2 (1974): 206–8, http://www.jstor.org/stable/25726592

[2] Ibid p. 207.

[3] Ibid p. 207.

[4] The European Parliament and the Council of the European Union, Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes

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

- The European Parliament and the Council of the European Union, Directive (EU) 2016/1919 of 26 October 2016 on legal aid for suspects and accused persons

- The European Parliament and the Council of the European Union, Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings

This paper will focus on state-guaranteed unpaid legal aid in criminal cases, as problems in this area have an extremely negative impact on suspects and defendants. For example, they may be in custody for years waiting for a guilty or acquittal verdict.[5] In addition, participation in this category of cases requires from the lawyers high speed of decision-making, input of effort and energy participating in the conduct of procedural actions, for example, during detention, selection of preventive measures, search, interrogation, etc.

This Master Thesis will raise and analyse the issues of the negative impact on fair trial of such aspects as:

Firstly, insufficient level of payment and other problems with lawyers' remuneration to appointed lawyers by the state can serve as a demotivator for qualitative and full representation of the client's interests or even lead to lawyers strikes[6].

Secondly, the allocation of complex categories of cases to lawyers who do not have sufficient experience in handling them results in a critically ineffective defence.

Thirdly, courts should not interfere in the client-lawyer relationship, unless the suspect or defendant has alleged ineffective legal aid or has filed a disciplinary complaint against the lawyer. Instead, the state should provide the suspect or defendant with pervasive and timely access to information about the possibility of filing such a complaint in the event of an ineffective defence. In addition, states and lawyers' self-governance bodies should shorten the timeframe for processing such complaints.

Thus, this paper will demonstrate that there may be differences and contradictions between existing theory and practice in the provision of state-guaranteed legal aid in different states.

The scientific research problem is: What aspects and related factors of state-guaranteed legal aid negatively affect the fair trial?

The scientific novelty. The novelty lies in the fact that despite the widespread and long-standing implementation of state-guaranteed legal aid as an integral part of the right to the fair trial, countries, including developed and economically strong ones, their lawyers' self-governing bodies and lawyers themselves may contribute to the violation of this right.

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[5] Aebi, M. F., Cocco, E., & Molnar, L., SPACE I - 2022 – Council of Europe Annual Penal Statistics: Prison populations, 2023, p. 3, https://wp.unil.ch/space/files/2023/06/230626_SPACE-I_2022_FinalReport.pdf
- Aebi, M. F., Cocco, E., Molnar, L., & Tiago M. M., SPACE I - 2021 – Council of Europe Annual Penal Statistics: Prison populations, 2022, p. 3, https://wp.unil.ch/space/files/2023/05/SPACE-I_2021_FinalReport.pdf
-Eva Belmonte,Carmen Torrecillas, María Álvarez del VayoDavid Cabo, Miguel Ángel Gavilanes, Eva Belmonte, Carmen Torrecillas, María Álvarez del Vayo, David Cabo, Miguel Ángel Gavilanes, El Confidencial, et al. "One in Five People in EU Prisons Are in Pretrial Detention." Civio, n.d. https://civio.es/2022/05/10/use-and-abuse-of-preventive-detention-in-the-european-union/

[6] Carolan, Mary, David Raleigh, and Olivia Kelleher. "Criminal Courts Grind to a Halt as Barristers Strike, with Ashling Murphy Case Impacted." The Irish Times, October 3, 2023. https://www.irishtimes.com/crime-law/courts/2023/10/03/criminal-courts-grind-to-a-halt-as-barristers-strike-with-ashling-murphy-case-impacted/

It should be noted that such issues as the allocation of complex categories of cases to lawyers who do not have sufficient experience in handling them, the failure of the state to ensure that suspects and defendants are properly informed about the possibility of filing complaints in case of ineffective defence, and the length of the procedure for handling such complaints, for example, are not taken into account at all in the recommendations of the Council of Bars and Law Societies of Europe (CCBE) 2023 on the contrary to the aforementioned issue[7].

Thus, the paper will indicate specific examples of all the problems mentioned above, and will outline the assumptions that explain the causes of these problems. Moreover, the paper will propose concrete steps that may contribute to solving the above problems or at least mitigating their negative impact.

The level of analysis of the research problem. The subject of this paper consists of three distinct issues that will be analysed. This analysis is necessary to identify the impact of these issues on the legal aid guaranteed by the state and, as a consequence, on the right to a fair trial. It is worth noting that the frequency of mentioning by different authors of books, studies and scientific articles of the above-mentioned problems in different periods indicates the presence of relevance and demand for their research.

Thus, back in 1974 in the article "Legal Aid in Europe" A Turmoil Mauro Cappelletti mentions the strikes of lawyers in Germany in 1972 due to low fees for legal aid[8]. Despite existence of this problem back in the 70s of the last century, it remains relevant in the 21st century.

For instance, in 2014 in a joint work on a comparative study of legal aid in nine European countries "Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?" Maurits Barendrecht, Laura Kistemaker, Henk Jan Scholten, Ruby Schrader, and Marzena Wrzesinska indicate that these countries are trying to improve legal aid systems through changes in fees.[9] However, the above-mentioned work does not indicate the reason for the problem of low fees and does not identify specific steps taken by states to overcome this issue.

In his 2023 book "Tomorrow's lawyers. An Introduction to Your Future. Edition three" Richard Susskind states that due to cuts in legal aid, access to justice in England and Wales is under serious threat and could become a boon only available to the rich.[10] At the same time, the

[7] Council of Bars and Law Societies of Europe, *"CCBE Recommendations on legal aid"*, (23 March 2023), p. 3, https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ACCESS_TO_JUSTICE/ATJ_Guides_recommendations/EN_AtJ_20230331_CCBE-Recommendations-on-legal-aid.pdf

[8] See Cappelletti, *supra* note 1 para 1.

[9] Maurits Barendrecht, Laura Kistemaker, Henk Jan Scholten, Ruby Schrader, Marzena Brzezinski, «Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice? », (2014), p. 101.

[10] Richard Susskind, *Tomorrow's lawyers. An Introduction to Your Future. Edition three*, (United Kingdom: Oxford University Press, 2023), ISBN 978–0–19–286472–7, p. 106.

book does not pay sufficient attention to the problem, namely, the author only mentions the problem without describing possible ways to overcome it.

In addition, this problem has also been studied in the US. In 2012, the problems of low fees in the US were pointed out by Professor Richard Klein in his article "The Role of Defence Counsel in Ensuring a Fair Justice System"[11]. This article talks about the negative impact of the problem on lawyers, but does not reveal how it affects their clients and justice in general.

With regard to the issue of allocating complex cases to lawyers who do not have sufficient experience in handling them, in 2014 work of Auke Willems "The United Nations Principles and Guidelines on Access to legal aid in criminal justice systems: a step towards global assurance of legal aid?"[12], it was stated that a high level of competence should be guaranteed in the provision of legal aid, and that there should be no concept of "bad legal advice is better than no legal advice" due to the lack of experience of lawyers. But the article is silent on what causes this problem and how to solve it

The study of the system of unpaid secondary assistance in Ukraine, which was conducted by the Directorate General of Human Rights and Rule of Law in 2016, voiced the opinion that passing the bar exam does not mean that a lawyer can automatically provide unpaid legal aid of adequate quality[13]. However, this study does not specifically explain why lawyers, once licensed as advocates, are not always able to provide unpaid legal assistance.

Furthermore, in a 2019 joint research paper written by Ching-fang Hsu, Ivan Kan-hsueh Chiang, and Yun-chien Chang, "Pro Bono Is Pro, Low Bono is Low: Qualitative and Quantitative Analysis of Lawyers' Legal Aid Participation", the study shows that the mere provision of services by a lawyer in the legal aid system, in general, may be perceived as lacking the necessary experience, connections and is a sign that the lawyer is barely making ends meet[14]. There are no suggestions in the paper on how to help increase quality in free legal aid sphere.

It is worth mentioning the 2016 book by Jill Coster van Voorhout "Ineffective Legal Assistance Redress for the Accused in Dutch Criminal Procedure and Compliance with ECtHR Case Law", where the author points out that constant judicial control of the advocate's work threatens his independence. [15] However, on the one hand, the author argues the inadmissibility of

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[11] Richard Klein, "The Role of Defense Counsel in Ensuring a Fair Justice System", *The Champion* (June 2012), p. 38.

[12] Auke Willems, "The United Nations Principles and Guidelines on Access to legal aid in criminal justice systems: a step towards global assurance of legal aid?", *New Criminal Law Review*, Vol. 17, (2014), p. 198.

[13] The Directorate General of Human Rights and Rule of Law, "Оцінювання системи безоплатної правової вторинної допомоги в Україні у світлі стандартів і передового досвіду Ради Європи", (2016), p. 53.

[14] Hsu, Ching-Fang and Chiang, Kan-Hsueh and Chiang, Kan-Hsueh and Chang, Yun-chien, Pro Bono Is Pro, Low "Bono is Low: Qualitative and Quantitative Analysis of Lawyers' Legal Aid Participation", *NYU Law and Economics Research Paper* No. 19-24, (2022), p. 40.

[15]Voorhout, Jill Coster van, *Ineffective legal assistance: Redress for the accused in Dutch criminal procedure and compliance with ECtHR case law*. Leiden: Brill Nijhoff, 2017, ISBN 978-90-04-31937-0, p. 451.

the courts' interference in the work of a lawyer, on the other hand, she does not suggest how to reduce this phenomenon.

Also, 2001 research paper by Taru Nicolina Bertha Maria Spronken "Een onderzoek naar de normering van het optreden van advocaten in strafzaken" where the author specifies that the court may interfere with the freedom of the defence only when the continuation of criminal proceedings is impossible. For example, if order is disturbed during the trial, or if the defence counsel uses powers in which the accused would have no legitimate interest[16]. This paper does not reveal exactly how to prevent the court from interfering with the lawyer's work.

This master thesis has two objectives: 1) What criteria can negatively affect the guaranteed legal aid in criminal cases in the sense of violation of the right to a fair trial;

2) to indicate the instruments that can facilitate the solution of the identified problems.

In order to achieve the aim of the study the following objectives are set:

1) To analyse the definition of guaranteed legal aid in the context of the right to a fair trial;
2) To demonstrate the forms of realisation of the right to guaranteed legal aid;
3) To reveal the issue of problems in the remuneration of lawyers in criminal cases;
4) To assess the impact of the problem of distribution of complex categories of criminal cases on lawyers who do not have sufficient experience in handling them;
5) To discuss the need in prevention of higher courts interference in any way, particularly in evaluation of the work of a lawyer if the suspect or the accused has not claimed ineffective legal defence at the previous court stage;
6) To propose the steps to address the above problems or at least mitigate their negative impact on the right to a fair trial.

The significance of this research lies in the fact that the results of this work can be useful both in the theoretical field and on practice by means of the fact that the solutions proposed in this work can be used to actualise the need for changes in the public sector financing of free legal aid, to improve the approach to the selection of lawyers to provide legal aid in complex categories of cases, as well as to relieve the judicial system, to reduce the risks of deliberate abuse of the right to defence, and to expand the rights of suspects and accused persons.

Methodology. During the study of the materials and their analysis, various methods of legal analysis were applied, namely:

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[16] Spronken, T.N.B.M. Verdediging : Een onderzoek naar de normering van het optreden van advocaten in strafzaken, (2001), 636–37, https://doi.org/10.26481/dis.20010420ts

1) Doctrinal-legal analysis allows us to familiarise ourselves with the range of studies proposed in the scientific environment, referring to sources such as reports, recommendations, books, articles, etc.;
2) The comparative analysis makes it possible to: identify the main differences in the approaches of different states to the fee policy of lawyers who provide free legal aid in criminal cases, and the consequences of such policies; the different requirements for lawyers and their selection systems for providing free legal aid in criminal cases; to compare national criminal procedure codes and the timeframes for the examination of complaints against lawyers;
3) The historical method is essential as it provides an opportunity to look at key historical events in the field of legal aid, cases of lawyers' strikes due to low fees in different countries;
4) The statistical method makes it possible to assess the level of development of the states where lawyers' strikes have taken place in recent years;
5) The linguistic method made it possible to read and analyse more books, articles, reports, news sites and other sources;
6) The critical research method is widely applied in this paper to identify the above problems and ways to overcome them.
7) The functional method allows to study the interaction between the state and the Bar.

The structure of the master thesis includes an introduction, two chapters, where the first chapter is divided into two subchapters and the second into three subchapters. This is followed by conclusions and recommendations. The first chapter deals with legal aid as one of the fundamental elements of the right to a fair trial, the first subchapter provides the definition of legal aid guaranteed by the state in the context of fair trial, the second subchapter deals with types of legal aid, the third subchapter presents the guaranteed legal aid in the aspect of criminal procedure. The second chapter analyses and describes the factors influencing the effectiveness of the implementation of state-guaranteed legal aid and fair trial in criminal proceedings. Thus, all subchapters of the second chapter are devoted to the study of individual criteria of the guaranteed right to legal defence in the aspect of the right to a fair trial.

Defence statement. The effectiveness of state-guaranteed legal aid in the criminal sphere and fair trial in general are linked to the improvement of such organisational and legal aspects as decent and timely payment by the state for the work of a lawyer, sufficient experience of a lawyer to participate in the complex category of cases, reducing the necessity for the courts to intervene to the client-lawyer relationship.

1. LEGAL AID AS A FUNDAMENTAL ELEMENT OF THE RIGHT TO A FAIR TRIAL

Access to legal aid is an important prerequisite for the right to a fair trial. Article 6 ECHR includes a number of different procedural guarantees[17]. For example, these guarantees include the right to effective participation in the judicial process and the right to adversarial proceedings[18]. Separate mention should also be made of the right to equality of arms, which the ECtHR practice distinguishes from the right to adversarial proceedings[19]. Without the right to legal aid, none of the three guarantees from above can be adequately respected.

Before proceeding further, it is necessary to define each of the above elements. According to Güveç v. Turkey: "Effective participation' in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for them, including the significance of any penalty which may be imposed. It also requires that they, if necessary, with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to defence counsel their version of events, point out any statements with which they disagree and make the trial court aware of any facts which should be put forward for the defence."[20].

The right of adversarial proceedings provides that each party has the opportunity to review and comment on all evidence or observations presented in order to be able to influence the court's decision[21].

Finally, the right to equality of arms means that each party must be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage compared to its opponent[22].

It should then be demonstrated for what reasons legal aid at trial is a critical component of the right to a fair trial. Thus, there are objective reasons why it is crucial for a person to have the opportunity to be represented in court rather than to defend their interests on their own.

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[17] Brems, Eva, and Janneke Gerards. *Shaping rights in the ECHR: The role of the European Court of Human Rights in determining the scope of human rights*. (United Kingdom, Cambridge, Cambridge University Press, 2015), ISBN 978-1-107-04322-0, p. 304.
[18] Ibid, p 308.
[19] "Kress v. France, application no. 39594/98, 7 June 2001", ECtHR, paragraphs 72-73.
[20] "Güveç v. Turkey, application no. 70337/01, 20 January 2009", ECtHR, para. 124.
[21] Kress v. France, see *supra* note 19, para. 74.
[22] Ibid, paragraphs 72-3.

The first reason is a lack of legal education experience and the necessary practice. Without legal education and practical training, it is difficult for a person to effectively carry out their representation in court on their own. Thus, in order for a person to effectively defend themselves in court, they must have skills in using computer equipment, drafting legal documents, good knowledge of both substantive and procedural parts of the law, the basics of public speaking, knowledge of etiquette in a court.

At the same time, it happens that during pre-trial investigation or already court consideration a person is in a special mode in detention, where they have no opportunity to spend enough time to fully study and analyse their case, search for judicial practice, search for witnesses, documentary or material evidence. In addition, without legal support, a person without proper skills will not be able to effectively appeal against the action or inaction of an investigator, prosecutor or a judge's decision. Thus, Martin Schönteich in his 2013 article "The overuse of pre-trial detention: causes and consequences" points out that the majority of arrested and accused persons lack education and skills for their defense, and that usually for the above reasons such category of persons cannot correctly apply for release from custody[23].

In 2005, Cardiff University commissioned a study by the Department for Constitutional Affairs of the United Kingdom entitled "Litigants in person. Unrepresented litigants in first instance proceedings". The study found that unrepresented litigants face problems such as a poor understanding of substantive and procedural law, a lack of understanding of what aspects of the case are relevant to the subject matter of the dispute, a lack of understanding of the nature of the litigation, and differences in the interpretation of fairness[24] .

In Amy Kirby's 2017 paper "Effectively engaging victims, witnesses and defendants in the criminal courts: a question of "court culture", the author confirms the relevance of the above problem in the criminal sphere. Thus, the paper states that lay litigants face difficulties in understanding the essence of the proceedings and the problem of expressing their thoughts[25].

Basically, in order to obtain a law degree in the EU, it is necessary to complete 5 years of study[26]. After that, if graduates want to become lawyers, they, for example, as in Lithuania, need

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[23] Martin Schönteich, "The overuse of pre-trial detention: causes and consequences", *CJM 92* no. 1, (2013), p.18.

[24] Richard Moorhead and Mark Sefton, "Litigants in person. Unrepresented litigants in first instance proceedings", (2005), p. 256.

[25] Amy Kirbey, Effectively engaging victims, witnesses and defendants in the criminal courts: a question of "court culture"?, BIROn - Birkbeck Institutional Research Online, Birkbeck University of London, (2017), p. 1,

- Amy Kirby, "Effectively engaging victims, witnesses and defendants in the criminal courts: a question of "court culture"?', *Criminal Law Review 12*, (2017), ISSN 0011-135X, p. 949.

[26] European Comission. "Duration of Degree Studies in Europe." European Education Area, March 2, 2023 https://education.ec.europa.eu/news/duration-of-degree-studies-in-europe

to obtain 5 years of legal work experience or 2 years of work experience as a lawyer's assistant and then pass the qualification exam for a lawyer's license[27].

Therefore, it is unfair to put ordinary litigants on a par with professional lawyers. A litigant's lack of proper legal skills means that their chances of understanding the process without legal assistance may be extremely low.

The second reason is the stress factor. Hence, a person participating in court in the procedural role of a suspect or defendant still needs serious stress resistance, because they alone confront on the one hand professional lawyers, namely the investigator, prosecutor, victims' lawyers, on the other hand victims, their relatives, and in the case of high-profile cases the press and the whole society. The accused must also appear separately before another representative of the legal profession, namely the judge.

For example, the official website of the Ministry of Justice of New Zealand has information for those who are going to participate in the trial without a lawyer. The Ministry warns that stress is likely to be encountered and that the involvement of a lawyer is likely to improve the defendant's position[28]. It should be emphasized that even having an attorney for the accused does not preclude serious emotional distress. A 2015 joint book by Jessica Jacobson, Gillian Hunter and Amy Kirby "Inside Crown Court: Personal Experiences and Questions of Legitimacy", concludes that the complexity of the process causes defendants in the courts to experience stress[29]. A similar point is made in a 2020 in a paper by Gillian Hunter, "Participation in courts and tribunals." [30].

In 2020 Miguel Clemente and Dolores Padilla-Racero, "The effects of the justice system on mental health", point out that not knowing what will happen is itself a source of stress and impairs the health of litigants. It is also suggested that an understanding of criminal procedure can reduce the risk to mental health of litigants[31].

A good example is the robbery case, which in the German press was called "Rotlicht-Prozess". In 2014 in Germany, due to the stress of the defendant's trial, by a doctor's recommendation the court was forced to hold sessions for no more than two hours at a time[32].

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[27] Lietuvos Respublikos Seimas. 2004, Lietuvos Respublikos advokatūros įstatymas, para. 3 of art. 7, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.229789?jf

[28] "Going to court without a lawyer", New Zealand Government (01 February 2023), https://www.justice.govt.nz/courts/going-to-court/without-a-lawyer/

[29] Jessica Jacobson, Gillian Hunter and Amy Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy*,(Bristol: Policy Press, 2015), ISBN 978-1-44731-705-0 , p. 202.

[30] Ryder, Ernest. Participation in Courts and Tribunals: Concepts, Realities and Aspirations. Edited by Jessica Jacobson and Penny Cooper. 1st ed. Bristol University Press, 2020, p. 24.

[31] Miguel Clemente and Dolores Padilla-Racero, "The effects of the justice system on mental health", *Psychiatry, Psychology and Law*, Vol. 27, No. 5, (2020), p. 867.

