



Anneli Soo

*Magister iuris*

*Adviser to the Criminal Chamber, Supreme Court of Estonia*

# An Individual's Right to the Effective Assistance of Counsel *versus* the Independence of Counsel: What Can the Estonian Courts Do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?

The reasons for ineffective assistance of counsel are manifold. First, counsel might just be a bad lawyer. Secondly, counsel may in a particular situation be unable to do his or her job properly (e.g., because of illness, consumption of alcohol, or a busy schedule).<sup>\*1</sup> Thirdly, counsel may have too little time or other resources to prepare adequately for trial, and fourthly, the law or the courts may create a situation in which counsel is unable to perform (e.g., excessively short procedural deadlines).<sup>\*2</sup> A fifth reason could be counsel's motivation, which might include everything from how attractive the case is for defence counsel to whether counsel will receive fair remuneration.<sup>\*3</sup>

There are two primary forces that can help to reduce ineffective assistance of counsel: the market and judicial supervision. It is clear that no one will hire a lawyer with a bad reputation.<sup>\*4</sup> But this will not solve the problem entirely. There are regions in Estonia where choice of counsel is limited and clients have to settle with the few local lawyers available.<sup>\*5</sup> Also highly problematic is the issue of appointed counsel, referring to where a person has no right to select counsel of his or her choice. As of 1 January of this year, counsel is appointed

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<sup>1</sup> This could also include situations where counsel is a good lawyer but specialises in an area of law that is different than the area of law of the case.

<sup>2</sup> F. C. Zacharias. Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice? –Vanderbilt Law Review 1991 (44), p. 66.

<sup>3</sup> Estonian Ministry of Justice (publisher). Määratud kaitsja kättesaadavus ja kvaliteet kriminaalmenetluses (Ministry of Justice. Access to and Quality of Appointed Counsel in Criminal Proceedings). Available at [http://www.just.ee/orb.aw/class=file/action=preview/id=33504/m%E4%E4ratud+kaitsja+k%E4ttesaadavus+ja+kvaliteet\\_KPO+\\_2\\_.pdf](http://www.just.ee/orb.aw/class=file/action=preview/id=33504/m%E4%E4ratud+kaitsja+k%E4ttesaadavus+ja+kvaliteet_KPO+_2_.pdf) (2.03.2010).

<sup>4</sup> F. C. Zacharias (Note 2), p. 66.

<sup>5</sup> Estonian Bar Association press release of 4 March 2010: Ligi 80% Eesti advokaatidest töötab Tallinnas (Approximately 80% of Estonian Advocates Work in Tallinn). Available at <http://www.advokatuur.ee/?id=417> (8.03.2010). One is reminded of a comment posted on the website of the daily newspaper Postimees in which one reader lamented that he required legal assistance in a small town in Estonia but his choice was

at the request of an investigative body, the Prosecutor's Office, or the court by the Estonian Bar Association, which means that the courts have no say in the choice of counsel.<sup>6</sup> While on the one hand this ensures that the body conducting the proceedings (I dare to say above all an investigating body or the Prosecutor's Office) cannot appoint an advocate who will make its job easy, it also leaves no possibility for the courts to exclude advocates who are known to provide ineffective assistance.

The European Court of Human Rights (hereinafter 'ECtHR') has on numerous occasions emphasised the principle of the independence of counsel in criminal proceedings and has held that all measures taken by the national courts calculated to permit the officially appointed lawyer to fulfil his or her obligations must be taken whilst respecting the basic principle of the independence of counsel.<sup>7</sup> The Code of Criminal Procedure<sup>8</sup> (hereinafter 'CCP') does not provide for the independence of counsel. Yet it is clear that defence counsel acts in the interests of the client in criminal proceedings and that it is not up to the opposing side or to the court to dictate how counsel should fulfil his or her obligations.<sup>9</sup> To a certain degree, the independence of counsel is defined in the Code of Criminal Procedure through the obligations of counsel. Subsection 47 (2) of the CCP provides that counsel is required to use all means and methods of defence that are not prohibited by law in order to ascertain the facts that vindicate the person being defended, prove his or her innocence, or mitigate his or her punishment. This allows us to conclude that counsel is bound by law and only by the law in the fulfilment of his or her duties. Insofar as the majority of counsel involved in criminal proceedings are advocates<sup>10</sup>, it makes sense to look for the definition of independence in the Bar Association Act.<sup>11</sup> Pursuant to subsection 43 (1) of the Bar Association Act, advocates are independent in the provision of legal services and shall act pursuant to the law, legal acts and resolutions adopted by the bodies of the Bar Association, the requirements for the professional ethics of advocates, good morals, and their conscience.

While counsel may be independent in their activities, a certain level of control over their performance must nevertheless be possible, to ensure that the right of the accused to the assistance of counsel does not become an empty right. Next to competition, judicial supervision is one of the most important mechanisms for reducing ineffective assistance of counsel. The court directs the proceedings and gains a direct overview of counsel's performance, and therefore can react rapidly in cases of ineffective assistance. The supervision of the court over counsel's activities can be divided into two categories, direct and indirect, with the former subdivided into ongoing and *ex post* supervision. By ongoing supervision I refer to the ability of the court to make pertinent remarks and enquiries with ineffective counsel, up to and including the ability of the court to remove ineffective counsel from the proceedings. The courts perform *ex post* supervision at the request of the accused, primarily in appeal or cassation proceedings, which may lead to annulment of the judgment of the lower court on grounds of ineffective counsel and the possibility of new proceedings for the accused.

This article focuses on direct judicial supervision and examines issues involved with both ongoing and *ex post* supervision. The author has intentionally omitted indirect supervision—e.g., complaints lodged with the Bar Association—as proper treatment of this broad topic is not possible within the limits of this article.

## 1. The right of the accused to the assistance of counsel

According to Article 6, paragraph 3 (c) of the European Convention on Human Rights and Fundamental Freedoms<sup>12</sup> (hereinafter 'ECHR'), everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal

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rather limited: one advocate was a known crook, another was the spouse of the judge trying the case, the third was hired by the opposing party, and he was left with no choice than to hire the fourth and last one.

<sup>6</sup> As counsel was previously appointed by the body conducting the proceedings, the purpose of the amendment was to ensure that prosecutors did not select the advocates they preferred (i.e. who were less difficult). See Estonian Ministry of Justice (publisher). Määratud kaitsja kättesaadavus ja kvaliteet kriminaalmenetluses (Note 3).

<sup>7</sup> See, for example, ECtHR judgment 9.04.1984, *Goddi v. Italy*, paragraph 31; ECtHR judgment 21.04.1998, *Daud v. Portugal*, paragraph 40.

<sup>8</sup> Kriminaalmenetluse seadustik. – RT I 2003, 27, 166; 2010, 8, 35 (in Estonian).

<sup>9</sup> The independence of counsel and the obligation of counsel to adhere to the rules and instructions of the court issued pursuant to law should of course not be confused. Failure to adhere to such rules and instructions may justify accusations of ineffective assistance by counsel.

<sup>10</sup> Pursuant to § 42 (1) 1) of the CCP an advocate or, with the permission of the body conducting the proceedings, any other person who meets the educational requirements established for contractual representatives in subsection 41 (4) CCP, may serve as contractual counsel. Pursuant to § 42 (1) 2) of the CCP, only an advocate may serve as appointed counsel. While to date no statistics have been published on the percentage of criminal proceedings that are conducted with participation of an advocate or the participation of other counsel, the author of this article dares to say, based on her experience, that the majority of counsel in criminal proceedings are advocates.