[32] "Rotlicht-Prozess: Stress für Angeklagte", *Rheinische Post*, (27 June 2014), https://rp-online.de/nrw/staedte/duesseldorf/rotlicht-prozess-stress-fuer-angeklagte_aid-16334443

Thus, a person without legal aid on their own may not be able to successfully confront an entire state system because, among other things, they are exposed to serious stress.

The third reason why a person without legal support may have difficulty in court is the lack of professional tools such as an attorney has. The lawyer who provides legal aid, unlike the accused or suspect has professional capabilities such as an ability of prompt information obtaining. The key aspect is that such information may be crucial to the case in the future.

The right of an advocate to request information may be provided for separately from the Criminal Procedure Law. For example, according to Art. 24 of the Law of Ukraine "On advocacy and advocacy activity"[33], if necessary, a Ukrainian lawyer within 5 days can obtain the information necessary for the case bypassing the investigator, prosecutor or judge. The exception is, for example, information that constitutes a banking secret, state secret, information that contains someone's personal data[34]. Moreover, in Ukraine also, for example, according to sub-paragraph 7 of para. 1 of Art. 1 of the Law of Ukraine "On Advocacy and Advocate's Activity"[35] includes the possibility of the advocate to interview persons with their consent. In Lithuania, the right of the advocate to obtain information is provided for in Article 44 of the Law of the Republic of Lithuania "On State-guaranteed Legal Aid"[36]

It should be noted that the accused or suspect may not always be able to obtain certain evidence in time, which subsequently puts them in a very disadvantageous position. In a 2010 paper by Ed Cape, Zaza Namoradze, Roger Smith and Taru Spronken "Effective Criminal Defense in Europe" it is stated that if a suspect in France does not have time to present their position at the stage of pre-trial investigation, and at the same time did not apply for the admission of their evidence, then, for example, in the case of accelerated judicial procedure, they lose this opportunity in the future[37].

It is important to emphasize that, according to the ECtHR practice, the effect of Art. 6, also applies to the stage of pre-trial investigation[38]. The lack of knowledge, practice and necessary experience, stress and lack of professional tools as a lawyer has may put them in a deliberately disadvantageous position in court. Thus, such a person may be disoriented during the trial, may

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[33] Верховна рада України. 2012. Закон України «*Про адвокатуру та адвокатську діяльність*», art. 24, https://zakon.rada.gov.ua/laws/show/5076-17#Text

[34] Ірина Сенюта, Христина Терешко, "Доступ адвоката до інформації з обмеженим доступом", Higher school of advocacy, (2023), https://www.hsa.org.ua/blog/dostup-advokata-do-informaciyi-z-obmezenim-dostupom#

[35] See Закон України «*Про адвокатуру та адвокатську діяльність*", supra note 33, sub-para. 7 of para. 1 of art. 1.

[36] Lietuvos Respublikos Seimas. 2000. *Lietuvos Respublikos valstybės garantuojamos teisinės pagalbos įstatymas*. Article 44, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.98693/asr

[37] Ed Cape, Zaza Namoradze, Roger Smith and Taru Spronken, *Effective Criminal Defense in Europe. Executive Summary and Recommendations*, Antwerp: Intersentia, (2010), p. 6.

[38] "Imbrioscia v. Switzerland, application no. 13972/88, 24 November 1993", ECtHR, para. 36.

miss the opportunity to properly familiarise themselves with the case, to express their comments and objections to the evidence, which will subsequently make it impossible to comply with the right to effective participation in the trial, the right to adversarial proceedings and the right to equality of arms.

In this regard, it can be concluded that regardless of people's material means, they should undoubtedly have access to professional legal assistance in the judicial process, as this is a fundamental element of the right to a fair trial. However, it is worth noting that in order for a trial to be truly fair, it is not enough to have a publicly appointed lawyer, and their assistance must also be practical and effective[39].

1.1. Definition of state-guaranteed legal aid in the context of fair trial

In order to define what state-guaranteed legal aid is, it is necessary to analyse the historical path of this legal phenomenon and analyse international sources of law and case-law. In addition, in order to understand more deeply the meaning of this concept, it is necessary to analyse separately the concept of legal aid and the circumstances under which such aid is guaranteed by the state.

As far as Europe is concerned, the probable origin of free legal aid dates back to 451 A.D.[40]. Thus, the clergy, in fulfilment of the Holy Scriptures, were to provide pro bono legal advice and representation to orphans, widows and other categories of needy people[41]. In the twelfth century, St. Thomas Aquinas equates legal aid with acts of mercy[42].

Canon law provided for the concept of "advocatus pauperum". Thus, such a term was applied to officials who received payment from the church for legal aid to the poor. In turn, exemption from court fees was given the Latin term "in forma pauperis", which is still relevant today[43]. Since for a long time the Christian Church played a key role in the political and social life of European states, free legal aid was a Christian virtue.

Nowadays, legal aid is an element of a fair trial and is provided for in international human rights law. Sub-paragraph "c" of para. 3 of Art. 6 of ECHR [44]and sub-paragraph "d" of para. 3 of

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[39] Фулей Тетяна Іванівна, Застосування практики Європейського суду з прав людини при здійсненні правосуддя. Науково-методичний посібник для суддів, ISBN 978-966-2310-29-0, (2015), p. 76.
- "Artico v. Italy", application № 6694/74, 13 May 1980", ECtHR, para. 33.

[40] Felice Batlan, Marianne Vasara-Aaltonen, *Histories of Legal Aid A Comparative and International Perspective*, (Basingstoke: Palgrave Macmillan, 2022), ISSN 2730-9630, p. 3.

[41] Ibid.

[42] Ibid.

[43] Ibid.

[44] Council of Europe. 1950. "*European Convention for the Protection of Human Rights and Fundamental Freedoms*" *Council of Europe Treaty Series 005*. Strasbourg: Council of Europe, subparagraph "c" of paragraph 3 of art. 6, https:// www.refworld.org/docid/3ae6b3b04.html

Art. 14 of ICCPR[45] directly oblige member states to provide legal aid to persons in criminal cases in two cases, namely when they do not have sufficient means to pay for legal assistance, and when the interests of justice require so.

Despite the adoption of the ECHR by many European countries and after its entry into force in 1953, the national legislation on legal aid in many member states continued to fall short of the Convention's requirements, or at least did not facilitate their implementation. The following are examples that can support this statement. For instance, it was not until 1972 in France that a law was passed which repealed a legal aid scheme dating back to the nineteenth century, and in 1975 in Austria the national Constitutional Court repealed the 1885 legal aid legislation[46]. In addition to this, for example, also in the early seventies of the last century, a law that was still in force under the fascist regime of Mussolini in 1923 was still in force in Italy[47]. Also, at that time, the need to change national legal aid legislation also affected countries such as France, Sweden, England and Germany[48].

Such reforms became necessary as millions of criminal cases came before the courts, but the complexity of legal systems meant that justice remained inaccessible to many[49]. In countries that were part of the USSR or under its occupation, reforms in the realisation of the right to legal aid took place later than in Western Europe. In Lithuania, for instance, reforms to transform legal aid in criminal matters were introduced in 2000, and offices were opened in Siauliai and Vilnius for this purpose[50]. In Hungary, changes in legal aid for socially disadvantaged parties took place in 2008[51].

The problem is that there is no single unified use of the term "legal aid" in the sources of international law. It should be noted that the ECHR[52] or ICCPR[53] use the term "legal assistance" instead of "legal aid".

Since these rules of international law do not provide a separate definition of the above-mentioned term "legal assistance", one should be guided by paragraph 1 of article 31 of Vienna

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[45] United Nations. 1966. "*International Covenant on Civil and Political Rights*", Treaty Series, vol. 999, p. 171, sub-paragraph "d" of para. 3 of art. 14, https://www.refworld.org/ docid/3ae6b3aa0.html
[46] See Cappelletti, *supra* note 1, p. 207.
[47] Ibid.
[48] Ibid, pages 207-208.
[49] Ibid, p. 207.
[50] The Open Society Justice Initiative, "Reforming Legal Aid in Lithuania. Report of a Conference held in Vilnius, Lithuania, April 22, 2004, including Agenda and list of participants.",(2004), p, 1, https://www.justiceinitiative.org/uploads/10282c09-6a03-4fec-9549-1e5a3352395a/lithuaniareport_20040422.pdf
[51] Szekeres Diana, "A jogi segítségnyújtás nemzetközi kötelezettségeink rendszerében, a magyarországi jogi segítségnyújtás rendszerének kialakítása, a jövő a társadalmi és politikai változások tükrében", (2010), p. 309.
[52] See ECHR, *supra* note 44, sub-paragraph "c" of para. 3 of art. 6.
[53]"See ICPR, *supra* note 45, sub-paragraph "d" of para. 3 of art. 14.

Convention on the Law of Treaties, namely, the principle of good faith and the ordinary meaning to be given to such term in its context[54].

Thus, it can be concluded that "legal assistance" is “legal aid” paid for by the accused or paid for by the state in criminal proceedings, if the accused lacks the means to do so and when the interests of justice so require.

Regarding the application of the above terms in Europe. In 1978 The Committee of Ministers (CM) issued Resolution (78) 8 On Legal Aid and Advice, which is a recommendation for the EU member states. This resolution did not deal with legal aid in criminal matters and was aimed at providing legal advice on civil, administrative, financial, social and commercial matters to persons who are in difficult financial circumstances.[55] The term "legal aid" can be found in this resolution. For example, when, among other things, the preamble notes that "legal aid" should not be regarded as charity, but as an obligation of the whole of society.[56]

In 1980, in Artico v. Italy case the term "legal aid" is used alongside the term "legal assistance" and the term "free legal aid" is also interchanged in the same sense with "free legal aid"[57].

In 1993, The CM adopted Recommendation No. R (93) 1 On Effective Access to the Law and to Justice for the Very Poor (Recommendation No. R (93) 1), which aimed at encouraging the EU member states to facilitate the provision of counselling to low-income persons through financial support to counselling centres[58]. Paragraph 3 of these recommendations gives to the term “aid” the same meaning as “assistance”[59].

Article 3 of such source of thr EU law as Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings defines the term 'legal aid' as "funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer"[60] (Directive (EU) 2016/1919).

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[54] United Nations, 1969. *“Vienna Convention on the Law of Treaties”*, Treaty Series, vol. 1155, p. 331, para. 1 of article 31, https://www.refworld.org/docid/3ae6b3a10.html

[55] The Committee of Ministers of the Council of Europe.1978. Resolution (78) 8 “On legal aid and advice”,

[56] Ibid, para. 4 of Preamble.

[57] See Artico v. Italy, *supra* note 39, paragraphs 13, 14, 33.

[58] The Committee of Ministers of the Council of Europe. 1993. Recommendation No. R (93) 1.

[59] Ibid; para. 3.

[60] The European Parliament and the Council of the European Union, Directive (EU) 2016/1919 of 26 October 2016 on legal aid for suspects and accused persons, art. 3.

In the United States, the criminal legal aid mechanism for low-income people has emerged through such cases as Powell v. Alabama[61], Gideon v. Wainwright[62]. In these cases, courts used both the term "assistance of counsel" and "aid of counsel" equally[63].

As for the use of the term legal aid in international UN documents, it is worth noting that this first occurs in 2012 in the document Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems[64] (UN Principles and Guidelines, Principles). The paragraph 8 of the Introduction of UN Principles and Guidelines states that for the purposes of the Principles, the term "legal aid" includes free legal education, counselling and representation of detained, arrested, suspected, accused, victims and witnesses when such persons do not have sufficient means to pay or when the interests of justice so require.[65]

As regards the term "not sufficient means to pay for legal assistance", in this case, even from a textual analysis, it can be concluded that it refers to the provision of free legal assistance if the accused does not have sufficient means.

It should be noted that the ECtHR does not define the concept of "sufficient means"[66]. The general rule of the ECtHR is that it is for the national authorities to determine the threshold of sufficient means[67]. However, the ECtHR also has a practice that provides safeguards against arbitrariness on the part of the state when considering whether to grant legal aid to a person on the grounds of insufficient means[68]. For example, in Pakelli v Germany, the Court stated that the burden of proving inability to pay for legal aid lies with the individual, but that the individual has no obligation to prove indigence[69].

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[61] "Powell v. Alabama 287 U.S. 45", Supreme Court of the United States October Term 1932, (1932), https://tile.loc.gov/storage-services/service/ll/usrep/usrep287/usrep287045/usrep287045.pdf

[62] Peter W. Fenton and Michael B. Shapiro, "Looking Back on Gideon v. Wainwright", National Assotiation of Criminal Defense Lawyers, (2012), https://www.nacdl.org/Article/June2012-LookingBackonGideonv-Wainwrigh#:~:text=Wainwright.&text=Expanding%20a%20precedent%20set%20by,in%20all%20American%20criminal%20cases

- Peter W. Fenton and Michael B. Shapiro, Looking Back on Gideon v. Wainwright, *The Champion Issue June 2012*, p. 24.

[63] "Gideon v.Wainwright 372 U.S. 335" Supreme Court of the United States, October Term 1963, (1963) p. 339, p.p 342-343, https://tile.loc.gov/storage-services/service/ll/usrep/usrep372/usrep372335/usrep372335.pdf.

- See Powell v. Alabama, *supra* note 61, pages 59-60.

[64] UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* : resolution / adopted by the General Assembly, 28 March 2013, A/RES/67/187, https://www.refworld.org/docid/51e6526b4.html

[65] Ibid, paragraph 8 of the Introduction.

[66] Open Society Justice Initiative. "Legal aid in Europe. Minimum requirements under international law" (4 April 2015), p. 5, https://www.justiceinitiative.org/uploads/d69e329c-6cb7-47ca-bdf0-07f8992a728b/ee-legal-aid-standards-20150427.pdf

[67] Ibid.

[68] Ibid.

[69] "Pakelli v Germany", Application no. 8398/78, 25 April 1983", ECtHR, para. 34.

The UN Principles and Guidelines, recommend that states should not apply an excessively low threshold in the means test[70], and that the criteria for the use of such a test should be publicly available to the public[71].

With regard to the second condition for the possibility of obtaining free legal aid, namely where the "interests of justice" so require, the ECtHR sets out three criteria on which the need for free legal aid may be assessed. Such criteria include the complexity of the case[72], the gravity of the offence[73] and the severity of the possible punishment, the social and personal situation of the accused[74]. For example, the mere possibility of a sentence such as deprivation of liberty may act for the provision of legal aid[75]. In Pham Hoang v France, the Court considered that the author of the complaint was entitled to legal aid because the applicant intended to persuade the domestic court to depart from established case-law[76]. The Biba v Greece judgement held that a language barrier could also be a reason for granting relief[77].

Thus, analysing all the above-mentioned interpretations of the term "legal assistance" reflected in Article 14 of the ICCPR or in Article 6 of the ECHR, it can be stated that the term "legal aid" has a similar meaning and can be used equally. However, because various sources of international law have begun to use the phrase "legal aid" in the context of unpaid legal assistance, it has become customary to use it in this sense.

Based on all of the above, the term state-guaranteed legal aid in the context of fair trial refers to the right of a person to have a state-paid lawyer in cases where they do not have the means to pay for it and where it is required, inter alia, by the complexity of the case, the gravity of the offence, the severity of the possible punishment, the social and personal situation of the accused.

[70] See Principles and Guidelines, *supra* note 64, para. 41(a).
[71] Ibid, para. 41(b).
[72] "Pham Hoang v France", application № 13191/87, 25 September 1992", ECtHR, para. 40.
[73] "Benham v United Kingdom", application № 19380/92, 10 June 1996", ECtHR, paras. 59, 64.
[74] "Biba v Greece", application 33170/96, 6 September 2000", ECtHR, para. 29.
[75] See Benham v United Kingdom, *supra* note 73, para. 59, para. 64.
[76] See Pham Hoang v France, *supra* note 72, para. 40.
[77] See Biba v Greece, *supra* note 74.

1.2 . Types of providing of state guaranteed legal aid

Free legal aid can be classified according to different criteria. Hence, legal aid may have different types depending on the nature of the legal problem and the client's need[78], the area of law in which legal aid is provided[79] and depending on the subject of providing of such assistance[80].

It should be noted that each state can categorise types of legal aid at its own discretion. However, the legal literature generally distinguishes three types of legal aid, namely 'first line', 'second line' and services that assist in negotiations (mediation)[81]. First line state guaranteed legal aid generally provides legal aid of an advisory nature that does not involve litigation, mediation, defence or representation in criminal cases[82]. Thus, such type of legal aid as first line legal aid is presented under the name "primary legal aid", for example, in Ukraine in Art. 7 of the Law of Ukraine "On free legal aid"[83], in Lithuania in paragraph 6 of Art. 2 of Law of the Republic of Lithuania "On State-guaranteed Legal Aid"[84], in Croatia in Art. 8 of Law "On free legal aid"[85].

Analysing the concept of "primary legal aid" on the examples of Lithuanian and Ukrainian legislation, it can be concluded that this concept is identical to the concept of "first line legal aid" because they are characterised by the same forms of provided legal aid. Primary legal aid in these countries includes provision of consultations, information, clarification of legal issues, drafting of complaints and applications addressed to state and municipal authorities[86], which is similar to the concept of "first line legal aid". However, in Lithuania, unlike Ukraine, primary legal aid also includes actions aimed at extrajudicial resolution of disputes and drafting of such procedural documents as an application for divorce, application for a court order, objection to the creditor's application, etc[87].

In Croatian legislation, in addition to similar forms of legal assistance, there is also a specification that assistance may be provided in the preparation of applications to the European

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[78] See Barendrecht et al, *supra* note 9, p. 25.
[79] Parliament of the United Kingdom. 2012. *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, art. 8, 13, https://www.legislation.gov.uk/ukpga/2012/10/contents/enacted
[80] See Lietuvos Respublikos valstybės garantuojamos teisinės pagalbos įstatymas, *supra* note 36, sub-para. 3 para. 1 of art. 15.
- Hrvatski sabor. 2013. *Zakon o besplatnoj pravnoj pomoći*, para. 3 of art. 6, https://narodne-novine.nn.hr/clanci/sluzbeni/2013_12_143_3064.html
[81] See Barendrecht et al, *supra* note 9, p. 25.
[82] Ibid.
[83] Верховна рада України. 2011. *Закон України «Про безоплатну правничу допомогу»*, art. 7. https://zakon.rada.gov.ua/laws/show/3460-17#Text
[84] See Lietuvos Respublikos valstybės garantuojamos teisinės pagalbos įstatymas, *supra* note 36, para. 6 of art. 2
[85] See Zakon o besplatnoj pravnoj pomoći, *supra* note 80, art. 8.
[86] See Lietuvos Respublikos valstybės garantuojamos teisinės pagalbos įstatymas, *supra* note 36, para. 6 of art. 2.
- See Закон України «Про безоплатну правничу допомогу», supra note 83, para. 2 of art. 7.
[87] Ibid. Lietuvos Respublikos valstybės garantuojamos teisinės pagalbos įstatymas, para. 6 of art. 2.

Court of Human Rights and international organisations[88]. Also, the division of legal aid into such type as "first line" legal aid can be found, for example, in Belgium[89], the Netherlands[90].

As for the next type of legal aid, namely services aimed at mediation between the client and their opponents, this type of legal aid can be in the form of negotiations, in which the lawyer is also involved, in the case of reconciliation of the parties or mediation. It may also include negotiating a plea agreement with the prosecution[91]. In this case, it is also useful to cite examples from the legislation of Lithuania, Ukraine and Croatia.

The Lithuanian legislation, namely in para. 11 of Art. 2 of Law of the Republic of Lithuania "On State-guaranteed Legal Aid "provides for the existence of mediation as a separate, independent type of free legal aid[92]. In its turn, the fact that mediation is a separate type of legal assistance in Ukraine can be inferred from sub-paragraph 4 paragraph 2 of Art. 7 of Law of Ukraine "On free legal aid"[93]. Thus, if to define the concept of mediation briefly - it is a voluntary negotiated method of extrajudicial resolution of a dispute between the parties with the participation of a mediator[94]. However, unlike in Lithuania and Ukraine, in Croatia state legal aid includes only primary and secondary legal aid, without singling out mediation as a separate type of legal aid[95].

Second line legal aid can serve to represent a person in pre-trial investigation bodies, courts in both civil and criminal cases, other state bodies[96]. In Croatia[97], Lithuania[98], Ukraine[99] this type of legal aid is called secondary legal aid.

Secondary legal aid includes the same forms of assistance as second line aid. Thus, for example, if to briefly describe the main feature and purpose of secondary legal aid, it is a guarantee of equal opportunities created by the state for access to justice[100].