<sup>11</sup> Advokatuuriseadus. – RT I 2001, 36, 201; 2009, 68, 463 (in Estonian).

<sup>12</sup> European Convention on Human Rights and Fundamental Freedoms. – RT II 1996, 11/12, 34. Entry into force in respect of Estonia 16 April 1996.

assistance, to be given it free when the interests of justice so require. While the right to choose counsel is deemed to be an absolute right and is by some authors considered to be the best of the alternatives provided for in Article 6 3 (c)<sup>13</sup>, the ECtHR has in certain cases found limitations of this right to be justified.<sup>14</sup> For example, the ECtHR has held that the national court may override the choice of the person charged with a criminal offence when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.<sup>15</sup> The ECtHR also accepts that national law may proscribe certain conditions for persons who have the right to act as counsel in criminal proceedings. It is also permissible for national law to lay down even stricter rules for those who wish to defend persons in supreme courts.<sup>16</sup> In the case of *Engel and others v. Netherlands*, while the ECtHR recognised that the right of the person to choose counsel was limited, it held that there was no violation of Article 6 3 (c) of the ECHR, as the persons charged were, in view of the simplicity of the case, capable of defending themselves.<sup>17</sup> Strong criticism has been voiced against the case law of the ECtHR that allows for limitations to a person's right to choose counsel, and it has been suggested that that ECtHR should change its position on this issue. Yet critics fail to fully agree as to the lengths to which judicial authorities should go to ensure the active participation of counsel in criminal proceedings.<sup>18</sup> There is a general tendency to agree with the ECtHR<sup>19</sup> in holding that counsel must demonstrate a certain amount of initiative to participate in the proceedings (e.g., request permission to be present during the questioning of a witness or suspect), but if counsel fails to do so, there is no violation of a person's right to counsel.<sup>20</sup> In cases where counsel abuses a person's right to assistance of counsel, with the intention of delaying the proceedings, by systematically failing to appear in court and thereby causing the trial to be repeatedly postponed, the court has the right to limit the person's right to choice of counsel and to appoint counsel for the person charged with a criminal offence.<sup>21</sup> In such cases, the principle embodied in Article 17 ECHR applies, by which the Convention does not protect any abuse of the law.<sup>22</sup>

Although a person's right to assistance of counsel for his or her defence was provided for in the US Constitution<sup>23</sup> already at the time of adoption of the Bill of Rights in 1789, it was not until 1932 that a case concerning a person's right to defence was brought before the Supreme Court.<sup>24</sup> In its judgment, the Supreme Court held that denial of counsel to the defendant constituted a violation of the Fourteenth Amendment, yet what is more important is that the Court recognised that a defendant in a capital case who is unable to employ counsel or defend himself has the right to have counsel appointed.<sup>25</sup> Another ten years later, the Supreme Court held that the right of assistance of counsel for a person's defence is protected by the Fourteenth Amendment, and a person must be guaranteed the assistance of counsel where this is necessary in the interests of a fair trial.<sup>26</sup> The Supreme Court's position halted the development of the right of assistance of counsel for a person's defence as a fundamental right for some time and drew much criticism and dissatisfaction.<sup>27</sup> In 1963, the Supreme

<sup>13</sup> S. Trechsel. *Human Rights in Criminal Proceedings*. Oxford: Oxford University Press 2005, p. 266. S. Trechsel does not explain what is meant by the concept 'best'. Since the object of Article 6 3 (c) of the ECHR is an effective defence (see C. Ovey, R. White. *The European Convention on Human Rights*. 4th Ed. Oxford: University Press 2006, p. 205) and a person can defend himself effectively in a situation where he is opposed by a professional prosecutor (lawyer) with the assistance of professional counsel chosen as he best sees fit, it is clear that the best option among the rights set out in Article 6 3 (c) of the ECHR is a person's right to defence with the assistance of counsel of his or her choice.

<sup>14</sup> See also K. Reid. *A Practitioner's Guide to the European Convention on Human Rights*. 3rd ed. Thomson: Sweet & Maxwell 2008, p. 153; S. Trechsel (Note 13), p. 268; P. Van Dijk, F. Van Hook, A. Van Rijn, L. Zwaak (eds.). *Theory and Practice of the European Convention on Human Rights*. 4th Ed. Intersentia: Antwerpen-Oxford 2006, p. 641.

<sup>15</sup> ECJ 25.09.1992, *Croissant v. Germany*, paragraph 29.

<sup>16</sup> ECtHR judgment 26.07.2002, *Meftah and others v. France*, paragraph 45.

<sup>17</sup> ECtHR judgment 8.06.1986, *Engel and others v. Netherlands*, paragraph 91.

<sup>18</sup> See S. Trechsel (Note 13), p. 267.

<sup>19</sup> ECtHR judgment 24.11.1993, *Imbrioscia v. Switzerland*, paragraph 42; ECtHR judgment 22.02.1994, *Tripodi v. Italy*, paragraph 30.

<sup>20</sup> S. Trechsel (Note 13), p. 267.

<sup>21</sup> The ECHR has accepted the appointment of additional counsel by the court on its own initiative even in cases where counsel chosen by the person charged with a criminal offence has not abused any rights, if the matter has been complicated and it can be presumed that the proceedings will take a long time. See *Croissant v. Germany* (Note 15), paragraph 30.

<sup>22</sup> S. Trechsel (Note 13), p. 267. The same principle applies to situations in which a person repeatedly changes counsel with the aim of delaying the proceedings. K. Reid (Note 14), pp. 158–159.

<sup>23</sup> The Constitution of the United States of America. Available at <http://supreme.justia.com/constitution/> (3.03.2010).

<sup>24</sup> W. G. Genego. *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*. – *The American Criminal Law Review* 1984–1985 (22), p. 182. The Sixth Amendment to the US Constitution states laconically that a person has the right of assistance of counsel for his defence.

<sup>25</sup> *Powell v. Alabama*, 287 U.S. 45 (1932). Available at <http://supreme.justia.com/us/287/45/case.html> (3.03.2010). Here the Court relied not on the Sixth Amendment guarantee of the right to counsel but rather on the due process clause of the Fourteenth Amendment, with its implicit principle that a criminal defendant must receive a fair trial. W. G. Genego (Note 24), p. 183.

<sup>26</sup> *Betts v. Brady*, 316 U.S. 455 (1942). Available at <http://supreme.justia.com/us/316/455/case.html> (3.03.2010).

<sup>27</sup> W. G. Genego (Note 24), p. 184.

Court finally ruled that all defendants, regardless of the charges against them or the specific criminal case at issue, have the right under the Sixth Amendment of the Constitution to court-appointed counsel.<sup>\*28</sup>

In Estonia, the right of a suspect or the accused to assistance of counsel is guaranteed by § 8 3), § 34 (1) 3), and § 35 (2) of the CCP. The right to counsel of a person who is deprived of his or her liberty because he or she is suspected of a criminal offence is prescribed separately in § 21 (1) of the Constitution of the Republic of Estonia.<sup>\*29</sup> Participation of counsel is normally mandatory in criminal proceedings as of the presentation of the criminal file for examination, but in the cases set out in § 45 (2) of the CCP<sup>\*30</sup>, assistance of counsel must be guaranteed throughout the criminal proceeding. If a criminal proceeding has not yet reached the stage at which participation of counsel is mandatory but a suspect nevertheless wishes to have counsel, assistance of counsel shall be ensured, pursuant to § 8 3) of the CCP.