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[88] See Zakon o besplatnoj pravnoj pomoći, *supra* note 80, para. 9 of art. 9.
[89] Juridisch advise. Flemish government website. date accessed 10 November 2023, https://www.vlaanderen.be/juridisch-advies
[90] Verwijsarrangement. Juridisch Loket, date accessed 10 November 2023, https://www.juridischloket.nl/professionals/verwijsarrangement/
[91] See Barendrecht et al, *supra* note 9, p. 26.
[92] See Lietuvos Respublikos valstybės garantuojamos teisinės pagalbos įstatymas, supra note 36, para. 11 of art. 2.
[93] See Закон України «Про безоплатну правничу допомогу», *supra* note supra note 83, sub-paragraph 4 paragraph 2 of art. 7.
[94] Верховна рада України. 2021. *Закон України «Про медіацію»*, p. 4. para. 1 art. 1, sub-paragraph 4 paragraph 2 of art. 7, https://zakon.rada.gov.ua/laws/show/1875-20#Text
- see Lietuvos Respublikos valstybės garantuojamos teisinės pagalbos įstatymas, *supra* note 36, sub-para. 12, para. 2 of art. 2.
[95] See Zakon o besplatnoj pravnoj pomoći, *supra* note 80, art. 8.
[96] See Maurits Barendrecht,Laura Kistemaker,Henk Jan Scholten, Ruby Schrader, Marzena Wrzesinska, *supra* note 9, p. 26.
[97] See Zakon o besplatnoj pravnoj pomoći, supra note 80, art. 12.
[98] See Lietuvos Respublikos valstybės garantuojamos teisinės pagalbos įstatymas. *supra* note 36, para. 1 of art. 2.
[99] See Закон України «Про безоплатну правничу допомогу», *supra* note 83 art. 13.
[100] Ibid.

In Lithuania[101], as in Ukraine[102] secondary legal aid can include representation and defence in court cases, preparation of documents. In addition, this may include assistance in reimbursement of court costs and expenses, representation in cases of preliminary settlement of disputes also in out-of-court procedure [103]. In Croatia[104] and Ukraine[105] the list of forms of secondary legal aid is similar and also includes defence, representation in courts and public authorities and drafting of procedural documents.

Based on the analysis of the above norms, the concepts of second line legal aid and secondary legal aid have the same meaning.

In addition to the above-mentioned norms of national legislation, the Handbook on ensuring quality of legal aid services in criminal justice processes also repeatedly refers to such type of legal aid as "secondary legal aid"[106]. The following division of types of free legal aid is based on the sphere of the applied law.

Thus, unlike the Lithuanian Law on Legal Aid or similar laws in Ukraine and Croatia, in Great Britain in Art. 8, 13 of the UK Legal Aid, Sentencing and Punishment of Offenders Act 2012 separately divides the types of legal aid by the area of law, namely in civil or criminal cases[107]. In its turn, the Hungarian legislation, namely § 11, § 17 of Act LXXX of 2003 "On Legal Aid" also divides legal aid according to the field of law in which such aid is provided. The text of the above-mentioned act uses the division into civil, administrative and criminal proceedings[108].

With regard to the division of types of legal aid by the subjects of its provision, the form of the legal aid provided has its effect. If we talk about primary legal aid, then depending on the form of legal aid it can be provided by civil servants, lawyers, their assistants, lawyers' assistants[109]. Depending on the national legislation, this may include also legal persons specialised in the matter, other legal professionals, legal clinics[110].

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[101] See Lietuvos Respublikos valstybės garantuojamos teisinės pagalbos įstatymas, *supra* note 36, para. 1 of art 2.
[102] See Закон України «Про безоплатну правничу допомогу», *supra* note 83, para. 2 of art. 12.
[103] See Lietuvos Respublikos valstybės garantuojamos teisinės pagalbos įstatymas, *supra* note 36, para. 1 of Art. 2;
[104] See Zakon o besplatnoj pravnoj pomoći, s*upra* note 80, art. 12.
[105] See Закон України «Про безоплатну правничу допомогу», *supra* note 83, para. 2 of art. 13.
[106] UN Office on drugs and crime. 2019. Handbook on ensuring quality of legal aid services in criminal justice. Practical Guidance and Promising Practices, pages 36, 49, 59, 117, https://www.unodc.org/documents/justice-and-prison-reform/HB_Ensuring_Quality_Legal_Aid_Services.pdf
[107] See Legal Aid, Sentencing and Punishment of Offenders Act 2012, *supra* note 79, art. 8, 13.
[108] Országgyűlés.2003. *évi LXXX. törvény a jogi segítségnyújtásról*, § 11, § 17, https://net.jogtar.hu/jogszabaly?docid=a0300080.tv
[109] See Lietuvos Respublikos valstybės garantuojamos teisinės pagalbos įstatymas, *supra* note 36, sub-para. 3 para. 1 of art. 15.
[110] See Закон України «Про безоплатну правничу допомогу», *supra* note 83, sub-paragraphs 5, 6 of para. 1 art. 9. - See Zakon o besplatnoj pravnoj pomoći, supra note 80, art. 6.

Mediation services may be provided, for example, by lawyers[111], institutions of the Ministry of Justice[112], persons who have undergone special training as mediators[113].

Secondary legal assistance can be provided by lawyers[114] or special organisations, such as centres for providing free legal aid in Ukraine[115].

In relation to the above, state-guaranteed legal aid can be divided into different types which depend on certain circumstances. These circumstances may be the nature of the legal problem, in which case legal aid can be of three types, namely 'first line' (primary), 'second line' (secondary) and negotiation services. Depending on the area of law in which legal aid is provided, such as administrative, civil or criminal. And depending on the subject who provides legal aid, such subjects may be lawyers, their assistants, civil servants, legal clinics, specialised legal aid centres, etc.

1.3. Guaranteed legal aid in the aspect of criminal proceeding

Today, state-guaranteed legal aid in criminal proceedings is a universally recognised element of the right to a fair trial in most countries. This inference is based on an analysis of such fundamental sources of international law as the Universal Declaration of Human Rights (UDHR) and the ICCPR. The Preamble of the UDHR states that peoples and states should endeavour to respect human rights and fundamental freedoms[116]. Article 11 of the UDHR states that the accused must be given every opportunity for defence during the trial[117].

In addition, para. 1 of Art. 2 of the ICCPR in its turn obliges member states to respect the rights set out therein[118], which include the right of everyone to a free lawyer in the absence of sufficient means for payment and in the interests of justice sub-paragraph d. para. 3 of Art. 14 ICCPR.

It is worth noting that the only major state that is not currently bound by the ICCPR is China[119]. However, despite the non-proliferation of the ICCPR to this state, the Chinese authorities

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[111] See Lietuvos Respublikos valstybės garantuojamos teisinės pagalbos įstatymas, *supra* note 36, para. 2 of art. 26.
[112] Ibid, para. 3 of art. 9.
[113] See Закон України «Про медіацію», supra 94 para. 1 of art. 9.
[114] See Lietuvos Respublikos valstybės garantuojamos teisinės pagalbos įstatymas, *supra* note 36, para. 1 of art. 17, - See Zakon o besplatnoj pravnoj pomoći. Supra note 80, para. 3 of art. 6.
[115] See Закон України «Про безоплатну правничу допомогу», *supra* note 83, para. 1 of art. 15.
[116] the United Nations General Assembly. 1948. *Universal Declaration of Human Rights*, 217 A (III), para. 6 of the Preamble. available at: https://www.refworld.org/docid/3ae6b3712c.html
[117] Ibid, art. 11.
[118] See ICCPR, *supra* note 45, UN General Assembly. 1966, para. 1 of art. 2.
[119] UN Human Rights Treaty Bodies. UN Treaty Bode Database. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=CHN&Lang=EN - Dorian Burkhalter, "How China is rewriting human rights norms", Swissinfo, (29 September 2023), https://www.swissinfo.ch/eng/politics/how-china-is-rewriting-human-rights-norms/48836162

also recognise the right to guaranteed legal assistance in both criminal and civil cases. For example, such a conclusion can be drawn from Article 2 of the Legal Aid Law of the People's Republic of China, which indicates the existence of a system of free legal aid for persons experiencing financial difficulties[120].

In European countries and member states of the Council of Europe, the obligation to provide legal aid in criminal cases is also stipulated in Article 6 (3)(c) ECHR, mentioned several times in this paper. The conditions for the provision of such assistance are, as in para. 3 of Art. 14 ICCPR the interests of justice and insufficiency of means of the accused.

It should be emphasised that state-guaranteed legal aid in criminal cases allows suspects and defendants who have financial difficulties in hiring a lawyer to receive a free defence at all stages of criminal proceedings[121]. At the same time, state-guaranteed legal aid helps to reduce the length of stay of detainees in pre-trial detention centres, legal aid in criminal cases can also help to reduce the number of prisoners in prisons, which has a favourable impact on the issue of prison overcrowding, in addition, a reduction in the number of unlawful convictions may also be a positive factor[122].

Nowadays, the European Union has adopted a number of regulations that address the issue of state-guaranteed legal aid in criminal matters. The Stockholm Programme - Roadmap Procedural Safeguards 2009[123] makes an important contribution to the development of free legal aid in the European Union. This is the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings[124]. The adoption of this document was motivated by the fact that free movement within the EU has led to an increase in the number of persons who become parties to criminal proceedings[125]. Thus, it was decided to strengthen the observance of procedural rights of suspects and accused persons in criminal cases[126] both at the pre-trial stage and in court[127].

This document, among other things, addresses the issues of providing suspects and defendants with legal advice from a lawyer at an early stage of criminal proceedings[128], guarantees

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[120] National People's Congress of China. 2021. *中华人民共和国法律援助法*., art. 2, http://www.moj.gov.cn/pub/sfbgw/zwfw/zwfwbszn/bsznflyz/202112/t20211228_445092.html
[121] See "Legal aid in Europe. Minimum requirements under international law", *supra* note 66, p. 4.
[122] Ibid.
[123] Stockholm Programme - Roadmap Procedural Safeguards. European Criminal Bar Association, https://ecba.org/content/index.php/projects/procedural-safeguards/360-stockholm-programme-roadmap-procedural-safeguards
[124] European Council. *Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*.
[125] Ibid, para. 3.
[126] Ibid. para. 10.
[127] Ibid, para. 1.
[128] Ibid, Annex. Measure C: Legal Advice and Legal Aid.

for vulnerable persons[129] and the issue of excessive pre-trial detention[130]. The Stockholm Programme was subsequently implemented by the EU through the adoption of the following normative acts that deal with the provision of legal aid in criminal proceedings.

Firstly, it is Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (Directive 2013/48/EU)[131].

Article 2 of Directive 2013/48/EU states that this regulation applies to persons from the moment they are suspected or charged. At the same time, the article specifies that legal aid is provided regardless of the deprivation of liberty of the above-mentioned persons[132].

Article 3(2) of Directive 2013/48/EU refers, among other things, to the inadmissibility of delays in the access of accused or suspects to a lawyer. This norm specifies the procedural events when a lawyer must be immediately provided to the suspect or accused. Thus, such situations include interrogations, other procedural actions to collect evidence, the moment before appearing in court on summons, deprivation of liberty[133].

In addition, this normative act applies if the person is requested under the European Arrest Warrant procedure[134], to persons who become suspects during interrogation[135] and in some cases to persons who are prosecuted for minor crimes by criminal courts[136].

Secondly, it is necessary to note Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings[137]. This document aims, among other things, to preserve the developmental opportunities of children who are wanted, suspected or accused persons[138]. This Directive applies to persons who have committed an offence before the age of eighteen and have become suspects or accused persons or are wanted persons[139].

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[129] Ibid, Annex. Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable.
[130] Ibid, Annex. Measure F: A Green Paper on Pre-Trial Detention.
[131] The European Parliament and the Council of the European Union, *Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*.
[132] Ibid, para. 1 of art 2.
[133] Ibid, para. 2 of art. 3.
[134] Ibid.
[135] Ibid, para. 3 of art. 2.
[136] Ibid, para. 4 of art. 2.
[137] The European Parliament and the Council of the European Union, *Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings*.
[138] Ibid, paragraphs 9, 10.
[139] Ibid, para. 12.

Paragraph 3 of Art. 6 of Directive 2016/800/EU essentially repeats the above-mentioned cases in Art. 3 para. 2 of Directive 2013/48/EU, where a minor must be provided with a lawyer without any delay[140].

Thirdly, it is Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings[141]. This Directive applies to the same categories of persons as Directive 2013/48/EU[142]. Paragraph 1 of Article 4 of Directive (EU) 2016/1919 essentially duplicates the provision of Article 14 ICCPR and Article 6(3)(c) ECHR, namely it refers to such criteria for the possibility of providing free legal aid as insufficient means and interests of justice[143]. In addition, this Directive in paragraph 2 of Article 4 includes the possibility for the state to verify the means of the above category of persons before providing them with a lawyer[144].

However, it is worth pointing out that the mere appointment of a free lawyer does not in itself constitute compliance with the right to a fair trial[145]. In Kamasinski v Austria, for example, the court stated that the state must intervene if it is sufficiently brought to the attention of the court or becomes apparent that a lawyer is incapable of providing effective representation[146].

At the same time, it is necessary to highlight such a document as Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems of 2012[147]. These Principles are the first international document adopted by the UN on access to legal aid in criminal proceedings[148].

The Principles recognise that "legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law and that it is a foundation for the enjoyment of other rights, including the right to a fair trial, as a precondition for exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process."[149].

It also argues that legal aid must be effective, sets global standards for its provision, emphasises the need for adequate qualifications for those providing it, and requires assistance to vulnerable groups of people[150].

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[140] Ibid, para. 3 of art. 6.
[141] See Directive (EU) 2016/1919, *supra* note 60.
[142] Ibid, para. 1 of art. 2.
[143] Ibid, para. 1 of art. 4.
[144] Ibid, para. 2 art. 4.
[145] See "Legal aid in Europe. Minimum requirements under international law", *supra* note 66, p. 9.
[146] "Kamasinski v Austria", application № 9783/82, 19 December 1989", ECtHR, para. 65.
[147] See Principles and Guidelines, *supra* note 64, paragraphs 2-3.
[148] Simonas Nikartas, Agnė Limantė, Tools and Criteria for Measuring Legal Aid Quality: Guidelines for EU Member States Project. (2018), p. 6.
[149] See Principles and Guidelines, *supra* note 64, paragraphs 2-3.
[150] See Simonas Nikartas, Agnė Limantė, *supra* note 148, pages 6-7.

In 2014, UN issued a Handbook entitled "Early access to legal aid in criminal justice processes". This Handbook was concerned with improving state-guaranteed legal aid at the early stages of criminal proceedings, namely at the time of arrest, notification of suspicion or prosecution[151]. In addition, the Handbook on ensuring quality of legal aid services in criminal justice processes was also adopted by UN in 2019[152]. This document is a practical guide for policymakers as well as practitioners to improve the quality of legal aid services in criminal justice processes[153].

Based on the above, it can be stated that state-guaranteed legal aid in criminal matters is of critical importance for modern justice systems today. Moreover, it can also be argued that no self-sufficient justice system can exist without state-guaranteed legal aid. The issue of realisation of such assistance in the criminal law aspect has been raised at the global level not so long ago, namely only in the second decade of the twenty-first century, therefore the improvement and development of the quality of such assistance is an urgent task for many states.

2. CRITERIA INFLUENCING THE EFFECTIVENESS OF THE IMPLEMENTATION OF STATE-GUARANTEED LEGAL AID AND FAIR TRIAL IN THE CRIMINAL PROCESS

This chapter will examine the criteria that negatively affect the effectiveness of state-guaranteed legal aid and fair trial in the criminal process in general. Subsequently, the following subchapters will examine such criteria that negatively affect a fair trial as: problems with the remuneration of lawyers, unpreparedness of lawyers to handle a complex category of cases, court interference in the client-lawyer relationship due to ineffective legal assistance.

Prior to the analysis of each of the above criteria separately, it is necessary to define the concept of "effective legal assistance" and analyse what normative acts reflect this concept, to find out why all of the above criteria in one or another way depend primarily on the state.

If to consider the definition of "effective legal assistance", then due to the fact that Article 6 of the ECHR covers both the stage of court proceedings and pre-trial investigation[154], it is necessary to outline the criteria for assessing such effectiveness separately and for the whole proceeding.

[151] UN Office on drugs and crime. "Early access to legal aid in criminal justice processes: a handbook for policymakers and practitioners", (2014), P. X of Glossary of terms.
[152] UN Office on drugs and crime. 'Handbook on ensuring quality of legal aid services in criminal justice processes", 2019.
[153] Ibid, p. 8.
[154] See Imbrioscia v. Switzerland, *supra* note 38, para. 36.

In a succinct definition of the above-mentioned concept, it can be concluded that assistance can be considered effective when lawyers perform the duties assigned to them at a level of basic quality[155]. The ECtHR in the case of Beuze v. Belgium provides a more detailed definition of this concept.[156]. The Court in that case indicates that legal aid at the stage of pre-trial investigation can be considered effective if such minimum requirements as the possibility for the suspect or accused to communicate and consult with a lawyer both before interrogation and including the period when no interrogation takes place are met. However, this includes the need for the lawyer's personal presence during the very first interrogation and all subsequent interrogations. It also includes the right to have meetings with lawyers without delay for all those placed in custody. All meetings must be ensured with the possibility of holding them in private. The Court specifies that the physical presence of a lawyer: "must enable to provide assistance that is effective and practical rather than merely, and in particular to ensure that the defence rights of the interviewed suspect are not prejudiced."[157].

In order to assess the overall fairness of the proceedings, it is necessary to take into account the full scope of the services provided. Namely, actions aimed at organising the defence, the search for evidence that may contribute to an acquittal, support for the accused, discussion of the case, actions aimed at ensuring appropriate conditions of detention[158].

Regarding the legal regulation of the concept of "effective legal assistance", it is worth noting that, at first glance, based on a textual analysis of sub-paragraph "c" of paragraph 3 of Art. 6 of ECHR and sub-paragraph "d" of paragraph 3 of Art. 14 of ICCPR, it is impossible to find specificity that it is the state's obligation to ensure that the legal assistance guaranteed by it is of high quality and effective. However, this research paper has already referred to ECtHR case-law, which clarifies the need to ensure that legal assistance is effective[159].

In Artico v. Italy, the Court stated, among other things, that when it comes to the right to a defense, such a right should not be illusory and theoretical, but practical and effective[160]. However, in Kamasinski v Austria, the Court points out the need for the state to intervene in manifestly ineffective representation before the court[161].

Unlike EU countries, which are required by Directive 2016/1919 to provide quality legal aid, in non-EU countries that are members of the Council of Europe, the state's duty to provide effective legal aid in each case may be governed by both ECtHR practice and national law.

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[155] See Simonas Nikartas, Agnė Limantė, *supra* note 148, p 8.
[156] "Beuze v. Belgium", Application no. 71409, 10 November 9, 2018", ECtHR, para 133.
[157] Ibid.
[158] Ibid, para. 135.
[159] See Kamasinski v Austria, *supra* note 146, para. 65.
[160] See Artico v. Italy, *supra* note 39, para. 33.
[161] See Kamasinski v Austria, *supra* note 146, para. 65.

For example, para. 1 of Art. 65 of the Constitution of Azerbaijan, which has been a member of the Council of Europe since 2001 [162]states that: "Everyone has the right to quality legal assistance."[163]. Thus, in spite of the fact that today the state reforms of justice system continue in Azerbaijan, which only provide for the adoption of the law "On free legal aid"[164], the Constitution as the main law, already guarantees every person in this country the right to have quality legal aid. In this case, there is no need for an additional interpretation of the concept of "state-guaranteed legal aid" to establish that it must also be effective.

At the same time, in Ukraine, which, like Azerbaijan, is not the EU member, but the Council of Europe member since 1995[165], neither the Constitution[166], the Law on Free Legal Aid[167] nor the Law on Advocacy and Advocate's Activity[168] specify that the legal aid provided by the state must be effective, practical or of high quality. Nevertheless, according to the Law of Ukraine "On the implementation of judgments and application of the case law of the European Court of Human Rights"[169], courts are obliged to be guided not only by the ECHR norms, but also by the existing practice of the ECtHR. Thus, interpreting the concept of "state-guaranteed legal aid" without the use of case-law, it is not possible to immediately establish that the state is responsible for its effectiveness.

In the EU countries, despite the fact that in previous years many documents adopted referred to the obligation to provide legal aid, until 2013 they did not specify the need to ensure its effectiveness. The situation has been changed by the European Union regulations such as Directive 2013/48/EU and Directive (EU) 2016/1919[170]. As mentioned in the previous subchapter, these regulations are aimed at providing detainees, suspects and accused persons with state-guaranteed legal assistance in criminal proceedings. Article 7 of Directive (EU) 2016/1919

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[162] Azerbaijan // 46 States, one Europe, Counsil of Europe, date accessed 15 November 2023 https://www.coe.int/en/web/portal/azerbaijan#:~:text=Azerbaijan%20joined%20the%20Council%20of%20Europe%20on%2025%20January%202001.

[163] *Azərbaycan Respublikasının Konstitusiyası*. 1995, Adopted by the citizens of Azerbaijan in a referendum on 12 November 1995 para. 1 of Article 65; https://president.az/az/pages/view/azerbaijan/constitution

[164] Rufik İsmayilov, Ödənişsiz hüquqi xidmət, Kaspi, 10 December 2019, https://www.kaspi.az/az/denissiz-huquqi-xidmet-fotolar

- Azərbaycan Respublikası Prezidentinin, 2018. *Azərbaycan ədliyyəsinin inkişafına dair 2019–2023-cü illər üçün Dövlət proqrami* https://static.president.az/upload/Files/2018/12/19/4ufyqgot5v_Az_rbaycan_dliyy_sinin_inki_af_na_dair_2019.pdf

[165] Ukraine // 46 States, one Europe, Counsil of Europe, date accessed 15 November 2023, https://www.coe.int/en/web/portal/ukraine#:~:text=Ukraine%20joined%20the%20Council%20of%20Europe%20on%209%20November%201995

[166] Верховна Рада України. 1996. *Конституція України*. art 59, https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text

[167] See Закон України «Про безоплатну правничу допомогу», *supra* note 83, sub-para. 1 of para. 1 of art. 1.

[168] See Закон України «Про адвокатуру та адвокатську діяльність", *supra* note 33, art. 25.

[169] Верховна Рада України. 2006. *Закон України "Про виконання рішень та застосування практики Європейського суду з прав людини"*, art. 17, https://zakon.rada.gov.ua/laws/show/3477-15#Text

[170] See Simonas Nikartas, Agnė Limantė, *supra* note 148, p. 8.

provides that states shall fund the provision of guaranteed legal aid to ensure quality legal aid, and an effective system of such aid[171]. In addition, this article contains an indication of the need for adequate training of lawyers who provide free legal aid[172]. Nevertheless, this normative act does not specify the ways of how to ensure quality legal aid[173].

In the U.S., the right to legal aid also provides for a duty to ensure the effectiveness of legal aid[174] and its adequacy[175]. Chinese law emphasises the need to provide timely legal assistance in accordance with applicable standards[176].

In terms of universal international instruments that encourage States to direct their efforts to ensure that legal aid is effective, these are The United Nations Basic Principles on the Role of Lawyers[177] (UN Basic Principles) and the UN Principles and Guidelines referred to repeatedly in this paper.

Among other things, for example, the UN Principles and Guidelines refer to the establishment of effective legal aid systems[178], timely and effective provision of legal aid at all stages of criminal proceedings[179]. However, these documents may serve as recommendations for all countries, but are not binding[180]. Any of the criteria that adversely affect the effectiveness of legal aid and fair trial in general is primarily up to the State. This assertion comes from an analysis of the above-mentioned norms and case-law. In addition, the analysis of the UN Principles also helps to reach this conclusion[181].

Analysing such criterion as problems with remuneration of lawyers who provide services in the system of state-guaranteed legal aid, the direct responsibility of the states is obvious. This assertion is based on the sub-paragraph "c" of paragraph 3 of Art. 6 of ECHR and sub-paragraph "d" of paragraph 3 of Art. 14 of ICCPR, which refer to the provision of a lawyer free of charge to persons who lack sufficient means. Although these articles do not explicitly state that it is the state that personally pays for legal assistance to those in need, the key word in them is "free of charge". Therefore, the obligation to ensure the financing of lawyers by the state in such cases is stipulated

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[171] See Directive (EU) 2016/1919, *supra* note 60, para. 1 of art. 7.
[172] Ibid, para. 3 of art. 7.
[173] See Simonas Nikartas, Agnė Limantė, *supra* note 148, p. 9.
[174] "McMann v. Richardson 397 U. S. 759", Supreme Court of the United States (1970).
[175] "Cuyler v. Sullivan 446 U.S. 335", Supreme Court of the United States, 446 U. S. at 446 U. S. S. 344. Id. at 446 U. S. 345-350, (1980),

- "Strickland v. Washington 466 U.S. 668", Supreme Court of the United States, Page 466 U. S. 686 (1984)

[176] See 中华人民共和国法律援助法, *supra* note 120, articles 19,20.
[177] The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990. *Basic Principles on the Role of Lawyers*, para. 6.
[178] See Principles and Guidelines, *supra* note 65, para. 15.
[179] Ibid, para. 27.
[180] Ibid, para. 6.
[181] Ibid, para. 15.

by Art. 1 ECHR[182], and paragraph 1 of Art. 2 ICCPR[183]. These norms oblige states to guarantee the observance of the rights and freedoms specified in these international treaties. In the EU countries, the obligation to fund legal aid systems is expressly stated in Article 7 of Directive 2016/1919[184].

Regarding insufficient experience of lawyers, neither Art. 6 of ECHR nor Art. 14 of ICCPR stipulate the obligation of the state to bear responsibility for any mistake of a lawyer. The practice of the ECtHR states that the state should not be responsible for all deficiencies committed by a lawyer and that since the legal profession is independent from the state, the issue of defense should remain between the lawyer and the client.

However, if it becomes apparent to the court that the lawyer is unable to provide effective assistance, or if the court becomes aware of this from other sources, the state is obliged to intervene. Thus, although the state should not arbitrarily interfere with lawyer performance at any time during a criminal trial, if, for example, it becomes apparent that there are impediments to effective legal assistance at this time, the court may recess the trial and allow lawyer additional time to review the case[185].

Also, based on Article 7 of Directive 2016/1919, it can be concluded that in the European Union countries the state has the obligation to take measures to promote the training of lawyers. It is also stated in this norm that such training in turn must be adequate[186].

Regarding the court's intervention in the client-lawyer relationship, the issue in this case is closely related to the above-mentioned case-law of the ECtHR. Therefore, it can be concluded that the State is also directly responsible for this criterion[187]. However, it is worth noting that sometimes the intervention of the court can be used by the accused as a defense tactic to delay the procedural deadlines, which may lead to the closure of the case on the statute of limitations. For these purposes, the paper will present, among other things, ways to reduce the chances of court interfering in the client-lawyer relationship at the appeal or cassation instance.

Following the aforementioned it can be stated that it is the state's responsibility to provide an effective defense, not just a nominal appointment of lawyer[188]. This means that the accused or suspect can reasonably expect that at all stages of the trial their lawyer will do everything possible to get the most favourable result for them in the case. Following the aforementioned it can be

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[182] See ECHR, *supra* note 44, art. 1.
[183] See ICCPR, *supra* note 45, para. 1 of art. 2.
[184] See Directive (EU) 2016/1919, *supra* note 60, para. 1 of art. 7.
[185] "Huseyn and Others v. Azerbaijan, applications nos. 35485/05 35680/05 36085/05 45553/05, July 26, 2011", ECtHR para. 183.
[186] See Directive (EU) 2016/1919, *supra* note 60, para. 3 of art. 7.
[187] See Huseyn and Others v. Azerbaijan, *supra* note 185, para. 183.
[188] "Номінальний чи ефективний? Критерії захисту нагадав ВС", Higher school of advocacy. 14 November 2023 https://www.hsa.org.ua/blog/nominalnii-ci-efektivnii-kriteriyi-zaxistu-nagadav-vs

stated that it is the state's responsibility to provide an effective defense. In addition, by analysis of the norms of international law and judicial practice of the ECtHR, it has been established that the state has a direct influence on such criteria as payment for the work done by a lawyer, the appointment of inexperienced lawyers in complex categories of cases, interference in the relationship between the client and lawyers in case of ineffective legal assistance.

2.1 Remuneration of a lawyer's work as a factor affecting the effectiveness of state-guaranteed legal aid

The remuneration of an appointed lawyer's work is an important factor that contributes to ensuring the right to a fair trial. In order to understand the impact of problems related to the remuneration of lawyers on the effectiveness of legal aid and to find solutions to it, it is necessary to do the following:

I. Analyse the international norms and documents that regulate the issue of payment of lawyers in the sphere of legal aid in criminal cases.
II. Demonstrate that by receiving lower pay than other members of the legal profession, lawyers may lose motivation. Argue that low motivation of lawyers can lead to poor quality of their work, reduce the effectiveness of the legal aid system as a whole and can negatively affect an individual case.
III. Give examples of countries in which problems with the remuneration of lawyers have had a negative effect.
IV. Based on the analysis, identify the most common problems that lead to dissatisfaction of lawyers in the matter of their remuneration.
V. Suggest possible solutions to them.

I. Analysis of the international regulation of the issue of payment of fees in the legal aid system.

This paper has already concluded that, based on the analysis of Art. 6 of ECHR and Art. 14 of ICCPR it is the state that is responsible for ensuring the financing of free legal assistance in criminal cases. However, these norms do not contain instructions on the amount of remuneration that lawyers should receive from the state for the legal assistance provided. In turn, the issue of the amount of remuneration for legal aid is raised in soft law sources. Thus, in the UN Basic Principles one can find an indication that states are obliged to provide sufficient funding for their free legal aid systems[189]. Paragraph 62 of the UN Principles and Guidelines stipulates that

[189] See UN Basic Principles, *supra* note 177, para. 3.

budgetary funds should sufficiently cover the entire list of services provided[190].However, this paragraph does not specify that the funds should be allocated to the extent necessary to ensure quality legal aid. Among other things, paragraph 62 of the Principles recommends that payments should be made in a timely manner[191]. As to the definition of "sufficient funding"[192], it is up to each State to determine and monitor whether funding meets the adequacy criterion[193].

Paragraph 61 of the UN Principles and Guidelines contains recommendations that include possible steps to improve the funding of legal aid systems[194]. The UN Principles include recommendations such as establishing legal aid funds, supporting relevant programmes, supporting lawyers' self-governance bodies, and assisting other organisations in this area[195]. At the same time, it is recommended to allocate funds, for instance, from the general criminal justice budget to the legal aid system to an appropriate extent, and to use confiscated property and fines obtained in the course of criminal proceedings to finance legal aid[196]. It is also suggested that lawyers be incentivised to provide legal aid in socially and economically difficult areas[197].

In addition, sub-paragraph "d" of paragraph 61 of The UN Principles[198] recommends a fair and proportionate distribution of finances between legal aid agencies and prosecution services. It is useful to note that in the above paragraph, the UN uses the interpretation of the funding of institutions that provide legal aid, leaving aside the issue of adequate payment of lawyers. Therefore, at first glance, this provision may be interpreted ambiguously, since even with fair and proportional funding of legal aid institutions, the remuneration of lawyers may not change and remain an order of magnitude lower than that of prosecutors. Thus, for example, budgetary funds within legal aid systems can be used exclusively for administrative and organisational matters, which would include increasing the salaries of senior officials and staff, training events, conferences, renovation of premises, purchase of equipment, etc.

For European Union countries, there is an obligation at the level of regional legislation to provide funding to such an extent as to ensure that legal aid activities are of adequate and sufficient quality[199]. This legislation also specifies that the quality of such assistance must ensure a fair trial[200].

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[190] See UN Principles, *supra* note 65, para. 62.
[191] Ibid.
[192] See UN Basic Principles, *supra* note 177, para. 3.
[193] See UN Principles, *supra* note 65, para. 60.
[194] Ibid, para. 61.
[195] Ibid, sub-para “a” of para. 61.
[196] Ibid, sub-para “b” of para. 61.
[197] Ibid, sub-para “c” of para. 61.
[198] Ibid, sub-para “d” of para. 61.
[199] See Directive (EU) 2016/1919, *supra* note 60, para. 1 of art. 7.
[200] Ibid.

Thus, international standards in the field of legal aid suggest that the state should ensure the financing of legal aid to a sufficient extent[201]. The EU law [202], in turn, more broadly states that states should not simply ensure sufficient funding for legal aid, but are obliged to do so in such a way as to ensure the existence of an effective legal aid system, and in such a way as to ensure sufficient quality for the provision of judicial proceedings.

Although the UN Basic Principles and UN Principles are not binding instruments to date, they nevertheless provide guidance to States and include solutions to many problems, including the issue of low fees.

Therefore, in order to ensure better compliance with these recommendations, certain provisions of the UN Basic Principles and the UN Principles on the issue of funding to date require interpretation, in particular para. 3 of UN Basic Principles and para. 61 (d) and 62 of UN Principles. A solution to this problem will be proposed at the end of this subsection.

II. It will be argued below that low remuneration of lawyers can reduce their motivation, which in turn can have a negative impact on the effectiveness of legal aid.

Lawyers in the legal aid system often compare their income with other members of the legal profession and often it is less than others', which can have a negative impact on their motivation (A). A lawyer's low motivation can reduce the effectiveness of legal aid (B). Low pay also encourages lawyers to leave the legal aid system and makes it more difficult to recruit new lawyers, which can also weaken the legal aid system (C). Lawyer's leaving of the legal aid system in a particular case may worsen the client's position because of the loss of time (D).

A. On the lower income of lawyers from the legal aid system compared to others in the legal profession.

Comparing oneself to someone else, a person is likely to be guided by related characteristics[203]. For example, when it comes to wages, instead of looking for an object with similar earnings for comparison, a person will choose those with similar occupational achievements. This phenomenon refers to the "related-attributes" hypothesis, which is nowadays accepted quite extensively[204].

Comparing one's income with that of other colleagues, a lawyer working in the legal aid system is likely to be guided by private attorney's fees or sometimes the salary of the prosecutor.

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[201] Яновська О.Г. "Європейські стандарти надання безоплатної правової допомоги в кримінальному судочинстві: проблеми реалізації в Україні". *Науковий вісник Міжнародного гуманітарного університету. Юриспруденція*, 2013, Вип. 6-1(2), p. 199.

[202] See Directive (EU) 2016/1919, *supra* note 60.

[203] Jerry Suls, Rebecca L. Collins and Ladd Wheeler. *Social Comparison, Judgment, and Behaviour*. (New York, Oxford Academic, ISBN 978-0-19-062911-3, (2020), p. 118.

[204] Wheeler L, Koestner R, Driver R., "Related attributes in the choice of comparing others: it's there, but it isn't all there is", *J Exp Soc Psychology*, (1982), pages 489-5.

This assertion is being held because a legal aid lawyer, a private lawyer or a prosecutor share quite similar characteristics. Thus, they all go through a rather long way of training and practice, pass examinations to access the profession, are directly involved in criminal proceedings and perform representative functions.

For example, the mass leaving of legal aid by English and Welsh solicitors to the Crown Prosecution Service due to low fees is evidence that solicitors compare themselves to prosecutors[205]. Moreover, in Canada in 2022, lawyers went on strike due to the lack of pay parity with Crown Prosecutors[206]. Based on the abovementioned, it can be concluded that legal aid lawyers can compare their fee with that of private advocates or with a prosecutor's salary.

B. On the impact of low motivation on the quality of work.

In the research paper "Social Comparison Affects Reward-Related Brain Activity in the Human Ventral Striatum" scientists, using special equipment, among other things, studied how the human brain will react to the information that the tasks performed will be rewarded worse than of the other participants in the experimental group. The study has shown that the lack of equal reward for performance of the same tasks in one group of people leads to a decrease in brain activity of a person, which as a consequence, reduces the motivation to perform any subsequent tasks[207]. Thus, it is possible that when lawyers know that they receive less income than, for instance, private lawyers or prosecutors, it may reduce their motivation to do quality work.

C. On the negative impact of low fees on the effectiveness of national legal aid systems in general.

An important aspect of adequate remuneration is that it can attract experienced lawyers to the free legal aid system and thus encourage them to do quality work[208].

Research has shown that when people learn that their colleagues in the same professional group are earning higher incomes, this leads to dissatisfaction with the job and encourages them to look for a new one. This reaction is caused by a reaction to inequality[209]. Leaving of a large number of British lawyers to the Crown Prosecution Service is evidence of this[210].

In Birmingham, UK, solicitors and barristers are reluctant to work in the free legal aid sector because they realise that they will face such problem as the low pay[211]. British lawyers

[205] House of Commons Justice Committee. "The Future of Legal Aid. Third Report of Session 2021-22". (2021), page 3.
[206] "Quebec legal aid lawyers to strike over equal pay with Crown attorneys", The Canadian Press, 6 June of 2022, https://www.cbc.ca/amp/1.6478659
[207] K. Fliessbach, B. Weber, P. Trautner, T. Dohmen, U. Sunde, C. E. Elger, A., "Falk Social Comparison Affects Reward-Related Brain Activity in the Human Ventral Striatum", *Science 318*, (2007) p. 1308.
[208] See Handbook on ensuring quality of legal aid services in criminal justice processes, supra note 105, p. 54.
[209] D. Card, A. Mas, E. Moretti, and E. Saez, "Inequality at Work:The Effect of Peer Salaries on Job Satisfaction", *American Economic Review,* 2012, p. 2892.
[210] See "The Future of Legal Aid", *supra* note 205, p. 3.
[211] Ibid, p. 27.

wishing to practise in criminal law would rather work as prosecutors than as solicitors in the legal aid system, as the income of prosecutors is higher[212].

Surely, low pay does not always lead to poor quality of services. However, it is worth noting that, more often than not, it can contribute to, for example, criminal law firms being unable to avoid staff attrition or having difficulty recruiting new staff[213]. Consequently, the lack of adequate remuneration for lawyers reduces the effectiveness of the legal aid system as a whole, as it may contribute to mass exodus of professionals and difficulties in recruiting new ones.

D. On the additional problems to which a lawyer's leaving of the legal aid system may lead.

It should be clarified that, apart from reducing the effectiveness of the legal aid system as a whole, the leaving of a lawyer will further lead to the following replacement of lawyer in a particular criminal case, which may result in the loss of valuable time for the defendant. Thus, the change of lawyer may increase the time of consideration of the case. The new lawyer is likely to have to take time to study the materials, meetings and consultations with the client, preparing motions, complaints, establishing psychological contact with witnesses of the defence, checking the conditions of the client's detention, etc.

Under all these circumstances, the loss of time may lead to ineffective defence. For example, the disappearance or death of a defence witness may occur, which would have a critical negative impact on the outcome of the case. Also, such time dragging can contribute to the client being in custody for a longer period of time. In addition, it is worth mentioning the additional stress that a suspect or defendant is likely to face when they learn about leaving of their previous lawyer from the case and the appointment of a new one.

In this regard, the change of lawyer entails the loss of valuable time, which may lead to irreversible consequences for the client.

III. In order to identify the most pressing problems in the issue of remuneration of lawyers, it is necessary to give an example of some developed countries that have already faced it.

Thus, in recent years, the United Kingdom, Ireland, New Zealand and Canada have faced the most serious consequences due to the problems in the area of remuneration. These are such consequences as strikes of lawyers or threats in their carrying out due to insufficient funding of the legal aid system, low fixed rates, delayed payment of fees, lack of parity between the salaries of prosecutors and lawyers, which as a result significantly affects the personal effectiveness of the lawyer and the effectiveness of the legal aid systems of these countries.

[212] Ibid, pages 30-32.
[213] Ibid, p. 3.

By analysing these cases on the example of developed countries, including one of the EU countries, and proposing solutions to the identified problems, it is possible to prevent the development and spread of similar problems in other states and other legal systems.

The first example is the UK. At the end of August 2022, criminal defence lawyers in England and Wales decided that they would refuse to participate in court hearings and announced an indefinite strike. This action was taken as a "last-ditch attempt to save justice"[214]. The Criminal Bar Association of England and Wales then reported that, among other reasons for the strikes, criminal barristers' fees have fallen by twenty-eight per cent on average since 2006. And in their first three years of employment, a criminal defence barrister receives an average of £12,200 per annum[215]. During the industrial action in October 2022, a consensus was found with the government. As a result, fee rates were increased by fifteen per cent. One of the conditions of the compromise was the gradual implementation of reforms to increase lawyers' rates[216]. As of today, the official UK Government's website states that the starting annual income for a criminal defence solicitor is £17,152[217]. In turn, by comparison, the Crown Prosecutor currently receives a minimum annual salary of £38,000[218].