The mandatory participation and assistance of counsel in criminal proceedings does not mean that a person is deprived of the right to defend himself or herself together with the advocate. A person has the right to submit evidence, complaints, and requests (see §§ 34 (1) 7) and 8), 35 (2) of the CCP), and he or she is together with his or her counsel a participant in the proceeding (under § 16 (2) of the CCP) and a party to the court proceeding (see § 17 (1) of the CCP). Only in cassation proceedings does the accused not have the right to defend him- or herself together with counsel, as the accused is not a party to a cassation proceeding under §§ 344 (3) and (5) of the CCP. The ECtHR considers it permissible for a State to restrict the right of a person to defend himself or herself in a supreme court.<sup>\*31</sup>

Counsel may participate in criminal proceedings on two bases: on agreement with the client or on appointment by a competent authority. Whereas conclusion of a contract with counsel imposes an obligation on the person being defended to pay for counsel's services, state-appointed counsel provides services to the person being defended free of charge, at least during the proceedings. In the light of ECtHR case law, it can be said that the ECtHR holds that it is compatible with Article 6 3 (c) of the ECHR for there to be a situation in which a person is provided with so-called free state legal assistance during the proceedings but assumes the obligation to compensate for such assistance upon conviction.<sup>\*32</sup> While the ECtHR has not directly stipulated the conditions under which the accused may be required to reimburse fees for legal assistance, it has been suggested in the literature that this should be possible only if the financial position of the accused has improved after the proceedings.<sup>\*33</sup>

According to the ECtHR, two conditions must be met, one financial and one legal, for a person to qualify for the right to free legal aid.<sup>\*34</sup> The financial condition is that the right to free legal aid is reserved for persons who do not have sufficient means themselves. The ECtHR has left the definition of this condition primarily to the domestic courts.<sup>\*35</sup> The legal condition is that the provision of free legal aid must be in the interests of justice.<sup>\*36</sup> The concept 'interests of justice' clearly does not mean that the accused should be provided with free legal aid only where the public interest so requires.<sup>\*37</sup> To date, the ECtHR has associated the legal condition with four criteria: the gravity of the offence, the complexity of the case, the principle of equal treatment of the parties, and the personal situation of the accused (e.g., mental health, linguistic skills, etc.).<sup>\*38</sup>

The grounds for provision of legal aid by the state are broader in the Code of Criminal Procedure than required by the ECHR and ECtHR case law, and we cannot speak of free legal aid in the classic sense. Namely, there is no consideration of the financial situation of a suspect or the accused under Estonian criminal procedural law; rather, pursuant to §§ 43 (2) 1) and 2) of the CCP, counsel is appointed for every suspect or accused person

<sup>28</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963). Available at <http://supreme.justia.com/us/372/335/case.html> (3.03.2010).

<sup>29</sup> Eesti Vabariigi põhiseadus. – RT 1992, 26, 349; 2007, 33, 210 (in Estonian). Subsection 21 (1) of the Constitution provides: "Everyone who is deprived of his or her liberty shall be informed promptly, in a language and manner which he or she understands, of the reason for the deprivation of liberty and of his or her rights, and shall be given the opportunity to notify those closest to him or her. A person suspected of a criminal offence shall also be promptly given the opportunity to choose and confer with counsel. – See also Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. Teine, täiendatud väljaanne (Constitution of the Republic of Estonia. Commented edition. Second revised edition). Tallinn 2008, § 21 comment 6.

<sup>30</sup> The participation of counsel throughout a criminal proceeding is mandatory if at the time of commission of the criminal offence, the person being defended was a minor; due to his or her mental or physical disability, the person is unable to defend himself or herself or if defence is complicated due to such disability; the person is suspected or accused of a criminal offence for which life imprisonment may be imposed; the interests of the person are in conflict with the interests of another person who has counsel; the person has been under arrest for at least six months; proceedings are conducted in the criminal matter pursuant to expedited procedure.

<sup>31</sup> *Meftah and others v. France* (Note 16), paragraph 45.

<sup>32</sup> *Croissant v. Germany* (Note 15), paragraphs 33–38.

<sup>33</sup> S. Trechsel (Note 13), p. 278.

<sup>34</sup> ECtHR judgment 13.05.1980, *Artico v. Italy*, paragraph 34.

<sup>35</sup> ECtHR judgment 19.06.2001, *Kreuz v. Poland*, paragraph 64.

<sup>36</sup> *Artico v. Italy* (Note 34), paragraph 34.

<sup>37</sup> S. Trechsel (Note 13), p. 272; K. Reid (Note 14), p. 155.

<sup>38</sup> S. Trechsel (Note 13), p. 273. The Court has listed these four criteria in for example ECtHR judgment 9.06.1998, *Twalib v. Greece*, paragraphs 52–53.

who has not chosen counsel but has requested the appointment of counsel, or who has not requested counsel in a case where participation of counsel is mandatory. Clause 43 (2) 3) of the CCP allows, as an exception, for a person's choice of counsel to be disregarded.<sup>39</sup> Since a person's financial situation is irrelevant to his or her right to use the assistance of appointed counsel in a criminal proceeding, it is reasonable that upon conviction the person assumes the obligation to reimburse the costs of legal aid, from which he or she can be released only where his or her financial situation does not allow him or her to perform this obligation. Thus, § 180 (1) of the CCP provides that procedural expenses, which under § 175 (1) 4) of the CCP include remuneration established for appointed counsel, shall be compensated for by the convicted offender in the case of conviction. Pursuant to the first sentence of § 180 (3) of the CCP, when determining procedural expenses, the court shall take into account the financial situation and chances of re-socialisation of the convicted offender. Pursuant to the second sentence of the same subsection, the court shall order a part of the expenses to be borne by the state if the convicted offender is obviously unable to reimburse the procedural expenses.

The ECtHR does not set any limitations as to number for appointed counsel.<sup>40</sup> Counsel is, however, limited in quantity under Estonian criminal procedure, as § 42 (2) of the CCP provides that a person may have up to three lawyers as contractual counsel. It would be reasonable and also compatible with the principle of equal treatment to apply the same limitation on numbers to appointed counsel. Neither the Code of Criminal Procedure nor the State Legal Aid Act<sup>41</sup> (hereinafter 'SLAA') indicates that more than one advocate could be appointed as counsel. There might nevertheless be criminal cases that are so complex that the appointment of one advocate as counsel would not guarantee the right to the assistance of counsel to the accused. In such cases, it should be possible to appoint several advocates as counsel.

It is questionable whether the accused should be able to choose counsel who is providing state legal aid. The position of the ECtHR on this issue is unclear. Some judgments indicate that the ECtHR supports the position that the person's preference should be taken into consideration in the appointment of counsel, but it has not always considered this to be a determining factor.<sup>42</sup> The Code of Criminal Procedure does not impose the obligation to consult with the accused regarding the choice of counsel prior to appointment of counsel. Subsection 20 (1) of the SLAA nonetheless indicates that it is preferable to have a situation in which the accused chooses, so to speak, the person who is appointed as counsel.