Furthermore, industrial actions are not only happening in England and Wales. For example, in November 2023, there were also strikes in Northern Ireland by solicitors who provide free legal aid in criminal cases. This strike was due to delays in the payment of fees[219].

The problem of low fees has not been lost on solicitors in Scotland. In May 2022, the Scottish Bar Association publicly criticised the government's failure to ensure that lawyers are paid sufficiently and threatened to go on strike, following the example of England and Wales[220].

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[214] Criminal Bar Association - Parliamentary Briefing. The Criminal Bar Association of England and Wales. 31 August 2022, p.1, https://www.criminalbar.com/wp-content/uploads/2022/09/CBA-Parliamentary-Briefing-31.8.22.pdf

[215] Ibid.

[216] "Criminal barristers in England and Wales vote to end strike action", The Guardian, (2022) https://www.theguardian.com/law/2022/oct/10/barristers-in-england-and-wales-vote-to-end-strike-action#:~:text=Industrial%20action%20began%20in%20April,of%20accepting%20the%20government%20offer.

[217] Baristers, National Careers Service, Government of the United Kingdom, date accessed 20 November 2023, https://nationalcareers.service.gov.uk/job-profiles/barrister#:~:text=You%20could%20do%20a%20degree,Course%20which%20takes%20one%20year);

[218] Crown prosecutor, website of National Careers Service, Government of the United Kingdom, date accessed 20 November 2023, https://nationalcareers.service.gov.uk/job-profiles/crown-prosecutor

[219] "Barristers' strike yields immediate boost to Northern Ireland legal aid budget", Irish legal news, (17 November 2023), https://www.irishlegal.com/articles/barristers-strike-yields-immediate-boost-to-northern-ireland-legal-aid-budget.

[220] "Scottish defence lawyers threaten strikes over legal aid fees", The Times, (20 June 2022), https://www.thetimes.co.uk/article/scottish-defence-lawyers-threaten-strikes-over-legal-aid-fees-95vp06gp7

Thus, despite the fact that the UK is an economically developed country[221], the annual income of an aspiring criminal defence lawyer there can be almost half the starting salary of a Crown Prosecutor.

On the basis of the above, low pay may continue to reduce the quality of legal aid[222]. The trend of lawyers leaving the legal aid system, as exemplified in England and Wales, may continue unabated, which could lead to the future failure of the legal aid system[223].

The next example is Ireland. This EU member state has a fairly low poverty rate[224]. Despite this, fees in the free legal aid system there have not increased since 2002. In both England and Wales and Ireland, young lawyers are opting for more remunerative legal careers. However, two-thirds of legal aid lawyers leave practice after an average of six years[225]. Even after several years, aspiring criminal defence lawyers face the challenge of earning a living minimum[226]. This crisis situation led lawyers throughout Ireland to protest in October 2023[227]. These strikes resulted in the government increasing legal aid funding by ten per cent[228].

If to conclude on the issue of criminal defence lawyers' fees in Ireland, the situation here is similar to the neighbouring UK. Namely, the measures taken by the government may also be insufficient to prevent lawyers from leaving the legal aid system. As mentioned above, even a few years of practice in criminal cases does not allow young lawyers to" earn for a living"[229], so perhaps a fee increase of only ten percent would not make a dramatic difference. As a consequence, the quality of legal aid in this country may also be deficient, which, along with the leaving of lawyers, may lead to a significant reduction in the effectiveness of legal aid.

Lawyers' strikes in New Zealand. In November 2021, the Law Society of New Zealand reported that the government was paying lawyers too little, causing the legal aid system to lose lawyers. It was also added that people are losing access to a fair trial because of this problem[230].

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[221] GDP – International Comparisons: Key Economic Indicators, House of Commons Library, United Kingdom Parliament, 15 November 2023, https://commonslibrary.parliament.uk/research-briefings/sn02784/
[222] See "The Future of Legal Aid", *supra* note 205, pages 3, 33.
[223] Ibid, page 3.
[224] "Living conditions in Europe - poverty and social exclusion", Eurostat, (June 2023), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Living_conditions_in_Europe_-_poverty_and_social_exclusion#:~:text=Highlights&text=In%202022%2C%2095.3%20million%20people,21.6%20%25%20of%20the%20EU%20population.&text=The%20risk%20of%20poverty%20or,%25%20compared%20with%2020.4%20%25
[225] Withdrawal of Services Recommended by The Bar of Ireland, The Bar of Ireland, (12 July 2023), https://www.lawlibrary.ie/recommended-wos/
[226] Budget 2024 investing in the frontline criminal justice system, The Bar of Ireland, (June 2023), p. 2.
[227] Ciara Dinneny, "Irish barristers strike over legal aid fees", Jurist, (Jurist 3 October 2023), https://www.jurist.org/news/2023/10/eu-dispatch-irish-barristers-strike-over-legal-aid-fees/
[228] Harry McGee, "Rise of 10% in criminal legal aid fees will be built upon in coming years, says McEntee", The Irish times, (11 October 2023), https://www.irishtimes.com/politics/2023/10/11/rise-of-10-in-criminal-legal-aid-fees-will-be-built-upon-in-coming-years-says-mcentee/
[229] See "Budget 2024 investing in the frontline criminal justice system", *supra* note 226, p. 2.
[230] Fara Hancock, Legal aid: Thousands turned away by lawyers in 'collapsing' system, RNZ, (11 November 2021), https://www.rnz.co.nz/news/national/455427/legal-aid-thousands-turned-away-by-lawyers-in-collapsing-system

Strikes of Canadian lawyers. In Quebec, Canada, a strike was also called in June 2022 due to the lack of pay parity between legal aid lawyers and Crown prosecutors. The status of salary parity between the two was established approximately 30 years ago[231]. This State has also faced a problem of lawyers leaving the legal aid system.

Generally speaking, looking at the possible root cause that leads to the problem of low fee rates in all the above mentioned states, then on the basis that the problem is not related to the level of the economy, it can be assumed that the reason lies in the lack of sufficient empathy for the accused at the state level[232]. However, this topic is not covered by legal science and is a mere assumption.

IV. A list of problems that can lead to low fees and dissatisfaction of lawyers in the matter of payment for their work.

To summarise, the most common problems that lead to the above problems are:

1. Inadequate funding of legal aid systems;

2. Lack of proportionality between legal aid lawyers' fees and the remuneration of other members of the legal profession;

3. Delay in the payment of fees;

4. Low fixed rates.

V. Solutions that can help to address the identified problems. A solution to the identified problems will be proposed at the national level (A). This will be followed by a solution at the EU level (B). This will be followed by a discussion of solutions at the international level (C).

A. Solutions to the identified problems at national level.

1) On addressing problems with the funding of legal aid systems.

In order to facilitate better funding of legal aid systems, states need to define reasonable and sufficient levels of fixation at the legislative level, rather than simply being guided by the notion of sufficiency. In order to do so, it is necessary to define what tasks and purposes such funding should necessarily cover. Such a rule is, for example, already used in the EU countries - Article 7 of Directive (EU) 2016/1919[233].

Therefore, it is possible to introduce such changes at the level of national legislation, which would stipulate that legal aid funding should ensure a system of effective legal aid, as well as quality legal aid provision that will contribute to a fair trial.

[231] See "Quebec legal aid lawyers to strike over equal pay with Crown attorneys", *supra* note 206.
[232] McCann, S. J. H. Societal threat, authoritarianism, conservatism, and U.S. state death penalty sentencing (1977-2004). *Journal of Personality and Social Psychology*, (2008), pages 913-23.
[233] See Directive (EU) 2016/1919, *supra* note 60, art. 7.

2) Regarding a possible solution to the problem of low rates of lawyers and the lack of proportionality between the remuneration of legal aid lawyers and other members of the legal profession.

The most effective way to solve this problem may be to raise the remuneration of lawyers from the legal aid system to the level of private lawyers' fees.

Despite the fact that lawyers and law firms independently determine the prices of their fees and rates and the prices for their services may differ[234], it is possible to determine the average market prices of services in the market of legal services.

For example, in 2023, in the Philippines[235] introduced minimum rates of fees, at one time in Ukraine[236] also in some regional bar associations developed rates of lawyers, which allowed to form an average market price for specific services of private lawyers.

Such minimum standards of lawyer's fees should be set by the national Bar Associations and regularly reviewed at least once a year, depending on the economic situation in the country.

In turn, legal aid systems should be guided by these standards when paying lawyers for their work.

In countries where the average monthly income of a lawyer working in the legal aid system is significantly lower than the average income of a prosecutor, the following is suggested.

In this matter, based on the principle of proportionality of remuneration of lawyers and prosecutors, states should promote that the total monthly income of a criminal lawyer should not be less than the average income of a prosecutor in their country. In this way, in some countries it may be possible to prevent lawyers from becoming unmotivated and leaving the legal aid system.

To this end, a possible solution would be to adapt the rates so that, on average, the lawyer would eventually be able to earn an income at least as high as that of a prosecutor. As a member of a free and independent profession[237] a lawyer may receive income from handling different cases at the same moment, some of which will be from the sphere of free legal aid and some of which will be from private practice. On this basis, the employment of lawyers in the field of free legal

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[234] See UN Basic Principles, *supra* note 177, para. 16
- "Barrasters and their fees. Bar Standarts Board, date accessed 23 November 2023, https://www.barstandardsboard.org.uk/for-the-public/finding-and-using-a-barrister/barristers-fees.html
- See Закон України «*Про адвокатуру та адвокатську діяльність*", supra note 33, para. 2, art 30.
- See Lietuvos Respublikos advokatūros įstatymas, *supra* note 27, para. 1 art. 50

[235] "Minimum wage for lawyers and understanding legal fees", Inquirer.net, (07 November 2023), https://business.inquirer.net/430263/minimum-wage-for-lawyers-and-understanding-legal-fees

[236] "Затверджені рекомендації щодо застосування рекомендованих ставок адвокатського гонорару", Рада адвокатів Чернігівської області, (2018) https://advokatrada.cn.ua/затверджені-рекомендації-щодо-засто

[237] See UN Basic Principles, *supra* note 177, para. 16.

aid is often incomplete, in this regard, for example, in Ireland[238], in the Netherlands[239], Ukraine[240], UK[241] may use a fixed payment for a specific action taken, a specific case, or for one hour of work.

For example, in states where the average monthly income of a lawyer depends on fixed rates for a particular action and is systematically lower than that of a prosecutor, the following algorithm can be used:

(a) Through analysis and statistics, establish the amount of the average monthly income of a lawyer with a standard caseload;

b) By analysing and statistically establishing a list of activities that a lawyer usually performs per month in order to obtain an average monthly income;

c) Calculate by how much it is necessary to raise the average cost of certain actions (services) from the above list, so that when they are added up, a number close to the average monthly salary of a prosecutor can be obtained;

d) Since the income of a novice and an experienced lawyer may differ, the fee schemes for such lawyers may be different. Thus, in this case, the fee scheme for such lawyers should be based on how much a novice or experienced prosecutor earns;

(e) The State should recalculate fee schemes in advance in line with the increase in the salaries of prosecutors.

In cases where the payment provides for a fixed rate per case or, for example, per hour of work. It is proposed to adapt the above algorithm depending on the type of fixed rate.

Lawyers in criminal cases, depending on the procedural tasks provide a fairly tangible list of services. So, for example, such services may include consultation, study of case materials, defence during detention, search, interrogation, election of preventive measure in court, participation in the court session, etc[242].

Thus, by forming a standard of work performed by a lawyer per month, and raising the rates for each procedural and other actions so that when summed up, the amount is close to the amount of the actual salary of a prosecutor, the chances of a lawyer to receive an income equal to that of a prosecutor or even higher may increase significantly. This change may encourage lawyers to be motivated to work harder, and it may prevent lawyers from leaving the legal aid system and encourage new motivated lawyers to join the ranks of the legal aid system.

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[238] "Defence lawyers protest at courthouses throughout Ireland", Irish legal news, (14 July 2023), https://www.irishlegal.com/articles/defence-lawyers-protest-at-courthouses-throughout-ireland

[239] Prof. Dr Christoph Burchard et al, "Practice Standards for Legal Aid Providers", (2018), p. 58.

[240] United Nations Office on Drugs and Crime, Global Study on Legal Aid Country Profiles (2016), p. 378.

[241] Ibid, p. 505.

[242] See "Затверджені рекомендації щодо застосування рекомендованих ставок адвокатського гонорару", *supra* note 236.

In addition, this approach may create competition for other professions[243], which would also have a positive impact on raising the profile of the legal aid system and increasing the professional requirements for lawyers in legal aid system.

It is fair to say that the state cannot always guarantee that a lawyer will receive an income equal to that of a prosecutor, but it is within its power to create favourable conditions for this. In addition, it should be clarified that, due to the principle of independence of the Bar, the state should not interfere with the ability of a lawyer to earn more than the established standard.

3) On the matter of delays in the payment of lawyers' fees, the following is proposed.

A provision should be implemented in the national legislation that in case of delays in payment of lawyers' fees, the state is obliged to pay them fair compensation for each day of delay. In addition, a clear list of force majeure circumstances should be defined, which would, in some cases, absolve the state of its responsibility for delayed payments.

It should be stipulated that officials responsible for ensuring timely payments to lawyers should be subject to the strictest disciplinary liability in case of fault that led to the delay. Disciplinary proceedings in such cases should be conducted in a manner that is as open to the public as possible, in an objective and expeditious manner, and with the outcome of the review publicly announced in the national media.

B. Addressing the problems encountered at the EU level.

As far as the EU Member States are concerned, each case of non-compliance by Member States with their funding obligations under Directive (EU) 2016/1919 should be dealt with by the European Commission on the basis of its own investigations, without waiting for complaints from natural or legal persons. The timing of such reviews should be as swift as possible, as the legal aid system may be in a vulnerable state in case of strikes by criminal defence lawyers. Thus, such situations are unacceptable as they may lead to massive violations of the right of suspects and defendants to a fair trial.

C. On the solution at the international level.

Thus, although the UN Basic Principles and the UN Principles are of a recommendatory nature, a certain part of the principles set out therein is officially used by states because of regional and national courts, which implement them when interpreting international human rights treaties[244].

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[243] K. Dow Scott, Dennis Morajda, James W. Bishop, "Increase Company Competitiveness "Tune Up "Your Pay System", *World at Work Journal first quarter,* (2002) p. 35.

[244] The Law Society of England and Wales, "UN Basic Principles on the Role of Lawyers Independence of the Legal Profession and Lawyer/Client Rights Worldwide" (2022), p. 3, https://www.lawsociety.org.uk/topics/research/un-basic-principles-on-the-role-of-lawyers#download

Taking into account the fact that in recent years a rather serious trend has emerged, which may indicate the lack of due attention of a number of states to the issue of financing legal aid in criminal proceedings, it is necessary to adopt a resolution at the UN level.

Thus, this resolution should at a minimum:

1) Remind countries to adhere to the principles relating to the role of the lawyer, principles, and guidelines on access to legal aid in criminal justice systems.

2) Encourage countries, such as the United Kingdom, to avoid delays in the payment of fees to lawyers who provide legal aid in criminal proceedings.

3) Encourage countries to ensure that States allocate budgetary resources not only sufficiently but also to the extent that this contributes to the stable and quality provision of legal aid in criminal proceedings and to the effectiveness of legal aid systems in general.

4) Encourage countries to ensure that legal aid lawyers' fee rates are as close as possible to private lawyers' fees in their country.

These measures will not fully solve all problems in a question of remuneration of lawyers, but they will draw the attention of states on the international arena, which will bring to the fore the importance of the issue of legal aid as an important element of fair trial.

The adoption of this resolution may have a positive impact on improving the quality of legal aid in many countries, which will certainly help many people to obtain justice. Thus, this subchapter reveals important problems such as inadequate funding for legal aid, delays in the payment of fees, and the lack of proportionality of lawyers' fees to other members of the legal profession. It has also shown how all these problems affect the quality of legal aid. Each of these problems can negatively affect both the effectiveness of legal aid in a particular case and the legal aid system as a whole.

Issues with the funding of legal aid systems can be resolved by clearly defining the goals and objectives that it should cover, rather than by an abstract sufficiency framework that each State may interpret in its own way. In this case, it is a matter of ensuring funding that will ensure both the proper quality of legal aid and the operation of an effective legal aid system.

This subchapter explains, among other things, that people tend to compare their income with that of others with similar professional characteristics. In the case of low salaries, lawyers will often compare themselves with private lawyers or prosecutors, who, as the UK example has shown, can earn almost twice as much. A solution to the problem may be the creation of average market standards for the rates of private lawyers, according to which legal aid lawyers will be paid. At the same time the principle of the need for pay parity between lawyers and prosecutors has been

confirmed by the Canadian example[245]. Creating in some countries such as the UK or Ireland conditions under which lawyers in the legal aid system will have the opportunity to earn the same amount as prosecutors, including the opportunity to earn more, will increase the motivation of lawyers to work harder and raise the credibility of the legal aid system.

The issue of delayed payment could be addressed by implementing fair compensation to lawyers for a day of delayed payment and introducing strict disciplinary liability for officials who allowed such delays. At the EU level, problems could be addressed by an immediate response by the European Commission in the form of investigations.

At the international level, it would be relevant to adopt a relevant UN resolution, which would remind about the need for states to comply with international standards in the field of legal aid and draw attention of countries to the inadmissibility of delayed payments to lawyers. This resolution should also specify to the states the mandatory goals and objectives that should be covered by the funding. In addition, the document should draw attention to ensuring that states promote timely increases in fixed attorney rates without taking the situation to strikes.

2.2. Lack of sufficient experience of a lawyer in a complex category of cases as an obstacle to the proper exercise of the right to defence

This subsection deals with cases where suspects or accused persons are defended by lawyers who do not have sufficient experience.

In order to analyse this topic, it is necessary:

I. To raise a question of what requirements international law, judicial practice and international documents impose on the issue of the necessary level of training of a lawyer in criminal proceedings.
II. To analyse specific situations that demonstrate the problem of appointing lawyers in cases in which they do not have sufficient experience or competence in general. To demonstrate how the issue of appointment of lawyer is regulated using the examples of the states represented.
III. Demonstrate the importance of the problem.
IV. To show on the basis of the legislation of other countries what criteria are taken into account when appointing a lawyer in a particular case.
V. To show the problems that can affect the appointment of inexperienced lawyers in complex cases.

[245] See "Quebec legal aid lawyers to strike over equal pay with Crown attorneys", *supra* note 206.

VI. To propose solutions to the problems identified.

I. Concerning the international requirements to the professional level of lawyers who provide legal assistance in criminal proceedings.

This topic has already been raised and dealt with at the beginning of the second chapter of this paper, as it relates to the issue of the effectiveness of legal aid. It was discovered that the norms of international law do not oblige the state to bear responsibility for all the mistakes made by a lawyer. Furthermore, the ECtHR emphasises that the issue of defence must remain within the scope of the lawyer-client relationship[246].

However, it has also been raised earlier in this paper that the State may intervene in cases of manifestly ineffective legal assistance of lawyer[247]. The Directive 2016/1919 has in turn rules obliging to take the necessary measures to ensure that legal aid is of good quality and that the state promotes adequate training of lawyers[248]. In addition, it was found that the basic framework for effective legal aid is provided by the ECtHR judgement in the case of Beuze v. Belgium[249].

Such a framework should cover: the possibility to communicate and consult with a lawyer throughout the proceedings, the lawyer's personal presence during all interrogations, and the confidentiality of meetings. A lawyer must provide effective and practical assistance and ensure that their client's rights are not violated. The assessment of the effectiveness of legal assistance in general is based on the totality of the work done by the lawyer[250].

The UN Basic Principles indicate that persons entitled to a lawyer should have such a lawyer who has experience and competence which are proportionate to the complexity of the offence with which the person is charged[251]. However, the UN Basic Principles define the following duties of a lawyer to his client, namely: "(a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients; (b) Assisting clients in every appropriate way, and taking legal action to protect their interests; (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate."[252]. The UN Basic Principles also recommend, inter alia, that states and national bar associations ensure that lawyers are adequately trained[253].