## 2. The right of the accused to effective assistance of counsel and the standard of effectiveness

It is first important to note that international law guarantees the right of a person not only to the assistance of counsel, but to the effective assistance of counsel. While this, however, need not be of the quality that the person charged with a criminal offence would wish, we cannot expect the rules of international law to guarantee the best possible defence.<sup>43</sup> The ECtHR does not evaluate the effectiveness of the assistance of counsel where the person has had counsel appointed, as it does in cases where a person has contractual counsel.<sup>44</sup> It has even been suggested by some authors that if more should be required of anyone, then it should be required precisely of appointed counsel. As the preference of the accused normally plays a very small role in the selection of appointed counsel, defence counsel must make a greater effort to create a bond of trust between the defender and the person being defended.<sup>45</sup> It is another matter altogether whether appointed counsel, who in Estonia receive payment that is 7–8 times lower than the fees paid to contractual counsel<sup>46</sup>, is prepared to make such an effort.

<sup>39</sup> Under this provision, counsel is appointed if counsel chosen by a person cannot assume the duties of defence within twelve hours as of the detention of the person as a suspect or, in other cases, within twenty-four hours as of entry into an agreement to defend the suspect or accused or summoning to the body conducting the proceedings and the counsel has not appointed substitute counsel for himself or herself.

<sup>40</sup> C. Ovey, R. White (Note 13), p. 207; S. Trechsel (Note 13), p. 271. For example, in its judgment *Croissant v. Germany* (Note 12) the ECtHR accepted that the domestic court appointed a third lawyer in addition to the two lawyers chosen by the person charged with a criminal offence in a complicated matter.

<sup>41</sup> Riigi õigusabi seadus. – RT I 2004, 56, 403; 2009, 67, 460 (in Estonian).

<sup>42</sup> S. Trechsel (Note 13), pp. 276–277; K. Reid (Note 14), pp. 153–154. See also *Croissant v. Germany* (Note 15) and ECtHR judgment 25.04.1983, *Pakelli v. Germany*, paragraph 31.

<sup>43</sup> S. Trechsel (Note 13), p. 270.

<sup>44</sup> See for example two of the leading ECtHR cases relating to ineffective assistance of counsel – *Artico v. Italy* (Note 34) and *Goddi v. Italy* (Note 7). Whereas Mr. Artico had appointed counsel, Mr. Goddi had contractual counsel. In both cases the ECtHR weighed the issue of ineffectiveness according to the same principles.

<sup>45</sup> J. P. Busch, B. J. George Jr, T. Karas, K. Mossman. The Lawyer's Use of the Standards. – *The American Criminal Law Review* 1974–1975 (12), p. 438.

<sup>46</sup> Aivar Pilv: Seadusandja võiks ka advokaati kuulata (Legislators Could Also Listen to Advocates). Available at: <http://www.epl.ee/artikkel/493155> (8.03.2010) (in Estonian).

As the ECHR imposes obligations only on States, a person cannot file an application with the ECHR solely on grounds that the assistance provided by counsel in a criminal proceeding was ineffective. Yet it is possible that the ECtHR will in certain cases hold that a State, primarily a domestic court of the State, is responsible for ensuring that a person charged with a criminal offence receives effective assistance of counsel.<sup>47</sup> The ECtHR has addressed the issue of effective assistance of counsel in many judgments, in which the ECtHR has considered whether the right guaranteed to the person charged with a criminal offence is in a particular case practical and effective or theoretical or illusory.<sup>48</sup> It is clear from the judgment in *Kamasinski v. Austria* that the ECtHR will refrain where possible from addressing the substantive aspect of counsel's assistance. In the above-mentioned case, the person charged with a criminal offence contended that his rights of defence had been violated, which he supported with a number of claims, including that his defence counsel had not provided effective legal assistance to him in the conduct of the case. Referring to its judgment in *Artico v. Italy*, the ECtHR held that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed to provide legal aid. The ECtHR also found that a State should intervene only if a failure by legal counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.<sup>49</sup> If counsel is unable to perform his or her duties, for whatever reason, the court is obliged to act—that is, either to appoint a substitute or to oblige counsel to perform his or her duties.<sup>50</sup> In any case, the domestic court may not remain passive in such a situation.<sup>51</sup> In general, the case law of the ECtHR indicates that the court currently considers Article 6 3 (c) of the ECHR to be breached only where counsel completely fails to perform some duty.<sup>52</sup> In other cases, the court has referred to the independence of defence counsel and has refrained from evaluating the effectiveness of legal assistance provided by counsel.<sup>53</sup> In any case, the ECtHR has never found Article 6 3 (c) of the ECHR to have been violated merely on the claim of a person charged with a criminal offence that counsel did not act in his or her best interests.<sup>54</sup>

In the US, complaints alleging ineffective assistance of counsel became more frequent after the decision of the US Supreme Court in *Gideon v. Wainwright*<sup>55</sup>, of 18 March 1963. Efforts to develop an effective assistance test had been made before that judgment, due to which by 1963 US courts were using the 'farce and mockery test'. According to this standard, it was up to the defendant to prove that the proceedings in his or her case were a farce and a mockery of justice.<sup>56</sup> This approach centred on the interests of justice and not the rights of the defendant, and it was widely criticised.<sup>57</sup> While the other US courts were actively seeking to develop a standard that would better protect an individual's rights<sup>58</sup>, the Supreme Court chose for a long time not to address the issue. The Supreme Court was finally compelled to take a position. In its judgment in *Strickland v. Washington*<sup>59</sup>, the Supreme Court held that claims alleging the incompetence of counsel must be decided on a case-by-case basis, and that the court must prove that the deficient performance of counsel harmed the interests of the defendant. This decision established a two-part test for determining whether the performance of counsel was so deficient as to deprive the defendant of his Constitutional right to counsel.<sup>60</sup> In order to find that counsel's assistance has been ineffective, the defendant must prove both the incompetence of counsel and harm caused. For the first element, the defendant must show that counsel's performance fell short of an

<sup>47</sup> S. Trechsel (Note 13), p. 286.

<sup>48</sup> See *Artico v. Italy* (Note 34). See also *Imbrioscia v. Switzerland* (Note 19).

<sup>49</sup> ECtHR judgment 19.12.1989, *Kamasinski v. Austria*, paragraph 65, but also for example *Daud v. Portugal* (Note 7), paragraph 38; ECtHR judgment 10.10.2002, *Czekalla v. Portugal*, paragraph 60.

<sup>50</sup> *Artico v. Italy* (Note 34), paragraph 33.

<sup>51</sup> K. Reid (Note 14), p. 157. See also ECtHR judgment 27.04.2006, *Sannino v. Italy*. In that judgment the ECtHR noted that the passiveness of the person charged did not excuse failure to act by the court (paragraph 51).

<sup>52</sup> In the case *Artico v. Italy* (Note 34) counsel refused to provide legal assistance to the person charged with a criminal offence. In the case *Goddi v. Italy* (Note 7) counsel failed to appear in court. In the case *Daud v. Portugal* (Note 7) the first appointed counsel provided no legal assistance at all, and the second failed to prepare for trial. In all these cases the ECtHR held that Article 6 3 (c) of the ECHR had been breached. It is noteworthy that all these cases involved a situation in which counsel completely failed to perform one of his or her duties.

<sup>53</sup> As emphasised in the introduction, the ECtHR first referred to the independence of counsel in *Goddi v. Italy* (Note 7) and has since that judgment emphasised the principle of independence of counsel repeatedly.

<sup>54</sup> K. Reid (Note 14), pp. 157–158.

<sup>55</sup> See also W. G. Genego (Note 24), pp. 185–186; W. H. Erickson. Standards of Competency for Defence Counsel in a Criminal Case. – The American Criminal Law Review 1979–1980 (17), pp. 237.

<sup>56</sup> W. H. Ericsson (Note 55), p. 237.

<sup>57</sup> W. G. Genego (Note 24), pp. 186–188; W. H. Ericsson (Note 55), pp. 237–239.

<sup>58</sup> One of the most famous cases from that period is *United States v. Decoster*, in which the effectiveness of counsel's assistance was contested in the courts of first and second instance for years, and culminated in the position that counsel must be 'reasonably competent'. (See also Identifying and Remediating Ineffective Assistance of Criminal Defence Counsel: A New Look after *United States v. Decoster*. – Harvard Law Review, February, 1980 (93), pp. 758–772.)

<sup>59</sup> *Strickland v. Washington*, 466 U.S. 668 (1984). Available at <http://supreme.justia.com/us/466/668/case.html> (3.03.2010).

<sup>60</sup> See also J. H. Israel, Y. Kamisar, W. R. LaFave. Criminal Procedure and the Constitution: Leading Supreme Court Cases and Introductory Text. St. Paul (Minn.): West 1991, pp. 605–606.

objective standard of reasonableness. For the second element, the defendant must prove that without counsel's errors, the result of the proceeding would have probably been different.

This judgment has also been strongly criticised.<sup>\*61</sup> First, the standard developed by the Supreme Court does not really differ in any aspect from the farce and mockery test<sup>\*62</sup>, and, secondly, the Supreme Court forgot that, while the right to counsel is one of the guarantees of a fair trial, it is not the duty of counsel to ensure a fair trial for the defendant. Counsel's duty is to adhere to the rules of ethics and to do everything in his or her power to ensure that the result of the proceedings is as favourable for the defendant as possible.<sup>\*63</sup>

For nearly 20 years, the US Supreme Court did not amend the test for effectiveness of counsel. It was not until 2003<sup>\*64</sup> that the Supreme Court, in *Wiggins v. Smith*, attempted to specify the vague guidelines provided in *Strickland v. Washington* and ruled that the effectiveness of counsel could be determined with reference to the American Bar Association (ABA) Guidelines. The guidelines referred to by the court (Guidelines 11.8.6) suggested that counsel should gather information on the defendant's medical history, educational history, employment and training history, family and social history, prior offences, and religious and cultural influences<sup>\*65</sup>. While the defendant in *Wiggins v. Smith* faced the death penalty upon conviction, there is no reason a defendant could not refer to the ABA Guidelines in any claim of ineffective counsel.<sup>\*66</sup> The Supreme Court has, however, emphasised that the ABA standards are strictly guides for determining what is reasonable and that they do not define reasonableness. While the states are free to set rules to ensure that assistance of counsel is sufficiently effective, the Supreme Court holds that the Constitution sets only one requirement: counsel must make objectively reasonable choices.<sup>\*67</sup> The Supreme Court has recently also specified the notion of prejudice and has stated that the defendant must show that it is reasonably probable that, but for counsel's errors, the outcome of the proceedings would have been different. In that judgment, the Supreme Court held that the defendant should have proved that there is a reasonable possibility that if counsel who was knowledgeable of mitigating evidence had presented it during the trial, the jury would have taken it into consideration and would have returned with a different sentence.<sup>\*68</sup>

It is rather questionable that a defendant could prove that a lighter sentence would have been imposed by the court if counsel's assistance had been effective, given that the only requirement for a specific sentence is that it be justified. It is, therefore, possible that even if counsel submits mitigating evidence, a court will find the guilt of the defendant to be such as merits the same sentence as would be imposed without any mitigating circumstances. It is submitted by the author of this article that the element of harm could be proved in Estonia primarily where counsel has failed to present evidence that would prove that the act does not involve the elements essential to the offence, the act is not unlawful, or the defendant is not capable of guilt. In such a case, the accused could clearly claim that if counsel had provided effective assistance, the criminal proceedings would have culminated in an acquittal or termination of the proceedings pursuant to § 199 (1) 1) of the CCP. The possibility can also not be ruled out that a reviewing court would find that failure to present important mitigating evidence by counsel also constitutes grounds for annulment of the decision of the lower court.

### 3. Judicial supervision of performance of counsel in criminal proceedings

Considering that the interpretations of the ECHR by the ECtHR are an inseparable part of the Estonian legal system<sup>\*69</sup>, Estonian state authorities, including the courts, are obliged to guarantee a right of defence to persons charged with a criminal offence that is practical and effective, not theoretical or illusory. On the basis of the case law of the ECtHR, the Estonian courts have a duty to intervene where the ineffectiveness of counsel is

<sup>61</sup> D. A. Dripps. Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard. – *Journal of Criminal Law and Criminology* 1997–1998 (88), p. 243.

<sup>62</sup> This was even recognised by the Supreme Court in *Strickland v. Washington* in which the Court speculated that introduction of a new standard for determining cases of ineffective counsel would lead to a different result compared with determination under the old standard only in a few rare cases.

<sup>63</sup> W. G. Genego (Note 24), p. 200.

<sup>64</sup> *Wiggins v. Smith*, 539 U.S. 510 (2003). Available at <http://supreme.justia.com/us/539/510/case.html> (3.03.2010). The Court affirmed the same in its judgment in *Rompilla v. Beard*, 545 U.S. 374 (2005). Available at <http://supreme.justia.com/us/545/04-5462/case.html> (3.03.2010).

<sup>65</sup> Guidelines 11.8.6.: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (11.8.6., 1989).

<sup>66</sup> J. H. Blume, S. D. Neumann. It's Like Deja Vu all over again: *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel. – *American Journal of Criminal Law* 2006–2007 (34), p. 129.

<sup>67</sup> *Bobby v. van Hook*, 558 U.S. \_\_\_\_ (2009). Available at <http://supreme.justia.com/us/558/09-144/percuriam.html> (3.03.2010).

<sup>68</sup> *Wong v. Belmontes*, 558 U.S. \_\_\_\_ (2009). Available at <http://supreme.justia.com/us/558/08-1263/percuriam.html> (3.03.2010).

<sup>69</sup> CCSCd 20.09.2002, 3-1-1-88-02.

manifest or sufficiently brought to their attention in some other way. Given the degree to which the ECtHR has been reticent to express its views in hearing claims concerning ineffective assistance of counsel, there is a significant chance that if a person who has been convicted in Estonia were to file an application regarding ineffective assistance of counsel, the application would not be satisfied by the ECHR. This should not, however, be taken to mean that the Estonian courts may turn a blind eye and fail to react to a violation of the right set out in the ECHR in the hopes that, should an application be filed, the ECtHR might for some reason (e.g., reference to independence of counsel) find that no violation of Article 6 3 (c) of the ECHR has occurred.