Thus, if to talk about the EU countries and Council of Europe member states, the ECtHR case-law and the norms of Directive 2016/1919 make it clear that the practicality and effectiveness

[246] See Huseyn and Others v. Azerbaijan, *supra* note 185, para. 183.
[247] Ibid.
[248] See Directive (EU) 2016/1919, *supra* note 60; paras 1, 3 of art. 7.
[249] See Beuze v. Belgium, *supra* note 156, para 133.
[250] Ibid, para 135.
[251] See UN Basic Principles, *supra* note 177, para. 6.
[252] Ibid, para. 3.
[253] Ibid, para. 9.

of legal assistance is an indispensable element of the right to defence. However, it should be noted that this statement does not apply to countries where the ECtHR's case-law is not directly binding on the courts, such as Wales and England[254].

In addition, it is worth noting that each country has national standards for the quality of a lawyer's work in general, which are regulated by national legislation. For example, in Lithuania this are Law on the Bar of the Republic of Lithuania[255] and Code of Ethics[256].

II. Next, examples that took place in the USA and Ukraine will be presented.

These examples will demonstrate the problem of assigning lawyers to cases in which they do not have sufficient experience or competence. At the same time, the rules for the appointment of lawyers in these countries will be analysed in parallel. Firstly, a case study from the USA will be presented and the local standards for the selection and appointment of lawyers in the legal aid system will be analysed. (A). Next, a similar analysis will be made using Ukraine as an example (B).

A. An example that took place in the USA, the State of Maine.

In 2020, during the processing of case data from the Maine Commission on Indigent Legal Services (MCILS) journalists found the following[257]. Between 2019 and 2015, due to an irregularity in the assignment of 250 cases, legal assistance was represented by lawyers with inadequate experience to do so. The list of such cases included both criminal misdemeanours and serious crimes, such as murder. The analysis showed that 69 lawyers out of 300 had provided legal aid at least once without the necessary experience[258]. Court clerks and judges told reporters they were unaware of the problem. A study of state Supreme Court decisions showed that none of the cases involving inexperienced lawyers were overturned. In addition, none of the officials were disciplined[259].

Next, the rules for the selection of lawyers in the free legal aid system in the above-mentioned US state will be analysed. A lawyer must have a bar licence, be in good standing with the Maine Board of Overseers of the Bar[260] The lawyer must also have an office, telephone, and

[254] "Human Rights and Criminal Prosecutions: General Principles", The Crown Prosecution Service, 18 September 2019, https://www.cps.gov.uk/legal-guidance/human-rights-and-criminal-prosecutions-general-principles#:~:text=European%20Convention%20(%22Strasbourg%22),courts%20in%20England%20and%20Wales
[255] See Lietuvos Respublikos advokatūros įstatymas, *supra* note 27.
[256] Lietuvos advokatų. 2016. *Etikos kodeksas*.
[257] "Lawyers Who Were Ineligible to Handle Serious Criminal Charges Were Given Thousands of These Cases Anyway", Propublica, (23 February 2021), https://www.propublica.org/article/lawyers-who-were-ineligible-to-handle-serious-criminal-charges-were-given-thousands-of-these-cases-anyway
[258] Ibid.
[259] Ibid.
[260] Maine commission on indigent legal services. 2010. Standards for qualifications of assigned counsel, para. 1 of Section 2, https://www1.maine.gov/mcils/rules/rules/Chapter%202%20-%20Final%20Adopted%20to%20SOS.pdf

email[261]. To be admitted to the legal aid system, a lawyer must successfully complete specially approved courses in the area of law of their choice[262]. The following admission option is also available. A lawyer may be admitted to the legal aid system without taking a special training course if they demonstrate that they have professionalism in a particular area of law in which they have practised for at least three years.

To be able to provide legal aid in serious crimes, among other things, a lawyer must have experience or training in less complex cases. A lawyer may seek professional advice from a more experienced lawyer[263]. The Rules also require that before a lawyer undertakes legal aid representation, they must consider whether they have the time, knowledge, experience, and resources to do a good job[264]. In 2019, a report commissioned by the state legislature was conducted and found them to have fairly simple eligibility requirements and inadequate oversight[265].

B. A Ukrainian example.

The following example is based on the high-profile criminal case "A terrorist attack near the Palace of sports"[266]. The defendants in that case were exchanged for Ukrainian servicemen at the end of 2019 in the framework of Normandy Summit 2019[267].

In 2015, three individuals were accused of organising the explosion of an anti-personnel mine during a peaceful rally in Kharkiv, killing four people and injuring many others[268].

The defendants pleaded not guilty in court[269] and faced life imprisonment[270]. In early autumn 2019, as one of the three defendants broke the contract with his lawyer, he needed legal assistance from the state[271]. After a new lawyer was appointed for the defendant, the new lawyer took time to familiarise himself with the case file, but after a while he stated that he did not

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[261] Ibid, section 3.
[262] Ibid, para. 2 of section 4.
[263] Maine commission on indigent legal services. 2012. Standards of practice for attorneys who represent adults in criminal proceedings, sub-para. B of para. 1 of section 2, https://www1.maine.gov/mcils/rules/rules/Adult%20Criminal%20Standards%20Final%20Adopted%20to%20SOS%20effdate.pdf
[264] Ibid, sub-para. B of para. 2 of section 2.
[265] Sixth amendment center. "The right to counsel in Maine. Evaluation of services provided by the Maine commission on indigent legal services",(2019), p. 25.
[266] "Взрыв в Харькове: умер еще один подросток", BBC News Україна, (24 February 2015), https://www.bbc.com/ukrainian/ukraine_in_russian/2015/02/150224_ru_s_kharkiv_4th_dead
[267] "Overall agreed conclusions of the Paris Summit in the Normandy format of December 9", 2019, President of Ukraine, 10 December of 2019, https://www.president.gov.ua/en/news/zagalni-uzgodzheni-visnovki-parizkogo-samitu-v-normandskomu-58797
[268] See "Взрыв в Харькове: умер еще один подросток", *supra* note 263.
[269] "Обвинувачені у справі про теракт на марші в Харкові не визнають свою провину", Українська правда, (5 June 2015), https://www.pravda.com.ua/news/2015/06/5/7070335/
[270] Верховна Рада України. 2001. *Кримінальний Кодекс України*, para. 3 art. 258, https://zakon.rada.gov.ua/laws/show/2341-14#Text
[271] "Адвокат обвинуваченого у теракті біля Палацу спорту відмовився від клієнта", Суспільне Харків, (23 October 2019), https://kh.suspilne.media/news/43943

specialise in such cases and that for these reasons he could not further defend the defendant[272]. However, the court refused to accept this statement and decided to hear the case further[273]. A week later, the defendant himself requested the court to replace his lawyer due to his lack of proper specialisation. The court refused this request and also continued to consider the case[274].

At the next hearing, the lawyer did not appear, so another lawyer was appointed to the accused, but the new lawyer also announced that she could not participate in the trial and declared a conflict of interest because she knew one of the deceased victims. Eventually, from the third time, the accused was still provided with a lawyer who continued his defence. However, this was more than two months in total from the very first time he expressed a need for legal assistance[275].

At the end of 2019, the defendants were sentenced to life imprisonment[276]. Analysing the legislation of Ukraine in the field of selection of lawyers in the legal aid system, this issue is regulated by the Regulation of the Cabinet of Ministers "On Approval of the Procedure and Conditions for Holding a Competition for the Selection of Attorneys Engaged to Provide Free Secondary Legal Aid" No. 1362 dated 28 December 2011[277] (The Regulation No. 1362).

This regulation stipulates that lawyers shall be appointed on the basis of their length of service, results of the training course, presence or absence of disciplinary sanctions, communication skills, emotional balance, ability to demonstrate examples of providing legal assistance[278].The selection also includes a competition[279]. This competition is stipulated by a separate normative act[280]. During the competition, among other things, the results of the distance learning course, the lawyers's general experience without specifying their specialisation, and the lawyer's motivation are taken into account[281].

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[272] "Справа про теракт у Харкові: новий адвокат не хоче захищати обвинуваченого", Mediaport, (23 October 2019), https://www.mediaport.ua/sprava-pro-terakt-u-harkovi-noviy-advokat-ne-hoche-zahishchati-obvinuvachenogo

[273] "Ухвала від 23 жовтня 2019, справа № 645/3612/15-к", Фрунзенський районний суд м. Харкова, 23 October, 2019, https://reyestr.court.gov.ua/Review/85194162

[274], "Ухвала від 30 жовтня 2019, справа № 645/3612/15-к", Фрунзенський районний суд м. Харкова, 30 October 2019, https://reyestr.court.gov.ua/Review/85288998

[275] See Адвокат обвинуваченого у теракті біля Палацу спорту відмовився від клієнта, *supra* note 268.

[276] "Обвинувачених у теракті в Харкові засудили до довічного ув'язнення, але відпустили з СІЗО", Радіо Свобода, (28 December 2019), https://www.radiosvoboda.org/a/news-kharkiv-terakt-obmin/30348945.html

[277] Кабінет Міністрів України.2011. *Постанова Кабінету Міністрів "Про затвердження Порядку і умов проведення конкурсу з відбору адвокатів, які залучаються для надання безоплатної вторинної правової допомоги"* № 1362.

[278] Ibid, para. 11.

[279] Ibid, para. 12.

[280] Кабінет міністрів України. 2017. *Наказ Міністерства Юстиції України «Про затвердження Порядку оцінювання адвокатів за результатами конкурсу з відбору адвокатів, які залучаються для надання безоплатної вторинної правової допомоги, та форм документів, що використовуються під час його проведення* № 3552/5.

[281] Ibid, para. 3.

Based on the analysis of the legislation of Ukraine regulating the provision of legal assistance[282], to date, when appointing an advocate in a criminal case, the complexity of the cases in which the advocate takes part, their specialisation, work experience, workload is not taken into account. Although it should be noted that these factors were taken into account in the old version of the Law of Ukraine "On Legal Aid"[283].

Regarding the fact that the appointment of Ukrainian lawyers in complex criminal cases does not take into account such criteria as the specialisation of the lawyer, work experience, etc. In the course of writing this paper a comment was taken from a Ukrainian lawyer with ten years of experience in criminal cases Oleksadr Shadrin[284], 5 of which he actively provided in the framework of free legal aid.

Thus, the lawyer replied: "When receiving an assignment, a lawyer can clarify the qualifications or the essence of the issue and immediately refuse if he does not have specialisation or competence in this matter. On the other hand, lawyers come to the free legal aid system to "train" without experience or with little experience or no specialisation at all. It is the same with workload. At some point a lawyer may say - I can't, I can't take a new assignment due to the workload. At some point there was a limitation of thirty simultaneous assignments, I don't know how it is now".

III. Demonstration the importance of the problem.

The examples of the above two countries demonstrated that legal aid systems can have systemic problems in assigning inexperienced lawyers to complex cases. For instance, the legal aid system in the State of Maine has rather loyal requirements for the selection of lawyers and does not have adequate control over this process. As stated above, these problems were publicised in the results of the official report to local authorities in 2019[285], but as can be seen from the official MCILS website, the standards have not changed since then[286]. The lack of proper response from the authorities in a situation where in 250 cases lawyers were assigned to cases where they did not have sufficient experience may continue to lead to similar violations, which as a consequence may lead to numerous complaints about violation of the right to a fair trial.

In the Ukrainian case, the problems identified may also point to serious deficiencies in the legal aid system.

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[282] See Закон України «Про безоплатну правничу допомогу», *supra* note 83.
[283] "Закон України «Про безоплатну правову допомогу»: Основні положення та підходи до впровадження", Ministry of Justice of Ukraine, date accessed 20 November 2023, https://minjust.gov.ua/m/str_39735
[284] Шадрін Олександр, Адвокатське об'єднання "Barristers", date accessed 21 November 2023, https://barristers.org.ua/team/shadrin-oleksandr
[285] See The right to counsel in Maine, *supra* note 262, p, 25.
[286] Adopted Rules & Standards, website of MCILS, https://www1.maine.gov/mcils/rules/adopted.html

Firstly, this case indicated inability of the state to provide an effective legal defence even though the case was widely publicised in the media and discussed at the international level, as the defendants were included in exchange lists as part of the military conflict in the east of the country[287]. Another criterion for the importance of this case was that the defendants were threatened with life imprisonment.

Both the legal aid system and the state should not allow a defendant in such a serious category of cases to be effectively without a lawyer for two months. Thus, the first appointed lawyer informed the court that he did not have the appropriate specialisation only after examining the case. When the second lawyer was already appointed, she only declared a conflict of interest when she arrived in court, as she knew one of the victims from her police work.

In this case, the State should have been guided by the requirements of practical and effective defence[288] and its minimum criteria[289], which serve to prevent similar situations. Thus, if the legal aid system were effective, immediately after the application for free legal aid, the accused would have been assigned a lawyer with proper specialisation, experience and, importantly, no obvious conflict of interest.

In addition, based on the previous subchapter, which dealt with examples from the UK, Ireland or New Zealand, it was found that problems with remuneration can lead to serious difficulties such as lawyers leaving the legal aid system and new lawyers being reluctant to join. Thus, the assignment of inexperienced lawyers to complex cases may be due to a trivial lack of lawyers. For example, in Lithuania[290], there was a case when one complex case required many lawyers from the legal aid system, which caused a problem in Vilnius city in finding lawyers for other criminal cases.

In connection with the above, the analysis of examples on different states, which have completely different levels of economy and legal system, is a demonstration that the appointment of inexperienced lawyers in criminal proceedings and the lack of lawyers can take place anywhere. The analysis of these all examples helps to find the actual problems that led to it. Moreover, it helps to find and propose solutions to the problems identified, which will help to prevent their occurrence in other countries.

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[287] "Великий обмін: виконавців теракту біля Палацу спорту у Харкові засудили на довічне і одразу звільнили", Прямий, (28 December 2019), https://prm.ua/velikiy-obmin-vikonavtsiv-teraktu-bilya-palatsu-sportu-u-harkovi-zasudili-na-dovichne-i-odrazu-zvilnili/

[288] See Artico v. Italy, *supra* note 33.

[289] See Beuze v. Belgium, *supra* note 156, para. 133.

[290] See Simonas Nikartas, Agnė Limantė, *supra* note 148, p. 28.

IV. On what criteria are taken into account by other states when appointing a lawyer to a case.

If to analyse the evaluation criteria for the appointment of lawyers in criminal cases in other countries, then, for example, in Lithuania the procedure of legal assistance provides for the applicant's wish to appoint a particular lawyer, the lawyer's place of work, their residence, workload, other circumstances affecting legal assistance. The applicant's proposal about a particular lawyer may not be accepted due to various objective reasons, such as their busyness in other cases[291].

In Latvia, when appointing lawyers, such aspects as their workload, their specialisation, competence, conflicts of interest and location are taken into account[292]. Bulgaria has similar requirements as Latvia and requires, among other things, the experience and specialisation of the lawyer to be assessed before appointment[293].

Estonian legislation provides for the court to assess the advocate's work in case of ineffective performance. Thus, a lawyer appointed may be removed by the court in case of negligence or incompetence and also at the request of the accused or suspect[294].

V. On the problems that may affect the appointment of inexperienced lawyers in complex cases.

The problems that may lead to the appointment of a lawyer to a case that is too complex for them are:

1. Insufficient number of lawyers who are willing to provide legal aid in the legal aid system.

2. Failure to include in the norms of the national legislation requirements that the appointment of a lawyer to a case should be based on such characteristics as the necessary experience, specialisation, workload, absence of conflict of interest, etc.

3. Lack of control at the level of the legal aid system to ensure that a lawyer is suitable for a complex case according to all professional criteria, including their experience and specialisation.

4. Lack of mandatory judicial control to ensure that the professional level of a lawyer meets the requirements for participation in a particular category of cases.

5. Absence of observers who could evaluate the lawyer's work.

6. Lack of external supervision over the quality of the lawyer's work.

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[291] See Lietuvos Respublikos valstybės garantuojamos teisinės pagalbos įstatymas, *supra* note 36, para. 5 of art. 18.
[292] Latvijas Republikas Saeima.2005. *Valsts nodrošinātās juridiskās palīdzības likums*, art. 33, https://likumi.lv/ta/id/104831-valsts-nodrosinatas-juridiskas-palidzibas-likums
[293] Народно събрание на република България. 2006.*Закон за правната помощ*, para. 3 of art. 18, https://mjs.bg/home/normdoc/2135511185
[294] Riigikogu.2004. *Riigi õigusabi seadus*, para. 3-1 of art. 20, https://www.riigiteataja.ee/akt/R%C3%95S

Before turning to the issue of solutions to the problems identified, it is worth noting the following. Thus, one of the ideas of this subchapter is that untrained lawyers should not provide legal assistance where their mistake may cost the accused or suspect too severe punishment or unjustified pre-trial detention, and sometimes even more serious consequences. For example, failure to uphold a client's right to medical treatment in custodial settings can cost a person their health or even their life.

It might be assumed that inexperienced lawyers can provide legal assistance in complex cases through consultation with a more experienced lawyer. However, such consultations do not guarantee that when the inexperienced lawyer is on their own, it will not be taken advantage of by an investigator, a more experienced prosecutor, an injured party's lawyer or a court.

ECtHR practice[295] states that a lawyer should defend the interests of their client zealously. However, without proper experience, this may not be possible and may, among other things, lead to the choice of an extremely unsuccessful defence strategy, which will eventually lead to the impossibility of remedying the situation. Thus, a defendant who agrees to such a tactic will have to accept responsibility for its failure[296]. Obviously, in such a case, the negative consequences for the client may be irreversible.

VI. Proposed solution to the problems.

As in the previous subchapters, first, a solution will be proposed at the national level (A). Subsequently, a solution that can have a positive impact at the global level will be proposed (B).

A. Possible solutions to the problems at the national level.

1) About the lack of lawyers.

To stimulate the desire of experienced lawyers to join the legal aid system and provide legal aid. A possible solution was already mentioned in the previous chapter. Thus, the rates in the legal aid system should be raised as much as possible to the rates of private lawyers. Such measures could help to attract more experienced lawyers.

2) The lack of mandatory characteristics to be taken into account when appointing a lawyer.

This problem can be solved by amending the national legislation in the field of legal aid, which, in fact, would be an implementation of the recommendations of the UN Basic Principles. For example, it was found that the requirement to take into account such characteristics as work experience and specialisation before appointing a lawyer to a particular case is present in Bulgaria, Latvia, and was once present in Ukraine.

3) The lack of mandatory control at the level of the legal aid system to ensure that a lawyer without proper experience is not appointed to a complex case.

[295] "Nikula v. Finland, application № 31611/96, 21 March 2002", ECtHR, para. 54.
[296] "Stanford v. the United Kingdom, application № 16757/90, 23 February 1994", ECtHR, paras. 23, 27.

This problem can be solved, for example, by developing and approving rules for the appointment of lawyers in criminal cases, which will take into account the standard of professional requirements for admission. It should be stressed that the standards should necessarily include such criteria as the lawyer's experience in handling certain cases, their workload, specialisation, and possible conflicts of interest. The selection of a lawyer for a particular case can be automatic, for example, which will avoid mistakes in the appointment.

Thus, for example, after the automatic selection of lawyers and their notification about it, they can have the opportunity through a special website or an application in a smartphone to familiarise themselves with the brief circumstances of the case, and the list of participants in the process. This will allow the lawyer, for example, to cancel his participation in the case even before the appointment, for example, due to a conflict of interest.

If there are reasons why the lawyer cannot participate in the case or if the lawyer within a certain short period of time does not confirm their willingness to be appointed, the system will automatically identify the next suitable lawyer. It should be noted that, in order to prevent lawyers from abusing the possibility of withdrawing from cases, their contract should provide clear rules for such withdrawal. However, there should be an alternative way of appointing lawyers in case of emergencies.

In addition, the above criterion of "necessary experience" should be defined, for example through analyses and statistics, including interviews with criminal lawyers themselves, possibly interviews with prosecutors and judges. Such surveys could update the understanding of how many months or years of practice in a particular category of cases a lawyer should have on average in order to be able to participate effectively in them. An important detail should be that the appointment of a lawyer should take into account not only specialisation in the field of law, but also clarification of which category of participants the lawyer has previously represented in such a field. For example, a lawyer who has previously specialised for five years in representing relatives of victims in murder and rape cases may have no experience at all in defending defendants in such cases.

However, it is worth emphasising that standards should be objective and not impose excessive demands on lawyers. The requirements should be such that all current capacities of the legal aid system are taken into account, including their funding. The system should not lead to an excessive burden on lawyers, otherwise it may provoke them to leave.

4) Lack of judicial control over the compliance of a lawyer with certain criteria of professional level for participation in a case.

The introduction of mandatory requirements to the professional level of lawyer for different categories of cases will allow to fix a certain standard for the admission of a lawyer to a

case. Judicial control will serve as a guarantee of effective legal defence for a person if the legal aid authorities have made a mistake in appointing a lawyer.