What can the courts do if counsel does not provide effective assistance in a criminal proceeding? One option is to rule on a claim of ineffective assistance lodged by the accused after the judgment has been passed, that is, when the result of the proceedings is clear. In such a case, the court reviewing the claim can consider the performance of counsel throughout the entire proceedings.<sup>\*70</sup> This approach is widespread in the US: the defendant, if convicted, has the opportunity to file a number of complaints concerning the ineffectiveness of counsel. The Federal Rules of Criminal Procedure<sup>\*71</sup> provide that the defendant has the right to assistance of counsel but does not provide any guidelines concerning what the courts should do if counsel is ineffective. For this reason, claims concerning ineffective assistance of counsel are heard according to the general rules of procedure, and such complaints can be filed as an appeal or a collateral attack.<sup>\*72</sup> Since the Supreme Court has held that a complaint regarding ineffective assistance of counsel must be satisfied only if the defendant proves that, but for counsel's errors, the result of the proceedings would have probably been different, it is not generally possible for a defendant to prove violation of the right to assistance of counsel in the course of proceedings. Therefore, a defendant has no choice but to wait for the judgment and to only then file an appeal.<sup>\*73</sup>

Applications concerning the ineffective assistance of counsel naturally reach the ECtHR only after the person has been convicted by a domestic court. The ECtHR has stressed that it is not its duty to impose new proceedings in a new form on a State. A State has the right to decide for itself what means it will use to put the applicant, as far as possible, in the position he or she would have been in had there not been a breach of the Convention. In so doing, the means chosen by the State must be compatible with the conclusions of the ECtHR and the rights of the defence.<sup>\*74</sup> In *Quaranta v. Switzerland*, the Court also stressed that a State should cure the defect before the case reaches the ECtHR at all.<sup>\*75</sup> According to this judgment, if a person's right of assistance of counsel has been breached in a lower court, the case should be tried anew, in a higher court.<sup>\*76</sup> If limitations on the cases within the jurisdiction of the court<sup>\*77</sup> render this impossible, the person should be guaranteed new proceedings in a lower court.

Unlike the US courts, the ECtHR does not require a person accused of a criminal offence to prove harm in cases of ineffective assistance of counsel. According to the ECtHR, the fact that the interests of a person charged with a criminal offence have not been prejudiced does not mean that his or her right to counsel has not been violated.<sup>\*78</sup> Moreover, the Court has noted that a breach of the ECHR is possible even where the rights of a person have not been prejudiced. The element of injury is important only within the context of Article 50 of the ECHR.<sup>\*79</sup> Thus, unlike the US Supreme Court, the ECtHR uses a one-step test and has held that a breach of the right of defence is possible even where the element of injury is not involved.

<sup>70</sup> This is clearly the only option available where the ineffective assistance of counsel becomes evident only after the judgment has been handed down.

<sup>71</sup> Federal Rules of Criminal Procedure. Online. Available at <http://www.uscourts.gov/rules/crim2007.pdf> (4.03.2010).

<sup>72</sup> P. W. Tague. The Attempts to Improve Criminal Defense Representation. – *The American Criminal Law Review* 1977 (15) 2, pp. 148–152.

<sup>73</sup> The fact that the defendant, according to the current standard, must prove that the outcome of the proceeding, save for counsel's errors, would have been different has been criticised time and again. It has been suggested that it should instead be up to the prosecutor, where the defendant has shown the errors of counsel, to prove that the errors did not influence the outcome of the proceedings. (See for example J. H. Blume, S. D. Neumann (Note 66), p. 164). Nonetheless, the author of this article has not read anything published in the US where the author would suggest that a breach of the right of defence might occur even where the errors of counsel did not affect the outcome of the proceedings.

<sup>74</sup> *Sannino v. Italy* (Note 51), p. 71.

<sup>75</sup> ECtHR judgment 24.05.1991, *Quaranta v. Switzerland*, p. 37. True, this judgment did not involve the ineffective assistance of counsel, rather the person was not accorded any assistance of counsel at all.

<sup>76</sup> P. Van Dijk, F. Van Hook, A. Van Rijn, L. Zwaak (eds.) (Note 14), p. 637.

<sup>77</sup> In Estonia, the Code of Criminal Procedure does not place limitations on the subject matter of cases before the circuit courts, which are appellate courts. In cassation proceedings, however, only matters of the incorrect application of substantive law or a material violation of criminal procedural law may be brought before the Supreme Court (see §§ 346 1) and 2) of the CCP).

<sup>78</sup> The ECtHR stated this clearly in *Artico v. Italy* (Note 34), p. 35. See also P. Van Dijk, F. Van Hook, A. Van Rijn, L. Zwaak (eds.) (Note 14), p. 638. In the context of the judgment in *Artico v. Italy*, the judgment in *Alimena v. Italy* is somewhat incomprehensible. (ECtHR judgment 19.02.1991, paragraph 20.) The Court repeated its finding in *Artico v. Italy* by which a person charged with a criminal offence does not need to prove the existence of injury, but went on to note that the person was deprived of legal assistance which could have helped him in his attempt to secure an unqualified acquittal.

<sup>79</sup> Article 50 of the ECHR provides: "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."



Filing a complaint regarding ineffective assistance of counsel does not necessarily guarantee a person's right of defence.<sup>\*80</sup> The required standard of proof alone may render a successful claim of ineffective assistance of counsel almost impossible. Secondly, the materials in a criminal case may not provide a court hearing such a complaint with sufficient information about counsel's actions over the course of the proceedings.<sup>\*81</sup> Thirdly, there is some question as to who should file such a complaint or appeal. A defendant may file an appeal with a circuit court on his or her own, but, pursuant to § 344 (1) 2) of the CCP, an appeal in cassation may be filed with the Supreme Court only by defence counsel, who must be an advocate. But how likely is it that one advocate would be willing to file an appeal alleging the ineffective assistance of another advocate? And if the accused chooses to file an appeal with a circuit court him- or herself to avoid any possible confrontation between two advocates, is the accused capable of filing a sufficiently well-drafted appeal and of making the relevant claims in the appeal? We must also consider that annulling a judgment and ordering a new hearing of the case is always a decision that must be weighed carefully, as new proceedings mean new costs, and there are no guarantees that the quality of evidence has been maintained (e.g., witnesses may have forgotten what they saw).<sup>\*82</sup> It is, understandably, more effective if a court can react to the ineffective assistance of counsel immediately in the course of the proceedings. This, however, raises the question of whether the court has the right to interfere with counsel's activities, since defence lawyers are independent in the performance of their duties, which has also been emphasised by the ECtHR. Yet, as noted above<sup>\*83</sup>, the ECtHR has stated that if counsel is unable, for whatever reason, to fulfil his or her duties, the domestic court is obliged to replace counsel or compel counsel to perform his or her duties.

On the one hand, there is nothing prohibiting the court from ordering counsel in the course of the proceedings to study the case file, confer with the client, etc. The obligation of counsel to become familiar with a criminal case is even set out separately in § 273 (4) of the CCP. The court may adjourn a court session for up to 10 days and order that the expenses related to the criminal proceedings due to the adjournment of the session be paid by the lawyer in question, if counsel is not familiar with the matter. An equally or even more important duty is, of course, the obligation to participate in court sessions in accordance with § 270 (2) of the CCP. The Code of Criminal Procedure does not impose any other obligations on counsel in the provision of assistance, which means that even if a court issues an order to counsel regarding his or her work, the court is not able to do anything should counsel fail to comply with the order.<sup>\*84</sup> It should also be noted that if a court finds that counsel has failed to present an important piece of evidence, the court may under § 297 (1) of the CCP order the collection of additional evidence on its own initiative. The Supreme Court has in numerous judgments held that the exercise of this right by the court is nevertheless an exception.<sup>\*85</sup>

If counsel fails to perform his or her duties, despite receiving repeated instructions from the court, the issue of removal of counsel may arise. Naturally, consideration must be given to the fact that removal of counsel constitutes a serious infringement of the principle of independence of counsel. Pursuant to §§ 54 (1) and 2) of the CCP, a person may not serve as counsel and must be removed if her or she has been subject to criminal proceedings on another basis in the same criminal matter, or if, in the same or a related criminal matter, he or she has previously defended or represented a person whose interests are in conflict with the interests of the person to be defended. If counsel does not remove him- or herself on these bases, the court shall remove counsel by a ruling on its own initiative or at the request of a party to the court proceeding (§ 55 (1) of the CCP). The court shall also remove counsel if it becomes evident in a proceeding for removal that counsel has abused his or her status in the proceedings by communicating with the person being defended, who was detained as a suspect or arrested, in a manner that may encourage the commission of another criminal offence or violation of the internal rules of the custodial institution (§ 55 (2) of the CCP). Thus, the Code of Criminal Procedure does not provide the possibility to remove incompetent counsel. The State Legal Aid Act does, however, provide for a change of provider of state legal aid in case of ineffective assistance of counsel. Under the first sentence of § 20 (3<sup>1</sup>), the court shall, at the request of the recipient of legal aid or on its own initiative, remove an advocate from the provision of state aid by means of a ruling if the advocate has shown himself or herself to be incompetent or negligent.<sup>\*86</sup> The State Legal Aid Act does not specify what constitutes incompetence or

<sup>80</sup> W. G. Genego (Note 24), p. 201.