For example, when a lawyer comes to the first court hearing where they are appointed as a lawyer and presents their credentials, the list of credentials could include the obligation to present a special questionnaire or extract from the register, which would be able to confirm that the lawyer meets the necessary professional requirements. This procedure will not take much time, but it may help to further reduce the risks of violation of the right to effective legal assistance. It should be clarified that the proposed solution may apply only to cases where legal aid is provided.

5) The absence of observers who could help the legal aid system to detect critical deficiencies in the work of a lawyer.

This mechanism, of course, depending on the financial capacity of the state, could be quite useful. Thus, for example, observation by representatives of legal aid organisations or institutions of the work of lawyers in courts, firstly, may encourage the lawyer to more active procedural behaviour, and secondly, prevent ineffective legal aid. However, it is worth noting that such an assessment should not be carried out in every hearing, as it may have a negative impact on both the defendant and the defence lawyer themselves.

Moreover, the constant involvement of an observer may result in significant financial costs. Observations may therefore be, for example, unplanned. Observations must necessarily be carried out by a lawyer at the appropriate level.

In addition, the lawyer should be able to appeal the results of such assessments. The mechanism for such an appeal should be uncomplicated and not require the expenditure of the lawyer's long time and resources.

6) Lack of external supervision of the advocate's work.

The offered solution may at first sight be controversial and unacceptable for European countries and other Civil Law countries due to the independence of the legal profession, but, for example, in the USA and Australia such measures are quite popular[297]. Such control can be exercised, for example, by the courts or the Ombudsman[298].

It would be appropriate, for example, to provide for the possibility for a suspect, accused person or their relatives to contact the Ombudsman or other special institutions by telephone to report unsatisfactory performance of a lawyer. However, it should be borne in mind that such oral statements should have an admissibility criterion. Thus, for example, by quickly questioning the applicant, it is possible to determine which criterion of effective defence is not met by the lawyer. In this way it will be possible to weed out frivolous complaints.

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[297] See Simonas Nikartas, Agnė Limantė, *supra* note 148, p. 17.
[298] Ibid.

B. A solution at the international level.

The proposed solutions, as in the previous subchapter are to mainstream the problem by adopting a UN resolution raising the issue of a lack of experienced lawyers due to problems with low remuneration and additionally the critical importance of paragraph 6 of the Basic Principles. With this resolution, countries can be urged to pay attention to this problem. It is possible that a certain number of states will follow the recommendations, which will play a positive role in improving the quality of legal aid and the effectiveness of legal aid systems in general.

In conclusion, this subchapter reveals that because the state has a duty to provide effective legal aid, it must ensure that a properly trained lawyers are present in complex cases.

The problems that lead to lawyers without sufficient experience being assigned to complex cases is the lack of decent remuneration. This problem could be solved by above-mentioned changes to domestic legislation from the previous subchapter.

The next problem is the lack of control at the level of legal aid institutions to ensure that only a lawyer with relevant experience is appointed to a complex case. This problem can be solved by implementing rules on the appointment of lawyers in criminal cases, which will take into account the necessary characteristics for admission. In addition, there is no court control to verify whether the professional level of the lawyer is commensurate with the complexity of the case in which he or she is involved. This problem can be solved by the court's obligation, once a lawyer has been appointed, to verify their professional characteristics to take part in a case. Of course, in this case, there should be appropriate requirements at the official level for lawyers to be admitted to certain cases.

The subchapter also refers to the absence of observers. The introduction of the practice of, for example, spontaneous visits to court hearings to check the quality of legal assistance may, among other things, encourage lawyers to do their work more effectively.

External supervision is more appropriate for a number of Common Law countries. Thus, despite the controversial role of this tool, it can sometimes play a decisive role in the effectiveness of the defence of the accused.

An international solution to the problem raised is a UN resolution that would raise the issue of the importance of reminding the public that the defence of people who cannot afford to pay for legal aid must be effective and, depending on the complexity of the case, the lawyer must have all the professional qualifications to participate effectively in it. The issue of low remuneration must necessarily be included in this problem.

2.3. Court intervention in the client-lawyer relationship in criminal proceedings

This section will discuss how the effectiveness of legal aid can be maximised by bypassing the need for judicial intervention and how to reduce the chances of such interference negatively affecting a fair trial.

The effectiveness of legal aid in criminal proceedings does not always depend on the state alone, but may depend on the clients and disciplinary bodies of the Bar. In order to identify the problems of this topic and propose ways to solve them, it is necessary to:

I. To establish at what point, notwithstanding the independence of lawyers, the court has the right to intervene in their relationship with a client to ensure the right to an effective defence. To establish the main forms of intervention.

II. To give an example of such intervention from court practice.

III. To analyse the abuse of the right to effective legal assistance

IV. To analyse the problems that lead to court intervention in the client-lawyer relationship.

V. Propose solutions to the problems identified.

I. On the point at which the court is obliged to intervene in the client-lawyer relationship to ensure effective defence and the forms of such intervention.

It is worth noting that this issue is closely linked to the question of the State's duty to provide effective legal assistance. Thus, it has already been held that the court must intervene in the client-lawyer relationship if it is obvious that legal aid is ineffective[299]. In addition, it has been found that, for example, in the case of Beuze v Belgium, the criteria for the court to assess the effectiveness of legal aid have been defined[300].

For example, if it became apparent to the court that a lawyer was not providing effective legal assistance, namely by repeatedly failing to appear in court without a valid reason, it could secure the presence of another lawyer, without even taking into account the opinion of the accused. Such a reaction of the court would be natural, as constant postponement of hearings is not in line with the tasks and purposes of justice[301]. Of course, it should not be forgotten that a lawyer must be independent[302]. This statement, for example, is also reflected in the ECtHR case-law, where in Cuscani v. United Kingdom the Court stated that the independence of a lawyer implies that defence

[299] See Kamasinski v Austria, *supra* note 146; para. 65.
[300] See Beuze v. Belgium, *supra* note 156, paras. 133-135.
[301] "Karpyuk and others v. Ukraine", ECtHR, applications nos. 30582/04 and 32152/04, 6 October 2015, para. 144.
[302] See UN Basic Principles, *supra* note 177, para. 16 of Preamble of UN Basic Principles.

in court is essentially a lawyer-client relationship[303]. Furthermore, the Court stated that for these purposes it did not matter whether the lawyer in question was a publicly or privately paid lawyer[304].

The UN Principles in turn also advise countries not to interfere with the organisation of the defence[305]. By the independence of the lawyer, the UN Principles, inter alia, imply that the lawyer should be able to fulfil freely, effectively and independently the duties assigned to them by the client. This implies that the lawyer should perform their work without undue interference, intimidation or harassment[306]. The UN Principles also require that disciplinary bodies reviewing the work of lawyers should also be independent[307].

In sub-para. b, para. 1 of Art. 7 of Directive (EU) 2016/1919 states that the state shall ensure quality legal assistance with due respect for the independence of the lawyer[308].

Sometimes in some EU countries, such as Estonia, the court may assess the work of lawyers in a broader sense and suspend them if it considers that they have committed incompetence or negligence[309]. If this provision is interpreted purely from a textual analysis, it can hardly meet the criteria of independence of lawyer as recognised by the above-mentioned ECtHR case-law and international standards.

As for the Common Law countries, as it was mentioned in the previous subsection, for example, in Australia or the USA it is a popular practice for courts, ombudsmen, etc. to supervise the work of a lawyer[310]. This trend may also indicate a deviation from the above UN recommendations.

It has also been found that direct forms of interference may include providing an accused or suspect with another lawyer when, for example, a lawyer systematically fails to appear in court, or, for example, for an important procedural action such as the imposition of a preventive measure in court[311]. The next form of interference is to allow lawyers to properly prepare for the case[312]. In addition, interference may be in the form of cancellation of decisions by higher courts[313].

Regarding the possibility of court intervention in defence tactics, some scholars[314] are of the opinion that courts should not evaluate them and that defendants should be responsible for the

[303] "Cuscani v. United Kingdom", application № 32771/96, 24 September 2002", ECtHR, p. 39.
[304] Ibid.
[305] See UN Principles, *supra* note 65, para. 16.
[306] Ibid, para. 36.
[307] Ibid.
[308] See Directive (EU) 2016/1919, *supra* note 60; sub-para. b para. 1 of art. 7.
[309] See Riigi õigusabi seadus, *supra* note 290, para. 3-1 of art. 20.
[310] See Simonas Nikartas, Agnė Limantė, *supra* note 148, page 17.
[311] See Karpyuk and others v. Ukraine, *supra* note 299, para. 144.
[312] See Huseyn and Others v. Azerbaijan, *supra* note 185, para. 183.
[313] "На що звертає увагу суд при оцінці ефективності захисту в кримінальному процесі?", Закон і Бізнес, (28 January 2022), https://zib.com.ua/ua/150345.html
[314] See Spronken, *supra* note 16, p. 464.

negative consequences of the defence tactics they have chosen and adopted. This view may be confirmed by the case law of the ECtHR[315].

It should be clarified that this subsection will not address such possible optional mechanisms for influencing the effectiveness of legal assistance as observations on the lawyer's misconduct in court or disciplinary complaints against lawyers by the court.

Thus, the court should intervene in the lawyer-client relationship if it has become apparent to it that the lawyer's performance does not meet the criteria for effective legal defence set out in this chapter, such as those set out in Beuze v Belgium[316].

The criteria for effective legal assistance are a guarantee that the state will strike a balance between the right to defence and the independence of the legal profession.

II. An example will be given of a decision of the Supreme Court of Ukraine which reversed a conviction due to ineffectiveness of legal defence[317].

This case will help to identify the list of actual problems that any justice system may face in the issue of court interference in the client-lawyer relationship.

A person was accused of forging an official document and engaging in fictitious business in 2015[318]. He faced a maximum penalty of two years of restriction of liberty[319]. Eventually a plea bargain was made between him and the prosecutor and a punishment in the form of a fine equivalent in those days to about 292 euros was agreed. A defence lawyer was present during this plea bargain and its subsequent approval in court[320].

After the conviction, the defendant appealed to the Court of Appeal and requested the cancellation of the sentence on the grounds of, inter alia, ineffective legal assistance. Thus, the defendant argued that lawyer had not participated in the case and had behaved too passively. The court disregarded such arguments and upheld the sentence[321].

In addition, in 2018, the accused filed a complaint against the lawyer, as a result of which the disciplinary commission recognised that the lawyer had indeed violated the lawyer's ethics and held him liable[322]. Thereafter, in 2019, the defendant filed a cassation appeal with the Supreme Court of Ukraine. As a result, the court, among other things, agreed with the defendant's arguments about ineffective legal assistance and sent the case for a new trial to the court of first instance[323].

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315 See Stanford v. the United Kingdom, *supra* note 292.
316 See Beuze v. Belgium, *supra* note 156, paras. 133-135.
317."Постанова Верховного суду України від 20 грудня 2018 року, справа № 757/56085/16-к", Верховний суд України, 20 December 2018, https://reyestr.court.gov.ua/Review/78979835
318 See Постанова Верховного суду України від 20 грудня 2018 року, *supra* note 315.
319 See Кримінальний кодекс України, *supra* note 267.
320. "Вирок від 30 березня 2017 року, справа № 757/56085/16", Печерський районний суд, 30 March 2017, https://reyestr.court.gov.ua/Review/65692717
321 See Постанова Верховного суду України від 20 грудня 2018 року, *supra* note 315.
322 Ibid.
323 Ibid.

In the court of first instance, the defendant asked to close the case due to the lack of corpus delicti. The prosecutor, in turn, asked the court to return the plea agreement to the prosecutor's office, as by that time one of the charges, namely, fictitious entrepreneurship, had already been decriminalised by the Parliament of Ukraine[324]. The court accepted the prosecutor's position and the case was sent to the prosecutor's office and was not returned to the court[325]. Thus, the ineffective legal assistance, in fact, led the defendant to a favourable outcome in the case because after several years of trial, he was able to get the verdict reversed and he was never prosecuted.

III. On the basis of the above example the problem of a possible abuse of the right to appeal against ineffective legal assistance in court can be discussed.

Inaction of the lawyer can be only a part of the defence tactics, which, for example, will later allow to overturn the verdict and send the case for a new consideration. In the future, if the offence does not fall into the category of serious crimes, where the statute of limitations may be quite long[326], the case may be delayed and closed due to the expiry of such terms.

Thus, in the above case of 2016, the statute of limitations for bringing the accused to criminal liability has already expired, because para. 1 of the article "forgery of documents" in Ukraine[327] refers to the category of such acts as minor criminal offences[328]. According to sub-paragraph 2 of para. 2 of Art. 49 of the Criminal Code of Ukraine[329], a person accused of such criminal offence as para. 1 of the article "forgery of documents" may be released from criminal liability due to the expiration of the statute of limitations in three years from the date of its commission. Thus, to date, these terms have already passed.

Although in this case it is hardly a question of the defence tactics chosen by the lawyer and the accused, since the lawyer was brought to disciplinary responsibility. However, if it is conceivable that the accused and lawyer would have deliberately adopted such a defence tactic, it may be possible to achieve a similar result in this case. However, it is worth noting that if a lawyer chooses such a defence tactic, where they deliberately not be proactive, they should agree a position with the client in writing. In this way, such actions will serve as a precaution so that the client will not be able to accuse the lawyer of unprofessionalism before the disciplinary body.

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[324] "Ухвала від 26 серпня 2019 року, справа № 757/56085/16-к" Печерський районний суд, https://reyestr.court.gov.ua/Review/85224535
[325] Ibid.
[326] See Кримінальний кодекс України, *supra* note 317, sub-para 4 para. 4 of art of Article 49.
[327] Ibid, para. 1 of art. 358.
[328] Ibid, para. 2 of art. 12.
[329] Ibid, sub-para. 2 of para. 2 of art. 49.

IV. Issues that may lead to the need for court intervention in the client-lawyer relationship.

Before the problems identified below are presented, it should be refined that their search and solutions will focus on helping to address ineffective legal assistance without going beyond the client-lawyer relationship and or at least beyond disciplinary cases.

The proposed measures will be able to provide individual with an understanding of what effective legal assistance means and how to influence an ineffective lawyer. In addition, such measures may promote the independence of the lawyer and incentivise the lawyer to be more effective.

Thus, the reasons that lead to the obligation of the state to intervene in the relationship between a lawyer and their client are:

1) Lack of informing the accused and suspects about the criteria of effective defence and the possibility to file a complaint against a lawyer for ineffective defence.

2) Lack of opportunity for the client to quickly replace the lawyer to another one without having to appeal to an investigator, prosecutor or court.

3) Complicated procedures for filing complaints against lawyers and excessively long time limits for their consideration by disciplinary bodies.

V. Analysis of the problems identified.

First, the problem of lack of informing the accused and suspects at all stages of criminal proceedings about the criteria of effective defence and the possibility to file a complaint against a lawyer for ineffective defence will be analysed (A). Next, will be discussed the issue of the client's ability to quickly replace ineffective lawyer (B). Lastly, it will analyse the problem concerning the too complicated and lengthy procedure for filing and considering a complaint against a lawyer in disciplinary bodies (C).

A. The lack of informing detainees, suspects or accused persons about the criteria of effective defence and the possibility to complain against a lawyer.

To begin with, in the Ukrainian case presented above, if a person had been informed by the state at the stage of pre-trial investigation, when he was still a suspect, about the criteria of effective defence and the possibility to file a disciplinary complaint against a lawyer in the future, his right to defence may not have been violated. Accordingly, as a consequence, the cassation court may not have had to assess the lawyer's performance.

For example, if to look at the current list of rights of detained, suspected or accused persons in Ukraine[330], Lithuania[331], the UK[332], and France[333], only information on the right to legal aid can be found. Thus, regardless of the state where the trial takes place, there is a possibility that without people being properly informed about what constitutes effective legal aid and about the possibility to lodge a complaint against a lawyer, they may for a long time not think at all about the quality of the assistance provided. This problem can lead to the accused beginning to analyse the adequacy of their defence too late in the process.

In addition, when the criteria for effective legal assistance are not explained to the defendant from the outset of the criminal proceedings and the possibility of filing a complaint against a lawyer is not communicated, the defendant may deliberately use this to build a defence tactic based on the idea of violating they right to legal assistance in order to avoid criminal liability. In this situation, the lack of the above-mentioned awareness of the defendant may lead to the forced intervention of the state in the form of cancellation of the sentence due to ineffective legal assistance and, consequently, to a possible violation of reasonable time limits. As a result, this situation may provoke a violation of the right to a fair trial. In this case, both the State itself and possible victims may be at a disadvantage.

B. On the Lack of opportunity for the client to quickly replace the lawyer to another one.

This problem is taken from the Ukrainian case[334] in the previous subchapter. In that situation, it was demonstrated that the defendant was unable for a long time to influence in any way the replacement of a lawyer who did not specialise in his case[335]. Moreover, the court did not allow the lawyer to leave the case, even though it knew that he did not have a specialisation.

In this case it can be concluded that there is a problem when the accused is not satisfied with the work of the lawyer and wants to change him, but in order to do so he has to apply to the investigator, prosecutor or court. For example, according to the Criminal Procedure Code of Ukraine, there are situations when the defendant does not have the right to refuse a lawyer[336] or

[330] Верховна рада України. 2012. *Кримінальний процесуальний кодекс України*, para. 3 of art. 42, https://zakon.rada.gov.ua/laws/show/4651-17
[331] Lietuvos Respublikos Seimas. 2002. *Istatymas "Baudžiamojo proceso kodekekso patvirtinimo, įsigaliojimo ir įgyvendinimo"* para 4 of art. 21, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.163482/asr
[332] "Guidance Notice of rights and entitlements Ukrainian (PACE Code C) (accessible version)", Home office, Government of the United Kingdom, (2020) https://www.gov.uk/government/publications/notice-of-rights-and-entitlements-ukranian/notice-of-rights-and-entitlements-ukrainian-pace-code-c-accessible-version
[333] Parlement Français.1959. *Code de procédure pénale*. articles 62-2- 63-5, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154/
[334] See "Взрыв в Харькове: умер еще один подросток", *supra* note 266.
[335] See "Ухвала від 30 жовтня 2019, справа № 645/3612/15-к", Фрунзенський районний суд м. Харкова, *supra* note 274.
[336] See *Кримінальний процесуальний кодекс України, supra* note 330, para. 3 of art. 54.

must do this through the investigator, prosecutor or court[337]. For example, Estonia[338] and Bulgaria[339] may also face this problem, where a defendant facing a sentence such as imprisonment or life imprisonment may find it quite difficult to dispense with ineffective lawyer and ask for another lawyer.

C. The difficulty of access to the procedure of filing disciplinary complaints against lawyers and the excessive duration of their consideration.

Not every detainee, suspect or accused person has experience in writing complaints competently. Also, not every person has the financial means to pay a mandatory fee to the disciplinary bodies for the consideration of their complaints. In Ukraine, for example, such an amount in 2023 was approximately 68 euros[340]. The Supreme Court of Ukraine considers the collection of such fees illegal[341].

In addition, the timeframes for consideration of such complaints are lengthy and may be contrary to the objectives of an effective right to defence. In Poland, for example, there have been complaints for many years about the length of time it takes to deal with complaints against lawyers[342]. In Poland, for example, there have been complaints for many years about the length of time it takes to deal with complaints against lawyers[343]. In Romania, although it is stated that the examination of the complaint is conducted as a matter of urgency[344], in fact the time limit for their examination may be more than 30 days[345], in Ukraine the term of consideration of a disciplinary case should not exceed more than 30 days[346].