<sup>81</sup> P. W. Tague (Note 72), p. 148.

<sup>82</sup> Identifying and Remediating Ineffective Assistance of Criminal Defence Counsel: A New Look after *United States v. Decoster* (Note 51), pp. 772–773.

<sup>83</sup> See p. 256 of this article.

<sup>84</sup> Subsection 267 (4) of the CCP provides that if counsel violates order in a court session, fails to comply with the orders of a judge or acts in contempt of court, a fine of up to one hundred minimum daily rates may be imposed on him or her by a court ruling. An order of a court should be understood to mean only such orders as are issued to maintain order in the court. The heading of § 267 CCP is after all "Measures applicable to persons who violate order in court session."

<sup>85</sup> CCSCd 26.09.2006, 3-1-1-67-06 and 3-1-1-91-07.

<sup>86</sup> The version in force from 1 January 2009 to 1 January 2010 required the consent of the accused to remove counsel; however, as of 1 January 2010, this is no longer required. It would appear that this amendment was intended to regulate situations in which the accused need not yet be aware that counsel's assistance is ineffective, or the defendant is aware but for some reason fails to demand that counsel be removed. In such case, the court must intervene on its own initiative. Nevertheless, no comment has been made concerning these amendments in the explanatory

negligence, from which we can conclude that these concepts will be interpreted by the court as the court sees fit in view of the particular circumstances of the case. The second sentence of § 20 (3<sup>1</sup>) provides that the court may, in advance, request the submission of explanations or a report from the recipient of state legal aid and the advocate. Thus it can be seen that in the area of legal aid, an important step forward has been taken toward guaranteeing the effective protection of counsel to all defendants. The State Legal Aid Act does not, of course, regulate contractual representation of counsel, but this situation is somewhat simpler. If the accused can see that counsel does not meet his or her expectations<sup>\*87</sup>, the accused can always hire another advocate.<sup>\*88</sup>

If counsel has failed to perform his or her duties competently and the accused or the court has for some reason not reacted to this in the course of proceedings in the court of first instance, the accused in Estonia may, pursuant to § 339 (2) of the CCP, file an appeal and later an appeal in cassation against the judgment of the court of first instance. Under that provision, the court may find that there has been a material violation of criminal procedural law other than as set out in § 339 (1) of the CCP, if the violation results in or may result in an unlawful or unfounded judgment. When ruling on an appeal under § 339 (2) of the CCP, the court must first ascertain that a violation (i.e., errors by counsel) has taken place and thereafter must weigh whether the violation resulted in or may have resulted in an unlawful or unfounded judgment. Thus, the test for ineffective assistance in Estonia is not a one-part test. The review of an appeal under § 339 (2) of the CCP is indeed more similar to the US approach: for a finding of breach of the right to counsel, it must first be determined that counsel's errors may have influenced the lawfulness of the judgment.<sup>\*89</sup> The Estonian and US approaches cannot, however, be considered the same, since neither § 339 (2) of the CCP nor the practice of the US Supreme Court to date requires that the violation might have changed the outcome of the proceeding in order for it to be considered a material violation of criminal procedural law, as is required under US precedent. In any case, Estonia should in developing its test consider that, according to the case law of the ECtHR, a person charged with a criminal offence does not have to prove the element of harm.

Requiring a person charged with a criminal offence to prove the existence of harm would appear, in the context of Estonia and upon closer examination, to contravene the nature of criminal proceedings and the principles underlying the participation of counsel in such proceedings. Pursuant to § 47 (2) of the CCP, counsel is required to use all those means and methods of defence that are not prohibited by law in order to ascertain the facts that vindicate the person being defended, prove his or her innocence, or mitigate his or her punishment, and to provide other legal assistance necessary in relation to a criminal matter to the person being defended. We can conclude from this provision that the objective of counsel's work is to provide the person being defended with all legal assistance necessary in a criminal case. If the success of an appeal concerning a breach of right of counsel were to require that the appellant prove that the outcome of the proceedings would have been different with the assistance of competent counsel, this would be tantamount to admitting that in cases where counsel has no evidence that vindicates the person being defended, proves his or her innocence, or mitigates his or her punishment—that is, where participation of counsel of whatever quality will not change the conviction of the person or the punishment imposed on him or her—the accused could just as well be left without any assistance of counsel at all. Therefore, in an appeal concerning ineffective assistance of counsel, by imposing on the accused the burden of proving that the outcome would have been different had counsel performed his or her duties (e.g., the accused would have been acquitted or would have received a lighter sentence), we would be negating the obligation of counsel to provide effective assistance in so-called hopeless cases.<sup>\*90</sup> This approach would place the accused in an unequal position and would clearly breach the ECHR and the provisions of the Code of Criminal Procedure. The accused also naturally has the option, if counsel has breached his or her duties and if the accused is unable to prove harm himself or herself, to appeal to the Court of Honour of the Bar Association or to claim damages from counsel, but here the accused reacts after

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memorandum. (See the Advokatuuriseaduse ja sellega seonduvate seaduste muutmise seadus. Seaduseelnõu 253 SE (Act to Amend the Bar Association Act and Other Related Acts. Bill 253 SE). Available at [http://www.riigikogu.ee/?op=ems&page=eelnou\\_otsing](http://www.riigikogu.ee/?op=ems&page=eelnou_otsing) (3.03.2010) (in Estonian).

<sup>87</sup> It is of course another matter whether the accused understands this.

<sup>88</sup> The question of whether the removal of counsel due to incompetency should be possible only with respect of appointed counsel or also with respect of contractual counsel merits separate and thorough consideration. According to the Code of Criminal Procedure, contractual counsel shall participate in the proceedings only so long as he or she has the approval of the accused. It can thus be said that currently, the wishes of the accused concerning contractual counsel are considered important in criminal proceedings. There may nevertheless be situations where the accused does not (cannot) see what the court can see: that counsel is not performing his or her duties correctly. Granting a court the right to remove contractual counsel in cases where the accused does not agree to removal is very problematic. This would infringe both the independence of counsel and the choice of the accused to freely choose counsel.

<sup>89</sup> The issue of burden of proof is somewhat more complicated. In the US, the defendant must prove that the result of the proceeding was different due to the error of counsel. In Estonia, the accused (or his or her (new) counsel) must at least note in an appeal why the violation may have resulted or did actually result in an unlawful or unfounded judgment. Thus, on first view it would appear that whereas in the US the burden of proof is very clearly imposed on the defendant, in Estonia the situation is not nearly so clear. The accused in Estonia should nonetheless indicate the errors in counsel's performance and somehow prove them. If the accused does not do so, there is nothing for the court of appeal or court of cassation to consider.

<sup>90</sup> W. G. Genego (Note 24), p. 200.

the end of his or her criminal proceedings and therefore is not assisted in ensuring that the criminal proceedings are conducted with the participation of counsel who can provide effective assistance. It should also not be forgotten that criminal proceedings must not only be fair but appear to be fair, not only with regard to a particular person accused of a criminal offence but with regard to all persons charged with a criminal offence. For this reason, an appeal or appeal in cassation should not depend on whether the person would have been convicted or acquitted had counsel's assistance been effective, or on the punishment that would have been imposed if counsel had performed his or duties correctly.<sup>\*91</sup> It must also be noted, as mentioned above, that proving harm is by its very nature practically impossible.<sup>\*92</sup>

It is also debatable whether counsel can perform his or her duties so incompetently that the person being defended could claim that counsel has not participated in the criminal proceedings at all, which constitutes a violation of criminal procedural law under § 339 (1) 3) of the CCP. This provision does not require consideration of whether the violation resulted or may have resulted in an unlawful or unfounded judgment; rather, the judgment is annulled automatically once the violation is ascertained. The author of this article is of the opinion that the ineffective assistance of counsel could be alleged on the basis of § 339 (1) 3) of the CCP only where counsel has been so ineffective during the proceedings that one could speak of his or her not participating in the criminal proceedings at all (e.g., where counsel has participated in court sessions without being familiar with the criminal matter). In other cases, claims regarding ineffective counsel should under valid law be based on § 339 (2) of the CCP. Currently in practice, however, a judgment can be appealed on the basis of § 339 (1) 3) of the CCP only where counsel has not physically participated in the criminal proceedings.

If a standard were established in Estonia concerning the requirements for assistance of counsel, there would be no need to divide the concept of ineffective assistance of counsel such that certain violations are considered to be material violations of criminal procedural law in the meaning of § 339 (1) 3) of the CCP and others in the meaning of § 339 (2) of the CCP. If an adequate standard existed, failure by counsel to perform his or her duties according to that standard—e.g., the standard that Estonian society agrees upon as the minimum required of counsel—could be deemed to be a material violation of criminal law. In such cases, there would be no need to debate the meaning, in the context of ineffective assistance of counsel, of the provisions of § 339 (2), under which a material violation of criminal procedural law is one that results in or may result in an unlawful or unfounded judgment. If a standard existed, it would make no difference whether substandard assistance of counsel were considered a material violation of criminal procedural law in the meaning of § 339 (1) 3) or § 339 (2) of the CCP, as both would result in clear breach of the right of counsel—that is, ascertainment of failure of counsel to provide assistance in accordance with the standard and an order to return the criminal matter to the court of first instance for a new hearing, by a different court panel.<sup>\*93</sup>

## 4. Conclusions

The author of this article is of the opinion that, in addition to *ex post* evaluation, Estonian courts must be able to act operatively and to remove counsel who does not provide effective assistance from criminal proceedings. Of course, granting the courts the right to remove ineffective counsel from criminal proceedings does not automatically mean that all problems related to ineffective assistance of counsel would disappear. First, the question arises whether courts should have the right to remove appointed counsel only in case of ineffective assistance, as set out in § 20 (3<sup>1</sup>) of the SLAA, or contractual counsel as well. In any case, the Code of Criminal Procedure does not currently allow for contractual counsel to be removed as a result of ineffective assistance. It must be considered that whereas appointed counsel is appointed by a competent authority to provide assistance and the person being defended may have no say in the choice of advocate, contractual counsel is chosen by each defendant him- or herself, in exercise of the right to choose counsel as provided for in Article 6 3 (c) of the ECHR. Even if the assistance of contractual counsel has been ineffective, if a court intervenes, the question inevitably arises as to whether this violates the right of the person charged with a criminal offence to choose counsel as provided for in Article 6, paragraph 3 (c) of the ECHR. Does a person charged with a criminal offence not have the right to decide whether to discontinue or continue co-operation

<sup>91</sup> A. Soo. Ebaefektiivne kaitse kriminaalmenetluses: mõiste ja probleemistik (Ineffective Defence in Criminal Procedure: Concept and Range of Problems). – *Juridica* 2007/6, pp. 368–369 (in Estonian).

<sup>92</sup> See page 257 of this article.

<sup>93</sup> Pursuant to § 341 (1) of the Code of Criminal Procedure, if material violation of criminal procedural law is ascertained in the course of a court session pursuant to § 339 (1), the circuit court shall annul the judgment of the court of first instance and return the criminal matter to the court of first instance for a new hearing by a different court panel. Pursuant to the second subsection of that section, the circuit court shall also annul the judgment of the court of first instance and return the criminal matter to the court of first instance for a new hearing by a different court panel if material violation of criminal procedural law is ascertained in the course of a court session pursuant to the procedure provided for in § 339 (2) of the Code and the violation cannot be eliminated in the court session. It is clear that ineffective assistance of counsel cannot be remedied in the higher court, rather the person must be accorded the opportunity to participate in proceedings where he or she receives effective legal assistance from counsel.

with counsel who has been proved to be ineffective? If it is indeed only the accused who can make this decision, does the court at least have an obligation to draw the attention of the accused to counsel's ineffective performance—that is, an obligation to make sure that the accused understands that the performance of counsel is substandard? Removal of appointed counsel, particularly counsel appointed with due consideration of the opinion of the accused, without the consent of the accused is also somewhat questionable. Is it indeed permissible for the court to decide on removal of counsel without the consent of the accused as set out in the current wording of § 20 (3<sup>1</sup>) of the SLAA? On the one hand, this ensures that the court will react in situations wherein the accused has no comprehension that his or her rights have been breached, yet, on the other hand, the court will be intervening very intensively in the relationship between counsel and the accused.

Additionally, there is no way to skirt the issue of whether Estonian judges would even dare to infringe the independence of counsel and evaluate an advocate's work. And if they do dare, on what would they base such evaluation? Should a court remove counsel if the court feels that counsel has been ineffective, or should a court base removal on a particular legal norm (be it provided for in the Code of Criminal Procedure, the State Legal Aid Act, or even the Bar Association Act or the Code of Ethics of the Bar Association)? And what should a court do if current legal norms are too general? This raises the question of whether guidelines should be laid down for the assistance of counsel as has been done in the United States (in the form of the ABA Guidelines). On the one hand, establishing guidelines is complicated, as each criminal matter requires a unique approach by counsel. On the other hand, however, it is easier for the courts to evaluate the work of counsel if guidelines for counsel have been established (and the existence of the ABA Guidelines proves that this is possible), and there is less of a chance that the courts will infringe the independence of counsel without good reason. In any case, the establishment of an effective counsel standard that would assist the court in evaluating the performance of counsel both during a criminal proceeding and also retrospectively in appeal or cassation proceedings should also be considered in Estonia. The existence of a standard would mean that in appeal and cassation proceedings the circuit courts and the Supreme Court would not have to analyse separately whether the ineffective assistance of counsel resulted in or may have resulted in an unlawful or unfounded judgment by the lower court. In order to ascertain that a material violation of criminal procedural law has taken place, it would suffice for the higher court to determine that the assistance of counsel in the lower court did not meet the established standard.