At the same time, the UN Principles recommend that complaints against lawyers should be considered immediately[347]. Thus, as can be seen from the above analysis, today in a number of countries the time lines for consideration of complaints are quite long. Such a problem can have a

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[337] Ibid, para. 2 of art. 54.
[338] Riigikogu. 2003. *Kriminaalmenetluse seadustik* art. 48, https://www.riigiteataja.ee/akt/106012016019
[339] Народно събрание на република България. 2006. *Наказателно-процесуален кодекс*, art. 96, https://justice.government.bg/home/normdoc/2135512224
[340] Рада Адвокатів України.2020. Рішення № 37 Про встановлення плати за організаційне забезпечення розгляду заяв (скарг) до кваліфікаційно-дисциплінарних комісій адвокатури та до Вищої кваліфікаційно-дисциплінарної комісії адвокатури, para 2, https://unba.org.ua/assets/uploads/legislation/rishennya/2020-06-18-r-shennya-rau-37_5ef4903adf787.pdf
[341] "КАС ВС вчергове визнав нечинним рішення рау про встановлення плати за організаційне забезпечення розгляду заяв (скарг) на адвокатів", Pravo, (8 June 2023), https://pravo.ua/kas-vs-vcherhove-vyznav-nechynnym-rishennia-rau-pro-vstanovlennia-platy-za-orhanizatsiine-zabezpechennia-rozhliadu-zaiav-skarh-na-advokativ/
[342] Dyscyplinarki adwokatów: nowy regulamin lekiem na obstrukcję postępowań, (03 September 2019), https://www.rp.pl/zawody-prawnicze/art1151191-dyscyplinarki-adwokatow-nowy-regulamin-lekiem-na-obstrukcje-postepowan
[343] Prezydium Naczelnej Rady Adwokackiej. 2021. *Regulamin działania rzeczników dyscyplinarnych i zastępców rzeczników dyscyplinarnych oraz trybu i sposobu ich wyboru*. § 39 para. 1.
[344] Uniunea Națională a Barourilor din România. .2011. Statutul profesiei de avocat, para. 1, art. 279.
[345] Ibid, para. 7 of art. 279.
[346] See Рішення Ради Адвокатів України № 37, *supra* note 332.
[347] See UN Principles, *supra* note 65, para. 38.

very negative impact on a person's ability to influence an ineffective lawyer which, as a consequence, may result in a fair trial being violated.

VI. *Solutions to the above problems.*

The proposed solutions will be to amend national legislation (A). The next proposal will be for international action at the UN level (B).

A. Addressing the identified problems at national and regional level.

1) On inability to quickly replace a lawyer.

Allow defendants discretion to change lawyers in any category of cases. In this case, the possibility of replacing a lawyer through a special application in the smartphone will be relevant, and for those who are detained it will be possible to replace a lawyer through an oral application by phone to the legal aid system or directly through a lawyer. However, it is important to provide such a system so that defendants cannot abuse the right to defence. For example, in case of systematic replacement of lawyers, the reason for the next application for replacement should be clarified and analysed for objectivity. The state should not interfere in such analyses.

2) Regarding the lack of informing individuals about the criteria for effective protection.

It is possible to implement the right to be informed about the criteria of effective legal assistance and the possibility to file a complaint against a lawyer. For example, in Ukraine or Lithuania, this can be done through amendments to the Code of Criminal Procedure.

In addition, this information could take the form of separate notice of rights, which would be given to the person before the appointment of a lawyer, the service of a suspicion or indictment, before the start of the trial, and several times during the trial itself. Such notices should contain sufficiently detailed information on the form and procedure for filing a complaint of ineffective legal assistance.

At the same time, at the time of handing over the abovementioned notice in court or pre-trial investigation body, it is mandatory to explain all the above information under audio or video recording. It should be mentioned that it is possible that many suspects or defendants in a stressful situation will find it difficult to adequately perceive all the above information, but in any case, it will increase the chances that people will pay more attention to the quality of assistance provided to them.

The police, courts, prosecutor's offices and places of detention can also display this information. Such information should be placed in places that are visible to the public.

The websites of bar associations and the websites of regional bar associations can also display information on the criteria for effective legal assistance and the possibility of filing a complaint, with detailed instructions on the procedure for filing a complaint.

Thus, as some examples show, people are often informed only about the right to a paid or free lawyer. Therefore, they may mistakenly believe that only the presence of a lawyer is sufficient for an effective defence, and the constant silence of the lawyer during important procedural actions is mistakenly perceived as a norm. A suspect's or accused person's awareness may, in fact, serve as an instruction on how to influence poor quality legal assistance. In addition, it may incentivise lawyers to be more diligent in their work, as it will increase the risk of disciplinary action.

It is worth noting that informing the defendant about the criteria for effective defence may also be positive in reducing the burden on the higher courts, as problems of ineffective defence will be addressed and remedied before sentences are handed down. Also, systematic informing and reminders may help appellate courts to identify cases where the defence may be using inaction of lawyer as a defence strategy.

3) In order to eliminate the difficulty of accessing the disciplinary complaints procedure and optimise the timeframe for their consideration, it is possible to do the following.

Advocates' self-governance bodies should abolish any monetary fees as a minimum for complaints for the category of people who are provided with legal aid in complex cases where, for example, the accused is facing a custodial sentence, to people who are only detained, or where a person is already in court-ordered custody. However, it is worth noting that, in general, the fee for filing a complaint against an advocate is a unjustified measure.

At the same time, it would be desirable for the advocates' self-governance bodies to provide the recipients of legal aid with the possibility to file complaints through the website of the Bar, where a person only needs to register, fill in a simple form and send scanned copies of documents confirming their identity, as well as evidence of the inefficiency of the advocate, if any.

Also, for this purpose, a suitable solution could be the creation by the advocates' administration bodies of a special smartphone application for the possibility of remote disciplinary proceedings. Such an application should, inter alia, have the function of sending correspondence and the possibility of videoconferencing.

It is also possible to set up special services within the disciplinary bodies which can receive oral complaints against lawyers from persons in custody by telephone.

The time taken to process complaints could be shortened, for example, by sending complaints and other materials to lawyers by e-mail, so that they could in turn send back their explanations remotely.

It is fair to note that in criminal cases where a person is in custody or where the accused or suspect is facing a custodial sentence, this category of persons should be able to have a complaint against a lawyer processed as quickly as complaints against prosecutors and investigators. For example, in Ukraine, such complaints against investigators and prosecutors are considered within

72 hours[348]. However, such complaints should be considered exclusively by the Bar. The introduction of such short time limits for consideration of complaints will be extremely useful when inaction of a lawyer may, for example, lead to loss of evidence, etc.

However, in such cases, in order to avoid pressure on lawyers by unscrupulous clients, it is necessary to provide, for example, for written and reasoned instructions on the need for urgent performance of certain actions by the lawyer, or a written statement from the client that no urgent action by the lawyer is necessary.

Thus, the prompt intervention of an independent, impartial disciplinary body can prevent incompetent behaviour by lawyers, preventing ineffective legal assistance. This approach may have an overall positive impact on the effectiveness of the legal aid system. In addition, when lawyers realise that they can be held liable for unprofessional conduct at any time, they will be more circumspect, thereby increasing their client's chances of a fair trial.

C. A solution to these problems at the international level could be as follows.

Adoption of an appropriate UN resolution that will enhance the rights of suspects and defendants can be taken by many states and can be positively adopted as a standard by national courts in general. Thus, this resolution could build on the following:

1) Suggest to States that defendants be able to make discretionary change of lawyer in cases of any complexity;

2) To propose states specific criteria for an effective defence. Such criteria could be taken, for example, from Beuze v. Belgium[349] It is also recommended to include, inter alia, criteria such as the lawyer's diligence in gathering evidence of the client's innocence, the timely submission of such evidence to the pre-trial investigation authorities or the court. Detailed analysis of the legality of all evidence of the client's guilt, timely declaration of the illegality of the evidence of guilt to the pre-trial investigation authorities and the court. Mandatory verification of the grounds for detention of a person. Verification of the risks that the state justifies the need to place the person in custody. In case of unlawfulness of the client's placement in custody, immediate official notification to the competent authorities and appeal. Systematic analysis of the actions or omissions of the investigator or prosecutor in a particular case. In case the actions or omissions of this category of officials worsen the client's situation, a complaint should be submitted to the competent authorities as a matter of urgency, etc.

3) To encourage states and advocates' self-governance bodies to ensure that recipients of legal aid are informed of the criteria for its effectiveness and of the possibility to lodge a complaint

[348] See Кримінальний процесуальний кодекс України, supra note 328, para. 2 of art. 306.
[349] See Beuze v. Belgium, *supra* note 156, para. 133.

against an advocate with independent disciplinary bodies. This should include information on the procedure for lodging such complaints[350].

4) To encourage states and lawyers' self-governing bodies to facilitate the implementation of the UN Principles' recommendation that complaints against lawyers be dealt with promptly.

In conclusion, it is worth mentioning that the court may interfere to the lawyer-client relationship and not allow the defendant to replace the lawyer by another. If legal aid is ineffective, the interference may lead to a violation of the right to a fair trial. This problem can be solved by simplifying the procedure for replacing a lawyer.

Also, this subchapter disclosed that the court has the right to intervene in the client-lawyer relationship when it is obvious to the court that the lawyer cannot perform an effective defence. The criteria for assessing effective defence are illustrated in Beuze v Belgium.

The problem that leads to such interference may be the lack of informing the accused and suspects about the criteria of effective defence and the possibility to file a complaint against the lawyer. The lack of such information may, inter alia, result in the accused deliberately pretending not to know that his defence was inadequate, in which case it is extremely difficult for the superior court to determine whether this is a defence tactic or a genuine complaint. Such situations can lead to erroneous reversals of convictions and further violations of the reasonableness of time limits.

This problem can be solved by implementing the right to be informed about the criteria for effective legal assistance and the possibility to lodge a complaint against a lawyer. The introduction of leaflets with this information, which would, among other things, be handed to and explained to the person at all stages of criminal proceedings, would increase people's understanding of the quality standards of legal aid and the mechanism for influencing ineffective lawyer. Posting the above information in the police, prosecutor's office, places of detention, websites of the Bar will also increase the chances of the accused to avoid formal defence.

In addition, the needs for court intervention in the lawyer-client relationship may be influenced by the rather complicated and lengthy procedures for filing and reviewing complaints against lawyers with disciplinary bodies.

An example of the benefits of a complaint might be a situation where the lawyer refuses to locate an important witness. The defendant, in turn, can file a complaint about the inaction of a lawyer, which, if dealt with promptly, can encourage the lawyer to gather the necessary evidence. In order to provide such opportunities to suspects and accused persons, the Bar self-governance bodies should significantly reduce the timeframe for consideration of complaints, in some cases

[350] See UN Principles, *supra* note 65, para. 18.

up to 72 hours, and make it possible to file a complaint remotely through a website, an app, in some cases by phone call.

At the international level, the solution could be a UN resolution drawing attention to the problem and recommending to states specific criteria for effective protection. The resolution could also call on states to inform people about such criteria, about the possibility of filing a complaint against a lawyer with disciplinary bodies, and about the procedure for filing such complaints. The resolution could also recall the importance of the speedy resolution of complaints.

CONCLUSIONS AND RECOMMENDATIONS

In previous centuries, legal aid to low-income people was merely an act of charity. Today, with the help of international law, namely such as Art. 14 of the ICCPR and Art. 6 of the ECHR, legal aid is an indispensable element of the right to a fair trial. Legal aid has now become a direct obligation of states.

The above-mentioned norms provide for the right of a person to both a paid lawyer and a state-funded lawyer. This is the case if a person lacks the necessary means or if the interests of justice require it. The interests of justice are represented by the practice of the ECtHR and may be related to the social and personal situation of the accused, the complexity of the case, the gravity of the offence, the severity of the possible punishment. It was also established that the right to a fair trial extends not only to the trial stage, but also to the stage of pre-trial investigation.

Legal aid has different types, namely first line (primary) legal aid, second line (secondary) legal aid and negotiated dispute resolution. This paper focuses on the problems in second line legal aid, as this type of legal aid is usually closely related to the topic of fair trial in criminal proceedings, where services to people are often provided only by licensed lawyers.

The paper finds out that legal aid in criminal proceedings has certain international standards, which were reflected in 1990 in the UN Basic Principles. This document, among other things, calls on countries to ensure that their lawyers are independent, trained in effective defence and that legal aid is adequately funded. In addition, in 2012, the UN adopted another document, namely the Principles and Guidelines. This document provides for many aspects, including the funding of legal aid systems, the quality of legal aid, and people's awareness of their rights. These Principles include specific measures that can contribute to improving the effectiveness of legal aid systems.

With regard to the EU and Council of Europe member states, this paper has examined in some detail the ECtHR's case-law, which sets out the requirement that legal aid must be effective rather than merely formal. Effectiveness can be assessed both on the basis of individual criteria of a lawyer's work and on the basis of the totality of their actions.

In order to improve the quality of legal aid and strengthen the right to a fair trial in EU countries, Directive 2016/1919 was enacted in 2016, which, among other things, sets out more detailed requirements for the funding of legal aid, namely it must be to such an extent that legal aid is of high quality and the legal aid system is effective. Among other things, this regulation sets out the requirement to ensure the quality of legal aid. At the same time, it calls for the independence of lawyers to be duly respected.

In order to study the theoretical part and to find possible universal problems in the field of legal aid and to solve them, the paper analysed national norms in the field of legal aid, criminal procedure, advocacy, as well as constitutional norms of such countries as Lithuania, Poland, Latvia, Estonia, France, Croatia, Great Britain, Hungary, Romania, Azerbaijan, USA, Bulgaria, Hungary, China, Ukraine.

This paper presents three issues that can negatively affect fair trial, namely problems with remuneration of lawyers, the appointment of lawyers without sufficient experience to complex cases, and the interference of courts in the client-lawyer relationship. In order to research these problems in more depth, case studies were analysed. Thus, cases of strikes of lawyers in connection with problems with the issue of lawyers' remuneration in the UK, Ireland, New Zealand and Canada were analysed. Examples of appointment of inexperienced lawyers to complex cases in the USA and Ukraine were analysed. A specific Ukrainian example of the Supreme Court's intervention due to ineffective legal assistance was also analysed.

To reduce the risk of problems with remuneration of lawyers at the national level, the following solution is proposed.

1) It is necessary to establish reasonable amounts of funding for legal aid and not just be guided by the notion of sufficiency. For this purpose, it is necessary to define the purpose that such funding should cover. For example, specifying that funding should be such that it covers the quality of legal aid provision and the effectiveness of the legal system.

2) States should ensure raise the remuneration of lawyers from the legal aid system will be close to the level of private lawyers' fees.

3) Provide that in case of delays in payment of lawyers' fees, the state should be obliged to pay them fair compensation for each day of such delay. To ensure that officials are held strictly disciplined for such delays if they are at fault.

To avoid the appointment of inexperienced lawyers in complex cases, the following solutions are suggested.

Proposed solutions to these problems at the national level.

1) To stimulate the desire of lawyers to join the legal aid system by establishing decent fees.

2) National norms should provide that the appointment of an advocate in a particular case should be done in such a way as to ensure the quality of legal assistance, taking into account a preliminary assessment of such characteristics of an advocate as their work experience, specialisation, advocate's workload, absence of conflicts of interest.

3) Implementation of mandatory rules for the appointment of advocates to cases, which will take into account the standard of professional requirements for admission.

4) Mandatory judicial control, which will serve as a check on the professional level of an advocate at the stage of presenting credentials.

5) Unscheduled observation by representatives of the legal aid system or other organisations of the quality of the advocate's work in public hearings of cases.

6) Introduce a mechanism for supervising the work of advocates. For example, such supervision could be carried out by a special ombudsman. This option may be more suitable for some Common Law countries.

Steps to reduce the possibility of the court interfering in the client-lawyer relationship.

1) Allow defendants to make their independent change of lawyer in a case of any complexity without any interference from the state.

2) Implementation of the right to be informed about the criteria of effective legal assistance and the possibility to file a complaint against a lawyer in the criminal procedure legislation.

3) Informing about the above-mentioned right at all stages of criminal proceedings.

4) Mandatory explanation of the above-mentioned right under audio recording or video recording at the moment of handing over the relevant leaflet in court and pre-trial investigation bodies.

5) Placement of information on the above-mentioned right in conspicuous places in the police, courts, prosecutor's office and places of detention.

6) The websites of lawyers' associations may also post information on the criteria for effective legal assistance and the possibility of filing a complaint against a lawyer in the most prominent place with detailed instructions on the procedure for filing a complaint.

7) Advocates' self-governing bodies should abolish any monetary fees for complaints.

8) Provide legal aid recipients with the possibility to submit complaints via websites unnecessary complications.

9) Create a smartphone application for filing and reviewing disciplinary proceedings.

10) Create special services within disciplinary bodies that will be able to take complaints verbally from people who arrive in custody.

11) Send a copy of complaints and disciplinary case files to lawyers by email, which will reduce the time taken to deal with complaints.

12) Reduce the timeframe for dealing with complaints to 72 hours for those facing a penalty such as imprisonment, who have just been detained, and who are already in court-ordered detention.

At EU country level, a swift response by the European Commission to states' failure to fulfil their legal aid commitments, in particular under Directive (EU) 2016/1919, is proposed. Such investigations should be carried out on their own initiative, without waiting for public reactions or

complaints from legal and natural persons. This should particularly apply, for example, to cases where legal aid lawyers go on strike due to funding problems or delayed payment of fees.

A proposed solution at the international level could be a UN resolution that would be aimed at the following: 1) To urge countries to avoid delays in the payment of fees to lawyers; 2) Encourage countries to ensure that states allocate budgetary resources in a manner that promotes quality legal aid and strengthens the effectiveness of legal aid systems; 3) Encourage countries to ensure raise the remuneration of lawyers from the legal aid system to the level of private lawyers' fees; 4) Propose to states that accused persons have discretion to change lawyers in cases of any complexity; 5) Developed and approved by the UN level criteria for effective legal defence. Propose such criteria to states; 6) Call for the need to inform the recipients of legal aid about the criteria of its effectiveness, about the possibility to file a complaint against a lawyer with independent disciplinary bodies, and about the procedure for filing such complaints; 7) Recall the need to consider complaints against lawyers without delay.

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ABSTRACT

Legal aid is an integral element of the right to a fair trial. The right to a legal assistance obliges the state not only to provide a lawyer, but also to ensure that such assistance is effective. However, for some reasons, states do not always fulfil these obligations effectively. This paper focuses on the problems that may reduce the effectiveness of legal aid and fair trial in general. Thus, the study aims to research such issues as problems in the remuneration of lawyers, the appointment of inexperienced lawyers in complex cases, and court interference in the client-lawyer relationship. Also, this paper identifies a number of reasons that contribute to the above problems.

As a result of this analysis, the paper proposes concrete steps to reduce the risks of these problems, which may increase the quality of legal aid. Thus, the proposed solutions may have a positive impact on the realisation of the right to a fair trial by the state.

Key words**:** *legal aid, ineffective legal assistance, low lawyers' fees, court interference in the client-lawyer relationship, right to fair trial.*

SUMMARY

STATE GUARANTEED LEGAL AID IN THE CONTEXT OF THE RIGHT TO FAIR TRIAL

Ihor Nahornyi

This Master's thesis is devoted to the study of problems that negatively affect legal aid and, as a consequence, a fair trial. Such issues include problems in the remuneration of lawyers, the appointment of inexperienced lawyers in complex cases, and court interference in client-lawyer relations. In order to analyse this topic, the paper reveals the concepts of state guaranteed legal aid and effective legal aid, analyses the types of legal aid, and provides specific examples of the above problems that have occurred in the United Kingdom, the United States, Ireland, New Zealand, Canada, and Ukraine.

The study of the above issues helps to find out what causes contribute to the above-mentioned problems, which in turn negatively affect the ability of states to properly ensure the right to a fair trial.

The main theme of the study is to identify and propose steps that can help to reduce the negative impact of the above-mentioned problems on the right to a fair trial. Such steps concern solutions at the national level, regional and international.

The first chapter of this paper is devoted to the theoretical part and through analysing international normative acts and documents, EU law and ECtHR case-law it helps to understand what legal aid is and what types of legal aid exist. At the same time, there is a separate theoretical analysis of legal aid in criminal proceedings.

The second chapter, in turn, introduces the concept of effective legal aid and, through the use of ECtHR case-law, provides specific criteria that set minimum standards for legal aid in criminal proceedings. This chapter focuses on case studies that demonstrate particular problems. In terms of remuneration of lawyers, the chapter focuses on problems such as insufficient funding of legal aid systems, low fee rates, and delays in fee payments. As regards the appointment of inexperienced lawyers in complex cases, it's mostly about the lack of lawyers due to low fees and the lack of requirements in national laws for mandatory professional characteristics of lawyers to participate in certain categories of cases. As for the court's interference in the client-lawyer relationship, the discussion focuses on the negative impact of state interference in the procedure for the replacement of a lawyer by accused or suspects and on the possibility abuse of the right to effective legal assistance for possible avoidance of criminal liability by cancelling convictions and delaying trials.

The results of this paper provide an insight into the inadequacy of the measures that states devote to legal aid. The case studies demonstrate that the attitude of states towards legal aid disadvantages both suspects and defendants and may compromise the right to a fair trial.